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**A TREATISE**  
**ON**  
**NEW TRIAL AND APPEAL**

**BY**  
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**PRESENTING AND ILLUSTRATING THE LAWS AND RULES OF PRACTICE**  
**IN CALIFORNIA, ARIZONA, COLORADO, IDAHO, MONTANA,**  
**NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA,**  
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**IN TWO VOLUMES**

**VOLUME II**

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**1912**

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**PART II.**  
**APPEAL.**  
**(879).**





# APPEAL.

## CHAPTER XXVI.

### OUTLINE OF THE SUBJECT.

§ 169. **Outline of Proceedings Necessary to an Appeal—Division of the Subject.**—The first step to be taken by a party who desires to have a judgment or order reviewed in the supreme court or in the district court of appeal is to give his notice of appeal. The next thing in order is to file in the court below an undertaking on appeal in the sum of three hundred dollars, and in some cases, if a stay of execution be desired, an additional undertaking must be filed. After this a record on appeal must be prepared if one be not already in existence. When the record is complete and on file in the court below, the appellant must have a copy or transcript of it printed and filed in the proper appellate court.

The proceedings above outlined will be considered in detail in the following pages. A proper treatment of the subject requires that we should consider the following matters, viz.: The appellate jurisdiction of the appellate courts; the judgments and orders which are appealable, together with the questions which may be presented on appeal; the parties who may appeal; the time and manner in which an appeal is to be taken and perfected; the effect of an appeal; the record by which each appeal must be supported; the transcript on appeal; the causes for which appeals may be dismissed and the practice in relation thereto; the general rules of practice and decision prevailing in the appellate courts; and lastly, the remedial powers of the courts and the manner in which relief is granted.

## CHAPTER XXVII.

## JURISDICTION OF THE APPELLATE COURTS.

- § 170. Jurisdiction of appellate courts is fixed by the Constitution—The legislature can neither increase nor diminish it.
- § 171. Cases in equity.
- § 172. Cases at law involving the title or possession of real estate.
- § 173. Cases at law involving the legality of any tax, impost, assessment, or municipal fine.
- § 174. Cases at law where the amount of the demand regulates the jurisdiction.
- § 174a. Cases at law where the value of the property regulates the jurisdiction.
- § 175. Cases of forcible entry and detainer.
- § 176. Proceedings in insolvency.
- § 177. Actions to prevent or abate a nuisance.
- § 178. Probate proceedings.
- § 178a. Criminal causes.
- § 179. Special cases and proceedings.
- § 180. Divorce cases.

§ 170. **The Jurisdiction of the Appellate Courts is Fixed by the Constitution; the Legislature can Neither Increase nor Diminish It.**—This proposition was laid down in the early case of “The Attorney General, *Ex parte*.”<sup>1</sup> In that case it was held that the supreme court had no power to issue writs of *quo warranto*, and Hastings, C. J., delivering the opinion, said:

“It is said by counsel that this court was created the highest judicial tribunal of the state by the people, and that it holds the same relation to the people of the state as the court of king’s bench to the king of England at the time of the organization of that court. Whatever may be the practice of the king’s bench as to writs of this nature, it is clear that the power which created this court has declared what its jurisdiction is. That power did not confer upon this court all the prerogatives and undefined power of the court of king’s bench, when the common law should be adopted, and which would have been inferred if its jurisdiction had not been defined. If the declaration of this jurisdiction be not exclusive of all other, why, it may be asked, define it? Without the use of the words, the court would possess ‘appellate

<sup>1</sup> 1 Cal. 85. Compare *Reilly v. Reilly*, 60 Cal. 624.

jurisdiction.' And if, as is contended, the court can exercise all other jurisdiction than that of the kind specified, then it may entertain appeals in any case where the matter in dispute is less than the sum of two hundred dollars, and thus it must follow (to give the language in the Constitution meaning) that we are forced to the inference that all other jurisdiction than that of an appellate court, and all matters incidental thereto, are excluded."

It follows from the general principle laid down in the above extract, viz., that the clause of the Constitution conferring jurisdiction upon the appellate courts is a definition and limitation, that the legislature can neither increase nor diminish such jurisdiction; and the decisions are to this effect.

1. *The Legislature cannot Increase the Jurisdiction of the Appellate Courts.*—The legislature cannot increase the jurisdiction of any court whose powers are defined by the Constitution. This was held with reference to district courts in *Caulfield v. Hudson*.<sup>2</sup> In that case an act of the legislature conferring upon the district courts jurisdiction of appeals from the county courts was held to be unconstitutional, and Murray, C. J., delivering the opinion, said:

"It seems that in this subdivision of power among the different arms of the judiciary there was an attempt at great care and accuracy in assigning to each a well-defined portion of judicial duty. In doing this there must have been some specific object or leading motive, and no other appears so reasonable as that it was intended to limit as well as confer jurisdiction, in order the better to secure the independence of this department of the government. For if, as is contended by the respondent, there is no prohibition to an increase of the jurisdiction by the legislature, it may be at once conceived how readily the functions conferred by the Constitution upon the supreme or district courts may be impaired or subverted, by imposing upon those courts a succession of new duties, which would force them into a sphere of action

\* 3 Cal. 389. See, also, *Hernandes v. Simon*, 3 Cal. 464; *Townsend v. Brooks*, 5 Cal. 52; *Parsons v. Tuolumne Water Co.*, 5 Cal. 43, 63 Am. Dec. 76; *People v. Fowler*, 9 Cal. 85. It was at one time supposed that the jurisdiction given to each class of trial courts was exclusive. *Zander v. Coe*, 5 Cal. 230; *People v. Fowler*, 9 Cal.

85. This theory was afterward exploded, and it was held that concurrent jurisdiction was conferred in certain cases. *Courtwright v. Bear River Co.*, 30 Cal. 573; *Yolo v. City of Sacramento*, 36 Cal. 193. But such concurrent jurisdiction was conferred by the Constitution and not by the legislature.

inconsistent with that already fixed by the fundamental law. If the legislature can force appellate jurisdiction on the district, they can equally give original jurisdiction to the supreme court, and then by a system of rules which they have unquestioned right to make, compelling the courts to give preference in hearing to certain causes, or to a particular calendar, the constitutional functions of the courts would exist only in name; for all practical purposes they would be effectually destroyed. . . . As early as the June term, 1850, of this court, the identical question was raised in reference to the power of this court. In the case of *The People ex rel. the Attorney General, Ex parte*, 1 Cal. 85, it was held that this court had no other than appellate jurisdiction, and upon the argument that as this court would have had appellate power without the words expressed in the Constitution, so it was useless to define its jurisdiction if it had not intended to exclude all other."

Upon the authority of this case it was held that the legislature could not confer upon the district courts jurisdiction of appeals from the courts of sessions,<sup>3</sup> or from the probate courts,<sup>4</sup> and that the statute authorizing district courts to try issues of fact joined in the probate courts was void.<sup>5</sup> Upon the same principle, viz., that the definition in the Constitution of the jurisdiction of a court is a limitation of such jurisdiction, it was held in *People v. Applegate*<sup>6</sup> that the legislature could not confer upon the supreme court jurisdiction of appeals in cases of misdemeanor. So in *Maxfield v. Johnson*<sup>7</sup> it was held that the court had no jurisdiction of an appeal, where the amount involved was under three hundred dollars, the court saying: "The appellate jurisdiction of this court is fixed by the Constitution, and in this class of cases is limited to such as involve the sum of three hundred dollars, exclusive of interest, and it is not in the power of the legislature to confer jurisdiction in cases where the demand exclusive of interest is less." So in *Camron v. Kentfield*,<sup>8</sup> it was held that by the use of the words "writ of prohibition" in the Constitution, the framers intended the writ known to the common law, viz., one issuing to a body exer-

<sup>3</sup> *People v. Peralta*, 3 Cal. 379.

<sup>4</sup> *Reed v. McCormick*, 4 Cal. 342.

<sup>5</sup> *Will of Bowen*, 34 Cal. 682.

<sup>6</sup> 5 Cal. 295.

<sup>7</sup> 30 Cal. 545.

<sup>8</sup> 57 Cal. 550. What is said in the

text relates to the judicial power. It is competent for the legislature to impose functions not judicial upon judicial officers. See *People v. Provines*, 34 Cal. 520; *People v. Bush*, 40 Cal. 344.

cising *judicial* functions, and that the legislature could not extend its operation to bodies exercising ministerial functions.

The principle that a constitutional definition of the jurisdiction of a court is a limitation of its powers has been declared by the supreme court of the United States with reference to its jurisdiction.<sup>9</sup>

Cases not within the constitutional jurisdiction cannot be reviewed on appeal or writ of error.<sup>10</sup>

2. *The Legislature cannot Diminish the Jurisdiction.*—The cases cited in the preceding subdivision show that the definition in the Constitution operates as a limitation. And it is plain that the legislature cannot amend the Constitution in this respect any more than in others. Accordingly, it is well settled that it cannot diminish the jurisdiction of the courts.<sup>11</sup> Nor can it create a new tribunal, and endow it with any of the powers of the constitutional courts.<sup>12</sup> If the legislature fails to provide proper machinery for the exercise of the appellate jurisdiction of the courts, those tribunals have power to frame the necessary machinery.<sup>13</sup> But

<sup>9</sup> *Hodgson v. Bowerbank*, 5 Cranch, 303, 3 L. ed. 108; *The St. Lawrence*, 1 Black, 527, 17 L. ed. 180; *The Lot-tawanna*, 21 Wall. 558, 22 L. ed. 654.

<sup>10</sup> See note 5 to section 301, *post*.

<sup>11</sup> See *Adams v. Town*, 3 Cal. 247; *Hicks v. Bell*, 3 Cal. 219; *Fitzgerald v. Urton*, 4 Cal. 235; *Wilson v. Roach*, 4 Cal. 362; *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323; *Adams v. Woods*, 8 Cal. 306; *Willis v. Farley*, 24 Cal. 490.

<sup>12</sup> *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70.

<sup>13</sup> See section 301, *post*.

The Constitutions of several states confer upon the supreme courts certain supervisory control over the inferior courts, akin to, but distinct from, the ancillary jurisdiction which belongs to it as a necessary adjunct to the complete exercise of its appellate and revisory jurisdiction, and distinct also from its jurisdiction by writ of error. The language varies in the different Constitutions, but its effect is the same. See section 2, article 8, Constitution of Montana; section 4, article 6, Constitution of Nevada; section 86, article 4, Constitution of North Dakota; section 18, article 5, Constitution of South Dakota; section 4, article 4, Washington Constitution;

section 2, article 5, Constitution of Wyoming. See, also, *State v. Crocker*, 5 Wyo. 385, 40 Pac. 682, *Anderson v. Matthews*, 8 Wyo. 307, 57 Pac. 156, *Smith v. Healy*, 12 Wyo. 218, 75 Pac. 430, *Mau v. Stoner*, 14 Wyo. 183, 83 Pac. 218, for a consideration of the scope of this jurisdiction.

The right of the supreme court to bring up for review any judgment of an inferior court is not questioned at the present day, even without statutory procedure. *State v. Reed*, 3 Idaho, 554, 32 Pac. 202. The higher court may, in the exercise of its powers as a revisory court, appoint a receiver to care for the interests of litigants pending an appeal. *Chemung etc. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619; *Eureka etc. Co. v. Lewiston etc. Co.*, 12 Idaho, 472, 86 Pac. 49. So, it is well settled that an appellate court may, under the power conferred upon most appellate courts to issue such writs as may be necessary to the complete exercise of their revisory jurisdiction, award suit money in divorce actions out of the property involved. *Bachelor v. Bachelor*, 30 Wash. 203, 70 Pac. 491; *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Willey v. Willey*, 22 Wash. 115, 79 Am. St. Rep. 923, 60

while the legislature can neither increase nor diminish the constitutional jurisdiction of the courts, it may regulate the mode in which the jurisdiction is to be invoked.<sup>14</sup>

§ 171. **Cases in Equity.**—In the Constitution of 1849 the grant of jurisdiction to the supreme court was as follows: "The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony on questions of law alone."<sup>1</sup>

Pac. 145; *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091; *Lake v. Lake*, 17 Nev. 230, 30 Pac. 878; *Pollock v. Pollock*, 7 S. D. 331, 64 N. W. 165; *Pleyte v. Pleyte*, 15 Colo. 125, 25 Pac. 25. As to the power of the trial court to make such an order after appeal, see *Storke v. Storke*, 99 Cal. 621, 34 Pac. 339; *Reilly v. Reilly*, 60 Cal. 624. The right of the higher court to make an allowance for the support of one of the interested parties was upheld in *Grant v. Grant*, 5 S. D. 17, 57 N. W. 1130; *Pollock v. Pollock*, *supra*; *Mercer v. Mercer*, 19 Colo. App. 51, 73 Pac. 668; *Hart v. Hart*, 31 Colo. 333, 73 Pac. 35; *Duxstad v. Duxstad*, 16 Wyo. 396, 94 Pac. 463, 15 Ann. Cas. 228; *Roby v. Roby*, 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50.

<sup>14</sup> See sections 181, 188, *post*.

The propositions laid down in the above section do not conflict with the case of *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717. That case relates entirely to the construction of the definition of the powers of the court given in the Constitution. It does not touch upon the power of the legislature.

<sup>1</sup> Article 6, section 4; *Laws of 1850*, p. 30. As to misprint in Constitution referred to, see *People v. Applegate*, 5 Cal. 295.

The Constitution of Colorado (article 5, section 1) vests the judicial power of the state in "matters of law and equity," in certain courts, among others a supreme court, and the same instrument (article 6, section 2) provides that "the supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state and shall have a general

superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."

The Constitution of Montana (article 8, section 3) provides as follows: "The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." The code contains no provision tending to limit this general scope.

The Constitution of Nevada (article 6, section 4; section 115, Constitution) provides that "the supreme court shall have appellate jurisdiction in all cases in equity. . . . The Constitutions of other states contain even more general phraseology. Section 9, article 5, Constitution of Idaho, confers appellate jurisdiction upon the supreme court to review "any decision of the district courts, or the judges thereof." Article 4, section 86, Constitution of North Dakota, provides that the appellate jurisdiction of the supreme court "shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." Article 7, section 6, of the Oregon Constitution, confers appellate jurisdiction over all final judgments, upon the supreme court. Article 4, section 4, of the Washington Constitution, confers appellate jurisdiction over "all actions and proceedings." Section 2, article 5, of the Wyoming Constitution, confers appellate jurisdiction "coextensive with the state, in both civil and criminal causes," etc.

The Constitution of Oklahoma (article 7, section 2) provides that

Under this clause the court had jurisdiction where the matter in dispute exceeded two hundred dollars, whether the action was in equity or at law. But if the matter in dispute did not exceed two hundred dollars, the mere fact that the case was in equity did not give the court jurisdiction. Thus in *Poland v. Carrigan*,<sup>2</sup> it was held that the court had no jurisdiction of an appeal in an action to foreclose a mechanic's lien for sixty-one dollars and ninety-six cents, and Field, C. J., delivering the opinion, said: "The fact that the plaintiff may at the same time seek an enforcement of a mechanic's lien or the foreclosure of a mortgage by which the demand is secured does not affect the question of jurisdiction." But by the amendments of 1862 the supreme court was given "appellate jurisdiction in all cases of equity."<sup>3</sup> After this the mere fact that the appeal was of a "case in equity" was sufficient to give the court jurisdiction without regard to the amount involved.<sup>4</sup> The provision of the Constitution of 1879 is as follows: "The supreme court shall have appellate jurisdiction in all cases in

"The appellate jurisdiction of the supreme court shall be coextensive with the state, and shall extend to all civil cases of law and equity."

The Constitution of South Dakota (article 5, section 2) provides that "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law."

The Constitution of Utah (article 8, section 4) provides that the original jurisdiction of the superior court shall cover the issuance of writs of *mandamus*, *certiorari*, prohibition, *quo warranto* and *habeas corpus*. . . . "In other cases the supreme court shall have appellate jurisdiction only and power to issue writs necessary and proper for the exercise of that jurisdiction."

<sup>2</sup> 20 Cal. 174. An action to foreclose a mechanic's lien is a case in equity and not a special proceeding. *Brock v. Bruce*, 5 Cal. 279. See, also, *Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *Fox v. Nachstheim*, 3 Wash. 684, 29 Pac. 140; *Dickson v. Corbett*, 10 Nev. 439. The cases of *McNeil v. Borland*, 23 Cal.

144, and *Van Winkle v. Stow*, 23 Cal. 457, were upon the act of 1861, which is different from the statute now in force. As to actions to foreclose the lien of taxes, see *People v. Mier*, 24 Cal. 61; *Bell v. Crippen*, 28 Cal. 327. And as to street assessments, see *Mahlstadt v. Blanc*, 34 Cal. 577. The following Washington decisions outline the scope of the supreme court's equity jurisdiction: *Blake v. Bank*, 12 Wash. 619, 41 Pac. 909; *Fenton v. Morgan*, 16 Wash. 30, 47 Pac. 214; *Trumbull v. Jefferson Co.*, 37 Wash. 604, 79 Pac. 1105; *Campbell v. Simpkins*, 10 Wash. 160, 38 Pac. 1039; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *State v. Daggett*, 28 Wash. 1, 68 Pac. 340; *State v. Cole*, 40 Wash. 474, 82 Pac. 749; *State v. Coon*, 40 Wash. 682, 82 Pac. 993; *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113; *Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125; *Horrell v. California etc. Assn.*, 40 Wash. 531, 82 Pac. 889.

<sup>3</sup> Article 6, section 4; Laws of 1862, p. 583. The amendments of 1856 and 1871 do not relate to the matter. See Laws of 1855, p. 311; and Laws of 1871-72, p. 892; see clause quoted in note 2 to section 173.

<sup>4</sup> Look at *Mahlstadt v. Blanc*, 34 Cal. 577.

equity, *except such as arise in justices' courts.*"<sup>5</sup> The provision as to justices' courts is as follows: "The legislature . . . shall fix by law the powers, duties, and responsibilities of justices of the peace; *provided*, such powers shall not in any case trench upon the jurisdiction of the several courts of record, except that said justices shall have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property, when neither the amount of the liens nor the value of the property amounts to three hundred dollars."<sup>6</sup> Under this provision the supreme court has not jurisdiction in *all* cases in equity as it had under the amendment of 1862, but only of such cases in equity as arise in the superior courts.<sup>7</sup>

There seems to have been some controversy as to the partition of the jurisdiction in cases of equity between the inferior courts,<sup>8</sup> but very little concerning the jurisdiction of the supreme court in such cases. In *People v. Davidson* it was said that the jurisdiction of the district court in equity was "that administered in the high court of chancery in England." But by this the court did not mean that the jurisdiction of the district court or supreme court was confined to the protection of the rights known to the English equity jurisprudence; for it is settled that cases concerning rights which are new creations, but which are enforced by remedies analogous in form to the relief formerly granted in courts of chancery, are cases in equity within the meaning of the Constitution. Thus actions to foreclose mechanics' liens<sup>9</sup> (under the present statute<sup>10</sup>), actions to foreclose liens for taxes,<sup>11</sup> and actions to foreclose the liens of street assessments<sup>12</sup> are cases in equity,"

<sup>5</sup> Article 6, section 4; see clause quoted in note 3 to section 173, *post*.

<sup>6</sup> Article 6, section 11.

<sup>7</sup> It seems clear that the exception in the grant of jurisdiction applies to such cases as actually arise in the justices' courts, and not such as might arise there. Under section 11, quoted in the text, the party has his election to commence his proceedings, in certain cases, either in the justice's court or in the superior court. If he adopt the former course, his only appeal is

to the superior court; if the latter, he may appeal to the supreme court.

See *Edsall v. Short*, 122 Cal. 533, 55 Pac. 327, for a construction of this provision.

<sup>8</sup> See, for example, *Courtwright v. Bear River Co.*, 30 Cal. 573; *Rosenberg v. Frank*, 58 Cal. 387.

<sup>9</sup> *Brock v. Bruce*, 5 Cal. 279.

<sup>10</sup> See note 2 above.

<sup>11</sup> *People v. Mier*, 24 Cal. 61.

<sup>12</sup> *Mahlstadt v. Blanc*, 34 Cal. 577.



although those particular liens were unknown to the old chancery jurisprudence.<sup>13</sup>

Appellate jurisdiction in cases in equity rests solely in the supreme court. The constitutional amendment of 1904 did not give such jurisdiction to the district courts of appeals.<sup>14</sup>

**§ 172. Cases at Law Which Involve the Title or Possession of Real Estate.**—Under the Constitution of 1849, as has been stated, the grant of appellate jurisdiction to the supreme court was as follows: "The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony on questions of law alone."<sup>1</sup> Under this provision the supreme court had jurisdiction in all cases where the matter in dispute exceeded two hundred dollars, whether the property was real, personal, or mixed. The jurisdiction depended upon the amount in dispute and not upon the character of the property involved. By the amendments of 1862, it was provided that "the supreme court shall have appellate jurisdiction . . . in all cases at law *which involve the title or possession of real estate*,"<sup>2</sup> etc. This provision was reproduced in the Constitution of 1879.<sup>3</sup> Under this language the mere fact that the case is a case at law which involves the title or possession of real estate is sufficient to give the court jurisdiction, without regard to the value of the property.

**1. Meaning of "Cases at Law."**—The term "cases at law" applies to civil cases only, and does not include criminal ones,<sup>4</sup> and

<sup>13</sup> Under the California Code of Civil Procedure as first adopted the section in relation to the supreme court provides that "its appellate jurisdiction extends, (1) to all civil actions for relief *formerly given in courts of equity*." Section 44. This change from the language of the Constitution was not only useless, inasmuch as the legislature can neither increase nor diminish the jurisdiction of the court (see section 170, *ante*), but was calculated to convey a wrong impression. The code, as it at present stands, undertakes to amend the Constitution only so far as special proceedings are concerned.

<sup>14</sup> See article 6, section 4, Constitution of California. And see Rickey

Land etc. Co. v. Glader, 6 Cal. App. 113, 91 Pac. 414; Litch v. O'Conner, 8 Cal. App. 489, 97 Pac. 207.

<sup>1</sup> Article 6, section 4; Laws of 1850, p. 30; see note 1 to preceding section. Similar provisions are to be found in section 4, article 6, Constitution of Nevada.

<sup>2</sup> Laws of 1862, p. 583. For clause quoted in full, see note 2 to section 173.

<sup>3</sup> Article 6, section 4. For clause quoted in full, see note 3 to section 173.

<sup>4</sup> People v. Johnson, 30 Cal. 98.

The following Washington cases may be referred to for illustration of the distinction between actions at law and in equity: Barto v. Seattle etc.

it does not include special proceedings. Thus in the Appeal of S. O. Houghton<sup>5</sup> it was held that a proceeding to change the grade of a street was not a "case at law." Crockett, J., said: "It is too plain to admit of debate that this is not a 'case at law,' within the meaning of section four, and that it is a 'special proceeding' within section eight, of which the county court has original jurisdiction. From an early period in the history of the state down to the present time, proceedings for the opening, grading, extension, paving, and alteration of streets, and the assessment of damages caused thereby, have been treated by the legislature and the courts as 'special proceedings,' and not as 'cases at law.' This court, in numerous decisions, has acquiesced in and directly affirmed this view of these cases; and the doctrine has become too firmly established to be open to discussion at this late day." Wallace, J., in his concurring opinion, said: "It results that 'special cases,' that is, cases which grow out of special proceedings authorized by statute creating rights not theretofore existing, and providing remedies not accustomed to be administered by courts of law or equity as such, are not cases at law within the appellate jurisdiction of this court, as defined by the Constitution, even though they may involve questions or values which, *if involved in a case at law*, would constitute it one to be reviewed here on appeal or writ of error."<sup>6</sup> Rhodes, C. J., in his dissenting opinion, subscribed to this view, saying: "The present Constitution, art. VI, sec. 8, grants to the county courts original jurisdiction of all such 'special cases and proceedings' as are not otherwise provided for; but neither the former nor the present Constitution expressly grants to the supreme court jurisdiction of 'special cases.' Are 'special cases' included within the meaning of 'cases,' as that term is employed in defining the jurisdiction of this court? I am of opinion that they are not. If they are, jurisdiction of no special case could be entertained by the county courts, because as soon as a special case

Co., 28 Wash. 179, 68 Pac. 442; Tom v. Sayward, 5 Wash. 383, 31 Pac. 976; Chapin v. Kenoyer, 12 Wash. 536, 40 Pac. 916; Durand v. Simpson etc. Co., 21 Wash. 21, 56 Pac. 846; Garneau v. Port Blakeley etc. Co., 20 Wash. 97, 54 Pac. 771; Durk v. Scully, 41 Wash. 357, 83 Pac. 426.

See the following as to the distinction between civil and criminal actions within the meaning of the section of

the Washington Constitution under consideration: State v. Allen, 14 Wash. 684, 45 Pac. 640; State v. Geiger, 20 Wash. 181, 54 Pac. 1129; State v. Murrey, 30 Wash. 383, 70 Pac. 971; In re Garfinkle, 37 Wash. 650, 80 Pac. 188.

<sup>5</sup> 42 Cal. 35; look at Saunders v. Haynes, 13 Cal. 145.

<sup>6</sup> See p. 62.

is created by statute, jurisdiction would at once vest in the district courts, by force of the term 'cases,' which is employed in the section defining the jurisdiction of the district courts. 'Special cases' would thus be provided for by the Constitution, and none would be left for the county courts."<sup>7</sup> Temple, J., concurred in this view.<sup>8</sup> The views of these four justices upon this point were approved in the recent case of the Matter of Bixler's Appeal.<sup>9</sup> In that case it was held that proceedings for the formation of a swamp land district were not "cases at law," and department one of the supreme court said: "To what is said in the Appeal of S. O. Houghton, we may add: It is clear that 'special cases or proceedings' are not included in the 'cases at law,' in which this court is given jurisdiction by the fourth section of art. VI of the Constitution, because, in the fifth section of the same article 'special cases and proceedings' are spoken of as constituting a separate and distinct class from such 'cases at law.'"

2. *Meaning of "Which Involve the Title or Possession of Real Estate."*—The term "cases at law" is limited by the words "which involve the title or possession of real estate." These words are not confined to cases in which the title or possession of real estate is the subject of the action, as in actions to quiet title or actions of ejectment, but may extend to cases which involve the title or right of possession, although the purpose of the action be different. Thus the title to real estate may be involved in an action of trespass,<sup>10</sup> or in an action to recover defendant's share of the cost of a partition fence. In *Holman v. Taylor*,<sup>11</sup> in which the plaintiff sued to recover the defendants' share of the cost of a partition fence, Rhodes, J., delivering the opinion, said:

"It is difficult to define with precision the word 'involve,' as it is employed in that section. Its primary signification is to 'roll up or envelope,' and it also means 'to compromise, to contain, to include by rational or logical construction,' but none of these express the precise idea, and its exact synonym may not be found in a single word. The idea intended to be embodied in the phrase, 'cases at law which involve the title or possession of real property,' may be expressed by the paraphrase, 'cases at law in which the title or possession of real property is a material fact in the

<sup>7</sup> See p. 67.

<sup>8</sup> See p. 63.

<sup>9</sup> 59 Cal. 550.

<sup>10</sup> *Doherty v. Thayer*, 31 Cal. 140.

<sup>11</sup> 31 Cal. 338. As to actions of forcible entry and detainer, see section 175, *post*.

case, upon which the plaintiff relies for the recovery or the defendant for a defense.' When the title or claim of title, the possession or right of possession, of real property, or any right growing out of or dependent upon either, is alleged in the pleadings as an issuable fact, the case is within the meaning of the constitutional provision. Actions to recover the title or possession of real property are clearly included within that clause, and it comprehends also actions that are not brought with that object, but to obtain redress for an injury to the title or possession, or in the assertion of a right or claim directly springing therefrom. The action of trespass upon lands involves the possession of the lands, for the right of recovery depends upon the fact of possession, and the right to the possession as against the defendant. The action, it is true, is brought for the recovery of damages, but the damages are those arising from the plaintiff's possession; and if it does not appear that he was in possession when the alleged injury was committed and was then entitled to the possession (if the defendant pleads *liberum tenementum*), the action will fail. The clause cannot be limited to cases in which the title or possession is in issue, for either the title or possession may be involved in the action, and the defendant may not take issue upon the allegation setting it up. The defendant in the action of ejectment may not controvert the plaintiff's allegations of title or right of possession, but may rest his defense upon the denial of the alleged ouster and damages, or the damages alone; and still the case would involve the possession of real property. The fact or one of the facts upon which the right of recovery depends may not be in issue, though issue might have been taken upon it, yet the fact is involved in the action. Where title or possession of real property is merely a fact in controversy—where it is incidentally brought into the action, or is only collaterally in question—it cannot be said that the case involves the title or possession, within the meaning of that clause of the Constitution. In the case at bar the title is not a matter merely incidentally or collaterally connected with the subject matter of litigation, but it forms the very base of it."

But the foregoing language is too broad and was modified in *Pollock v. Cummings*.<sup>12</sup> In that case it was held that a justice

<sup>12</sup> 38 Cal. 683. Approved and followed in *Cornett v. Bishop*, 39 Cal. 819.

of the peace had jurisdiction of damages for trespass upon real property, where the right of possession was not put in issue. And Rhodes, J., delivering the opinion, said:

"In *Holman v. Taylor*, the title of the respective parties to certain parcels of real estate was in issue, and in ascertaining the meaning of the clause of the Constitution 'all cases at law which involve the title or possession of real property,' the subject of possession was considered, but only by way of argument, and for the purpose of illustration; and in the discussion our language was not in all respects sufficiently guarded and definite. To constitute a case which involves the possession of real property, it is not enough that the possession is a fact in controversy, or incidentally in question, or that the *fact* of possession is in issue; but the *right of possession* must be involved in the action. The paraphrase of the clause of the Constitution, given in *Holman v. Taylor*, would be more accurate, and would more fully express our idea of the meaning of that clause, if given in this language: 'Cases at law in which the title or *right* of possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery, or the defendant for a defense.' The allegation of the right of possession is quite different from that of possession in fact, which may constitute merely the basis of some right or claim constituting the cause of action, or the defense to the action. In an action for use and occupation, the possession of the defendant may be alleged on one side and denied on the other, without presenting an issue as to the right of possession. And so, in an action of trespass upon real property, the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises; and his *right* to the possession is not involved unless the defendant tenders an issue upon that fact, and in such case, as was said in *Holman v. Taylor*, the right of recovery depends both upon possession in fact and the right of possession. In our judgment it was not the intention to withdraw from justices of the peace and other inferior courts, and confer upon the district courts jurisdiction of cases of the character of those mentioned, in which the right of possession is not involved; but it was intended to give to the latter courts jurisdiction of cases involving the *right* of possession of real property."

In the subsequent case of *Gorton v. Ferdinando*,<sup>12</sup> it was held that an ordinary action for trespass on real property, where no answer is put in, does not involve the title or possession of real property.

In *People v. Horsley*,<sup>12a</sup> it was held that in an action for the usurpation of a franchise in the illegal collection of tolls upon a public road, where the defendants claimed the right to collect such tolls under a grant from the board of supervisors of the county, which declared a certain portion of a wagon road a toll road and gave them the right to keep it in repair and collect tolls, etc., "the title or possession of real estate" within the meaning of the Constitution was involved.

In *Schroeder v. Wittram*,<sup>12b</sup> which was an action to recover a deposit on a purchase of real estate under an agreement to complete the purchase in case the title should prove to be *good*, two justices were of the opinion that proof of title was only incidentally involved, and did not enter into the merits except indirectly and by reason of the particular line of defense involved; and in *Copertini v. Oppermann*,<sup>12c</sup> which was the same kind of a case—an action for the recovery of a money deposit on a real estate deal, it was held that the title to real property was directly involved. So in like manner in *Hart v. Carnall-Hopkins Co.*,<sup>12d</sup> a similar case, a similar conclusion was reached, the court holding that "if the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original and this court appellate jurisdiction, whether the involution may be said to be merely incidental or not." This is believed to be the correct statement of the principle involved, and was followed approvingly in *Baker v. Southern California Ry. Co.*,<sup>12e</sup> which was a suit for damages against a railroad for killing domestic animals on its unfenced right of way through plaintiff's premises, the defendant having by a verified denial of plaintiff's right of possession secured the transfer to the superior court for trial.<sup>12f</sup>

If the title or possession of real estate be not really involved in the case, counsel cannot introduce it into the case by averring

<sup>12</sup> 64 Cal. 11, 27 Pac. 941.

<sup>12a</sup> 65 Cal. 381, 4 Pac. 384.

<sup>12b</sup> 66 Cal. 636, 6 Pac. 737.

<sup>12c</sup> 76 Cal. 181, 18 Pac. 256.

<sup>12d</sup> 103 Cal. 132, 37 Pac. 196.

<sup>12e</sup> 110 Cal. 455, 42 Pac. 975; S. C., 114 Cal. 501, 46 Pac. 604.

<sup>12f</sup> See, also, *Boyd v. Southern Cal. Ry. Co.*, 126 Cal. 571, 58 Pac. 1046; *Raisch v. Sausalito Land Co.*, 131 Cal. 215, 63 Pac. 346.

in the answer that it is involved. Such an averment is immaterial.<sup>14</sup>

**§ 173. Cases at Law Which Involve the Legality of Any Tax, Impost, Assessment, Toll, or Municipal Fine.**—The Constitution of 1849 provided that the supreme court should have appellate jurisdiction “in all cases . . . when the legality of any tax, toll, impost, or municipal fine is in question.”<sup>1</sup> As amended in 1862 the provision was that the court should have appellate jurisdiction “in all cases *at law* which involve . . . the legality of any tax, impost, assessment, toll, or municipal fine.”<sup>2</sup> This language is reproduced in the Constitution of 1879.<sup>3</sup>

The meaning of the term “cases at law” was considered in the preceding section. It was there shown that it did not include special proceedings, and was restricted to *civil* cases at law.<sup>4</sup> In *City of Santa Barbara v. Stearns*,<sup>5</sup> it was held that similar language conferred upon the district courts jurisdiction of an action

<sup>14</sup> *Ghirardelli v. Greene*, 56 Cal. 629. See, also, *Raisch v. Sausalito Land Co.*, 131 Cal. 215, 63 Pac. 346.

<sup>1</sup> See the clause quoted at the beginning of the preceding section.

<sup>2</sup> The grant of appellate jurisdiction in the amendment of 1862 was as follows: “The supreme court shall have appellate jurisdiction in all cases in equity; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy amounts to three hundred dollars; also in all cases arising in the probate courts; and also in all criminal cases amounting to felony on questions of law alone.” Article 6, section 4, given in *Laws of 1862*, p. 583.

<sup>3</sup> The grant of appellate jurisdiction in the Constitution of 1879 is as follows: “The supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justice’s courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine or in which the demand, exclusive of interest, or the value of the property in controversy amounts to three

hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone.”

Section 4, article 6, Constitution of Nevada, contains the following language: “The supreme court shall have appellate jurisdiction in all . . . cases at law in which . . . the legality of any tax, impost, assessment, toll, or municipal fine, . . .” is involved. Section 4 of article 4 of the Constitution of Washington is framed differently, although the effect is practically the same: “The supreme court shall have . . . appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, *unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.*”

<sup>4</sup> See *People v. Johnson*, 30 Cal. 98.

<sup>5</sup> 51 Cal. 499.

to recover the amount of a wharf license due under the provisions of an ordinance of the city, the defendant having filed an answer denying the validity of the license. In *Brown v. Rice*,<sup>6</sup> the action was to recover a penalty of twenty-five dollars imposed by section 518 of the Civil Code, for collecting more than the established rate of toll allowed. It was held that the district court had no jurisdiction, and the court said: "It is not pretended that the rates of toll as fixed by the board of supervisors were illegal in any respect. The demand and recovery by the toll-gatherer of a larger amount than that fixed by the board was not a collection of tolls, but an act of extortion, for which the statute prescribes certain penalties and consequences." These cases do not decide the question whether the district (superior) courts or the supreme court would have jurisdiction of an action to collect a toll or license imposed by a municipal ordinance where its "legality" is not put in issue by the pleadings. In the case first cited it is assumed that the jurisdiction of the police court ceased "upon filing of the answer." But it would seem that the "legality" of a municipal license, etc., may be questioned in argument upon the facts stated in a complaint to collect it at any stage of the cause without any pleading on the part of the defendant; and if that be so would not "the legality" of the license be "involved"? And inasmuch as no provision is made for bringing up the argument of counsel, must it not be presumed in support of a judgment for the plaintiff that the legality of the license was questioned at the trial? No case has been found which directly decides this point. In *People v. Mier*,<sup>7</sup> the action was to foreclose a lien for taxes. The court held that being to foreclose a lien it was a case in equity, and that the district court had jurisdiction without regard to the amount. The court said that if the complaint had not contained a prayer for the foreclosure of a lien, the action would have been at law, and that the district court would not have had jurisdiction. The court went on to say that if the answer had set up a defense questioning the legality of the tax, the district court would probably have had jurisdiction under the clause of the Constitution to that effect. In the subsequent case of *Bell v. Crippen*,<sup>8</sup> the court followed without discussion the

<sup>6</sup> 52 Cal. 489. See, also, *Hansen v. Nilson*, 17 Wash. 606, 50 Pac. 511.

<sup>7</sup> 24 Cal. 61.

<sup>8</sup> 28 Cal. 327.



*dictum* in *People v. Mier*, to the effect where the action was for a sum less than three hundred dollars, and did not seek the foreclosure of a lien, the district court had no jurisdiction. But the decision appears to have proceeded entirely upon the authority of the *dictum* in *People v. Mier*, and the clause as to the legality of tax, etc., was not adverted to.<sup>2a</sup>

The word "assessment" used in this phraseology refers to assessments relating to public taxation, or to raise funds for public purposes, such as local public improvements, and it does not include assessments or calls made by private corporations to collect subscriptions to its capital stock, or to compel its stockholders to contribute to its treasury additional sums in proportion to their ownership of paid-up stock.<sup>3</sup>

§ 174. **Cases at Law in Which the Amount of the Demand Regulates the Jurisdiction.**—The provision of the Constitution of 1849 was as follows:

"The supreme court shall have appellate jurisdiction in all cases *when the matter in dispute exceeds two hundred dollars*, when the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony on questions of law alone."<sup>1</sup>

Under this clause the limitation as to amount applied to cases in equity<sup>2</sup> as well as to cases at law; and the amount was required to *exceed* two hundred dollars. The court had no jurisdiction of an appeal from a judgment in an action for two hundred dollars.<sup>3</sup> In estimating the "matter in dispute" interest was included.<sup>4</sup> And it was held in an early case that costs formed part of the matter in dispute.<sup>5</sup> But that case was overruled in *Dunphy v. Guindon*,<sup>6</sup> which was followed in subsequent cases,<sup>7</sup> and it became the settled rule that costs formed no part of the

<sup>2a</sup> An action for the recovery of taxes paid upon an alleged erroneous assessment, the assessment officials having assessed a certain parcel of land as containing more land than it actually contained, is not an action in which the validity of a tax is involved within the meaning of this clause. *Thomas v. Lincoln Co.*, 41 Wash. 150, 83 Pac. 18.

<sup>3</sup> *Bottle Mining & Milling Co. v. Kern*, 154 Cal. 97.

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<sup>1</sup> Article 6, section 4; Laws of 1850, p. 30.

<sup>2</sup> See section 171, *ante*.

<sup>3</sup> *Zabriskie v. Torrey*, 20 Cal. 173.

<sup>4</sup> *Malson v. Vaughn*, 23 Cal. 61; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96, 11 Morr. Min. Rep. 381.

<sup>5</sup> *Gordon v. Ross*, 2 Cal. 156.

<sup>6</sup> 13 Cal. 28.

<sup>7</sup> *Votan v. Reese*, 20 Cal. 89; *Zabriskie v. Torrey*, 20 Cal. 173; *Bolton v. Landers* (No. 2), 27 Cal. 106.

matter in dispute.<sup>9</sup> Under the clause above quoted the rule, afterward established, that in estimating "the matter in dispute" the amount claimed in the *ad damnum* clause of the complaint was to be taken did not prevail. The jurisdiction of the *trial* court was determined by the *ad damnum* clause,<sup>9</sup> as was also the jurisdiction of the appellate court where the plaintiff was appellant;<sup>10</sup> but where the defendant was appellant, it was held that the jurisdiction of the supreme court was to be determined by the amount of the judgment, which must exceed two hundred dollars.<sup>11</sup> The rule was stated in the subsequent case of *Skillman v. Lachman*,<sup>12</sup> as follows: "Where the plaintiff is appellant, and the judgment is for the defendant, the jurisdiction of this court is determined by the amount claimed by the complaint, for that is the 'amount in dispute' in such cases. (*Gillespie v. Benson*, 18 Cal. 410; *Votan v. Reese*, 20 Cal. 89.) But if the appeal is by the plaintiff from a judgment in his favor, the 'amount in dispute' is the difference between the amount of the judgment and the sum claimed by the complaint. (*Votan v. Reese*, 20 Cal. 89.) So upon the same principle, if the appeal is taken by the defendant from a judgment rendered against him for a sum exceeding two hundred dollars, exclusive of costs and percentage, this court has jurisdiction of the case, because the amount of the judgment is the 'amount in dispute' on the appeal. So, too, if the appeal is taken by the defendant from a judgment in his favor, where he has set up a counterclaim, if that judgment is for a sum more than two hundred dollars less than he claims in his answer, this court has jurisdiction."

By the amendment of 1862,<sup>13</sup> it was provided that the supreme court should have appellate jurisdiction "in all cases at law . . . in which *the demand*, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars." This amendment effected several changes. The jurisdictional amount was raised from two to three hundred dollars; the limitation as

<sup>9</sup> Neither did a "percentage." See *Zabriskie v. Torrey*, 20 Cal. 173. But it was held that where the costs themselves exceeded two hundred dollars, they could constitute the subject of an appeal. See *Meeker v. Harris*, 23 Cal. 285; compare *People v. O'Neil*, 47 Cal. 109.

<sup>9</sup> *Jackson v. Whartenby*, 5 Cal. 94.

<sup>10</sup> *Gillespie v. Benson*, 18 Cal. 409.

<sup>11</sup> *Votan v. Reese*, 20 Cal. 89.

<sup>12</sup> 23 Cal. 198, 83 Am. Dec. 96, 11 Morr. Min. Rep. 381.

<sup>13</sup> Article 6, section 4, quoted in note 2 to section 173, *ante*.

to amount applied only to cases at law;<sup>14</sup> the sum was not required to *exceed* but only to *amount to* three hundred dollars;<sup>15</sup> the rule that interest formed part of the amount was changed;<sup>16</sup> and the term "demand" was substituted for "matter in dispute." Nothing was said about costs forming a part of the demand, and the rule in that regard established by the previous decisions above referred to continued to prevail.<sup>17</sup> After the amendment the rule of the previous decisions with reference to what was to be taken as the jurisdictional amount was changed. In *Maxfield v. Johnson*,<sup>18</sup> it was said that the jurisdiction was to be determined by the *ad damnum* clause in the complaint, and not by the amount of a counterclaim. Afterward, in *Solomon v. Reese*,<sup>19</sup> the subject was more fully considered. In that case the complaint was for five hundred and fifty dollars. The plaintiff had judgment for three hundred dollars principal, thirty-two dollars and sixty-one cents interest, and costs; but not being satisfied appealed. It was contended that under the rule in *Votan v. Reese* and *Skillman v. Lachman*, above cited, the amount in controversy was the difference between the amount which plaintiff claimed and the amount which he recovered, which was less than three hundred dollars, and that therefore the supreme court had no jurisdiction. But the court sustained its jurisdiction, and Sanderson, J., delivering the opinion, said:

"The language of the Constitution in respect to the jurisdiction of this court is the same as it is in respect to the jurisdiction of the district court, and there can be, therefore, no difference in the rules by which questions as to jurisdiction of the subject matter are to be determined in the two courts. For the purpose of ascertaining whether the district court has jurisdiction we look to the complaint, and in this class of cases, if the sum sued for amounts to three hundred dollars exclusive of interest, that court has jurisdiction, and by parity of reason this court

<sup>14</sup> As to the meaning of the term "cases at law," see section 173, *post*.

<sup>15</sup> Before this amendment the sum was required to *exceed* two hundred dollars. See note 3 above.

<sup>16</sup> Before the amendment it was held that interest formed a part of the "matter in dispute." See note 4 above. The words "exclusive of interest" in the amendment of 1862 mean exclusive of the interest accrued at the commencement of the action, as well

as that accruing afterward; for the same language is used in the grant of jurisdiction to the district (superior) courts. And since such courts must have jurisdiction when the action is commenced, the only thing the words "exclusive of interest" can apply to is the interest accrued up to that time.

<sup>17</sup> See *dictum* in *Maxfield v. Johnson*, 30 Cal. 545.

<sup>18</sup> 30 Cal. 545.

<sup>19</sup> 34 Cal. 28.

has jurisdiction on appeal. The amount sued for, exclusive of interest, is the test of the jurisdiction of this court as well as that of the district court, regardless of the judgment of the latter court. We dissent entirely from the *dictum* of the court in the case of *Votan v. Reese*, 20 Cal. 89, to the effect that where the plaintiff recovers in the district court less than he sues for, the test of the jurisdiction of this court, in the event the plaintiff appeals, is the difference between the judgment of the district court and the demand made in the complaint, exclusive of interest. All civil cases which the district courts have jurisdiction to try, this court has jurisdiction to review, no matter what the judgment of the district court may have been. If the plaintiff sues to recover a demand for five hundred dollars, and the district court gives him a judgment for three hundred only, his demand does not thereby become converted into a demand for two hundred dollars, for the purpose of an appeal, should he be dissatisfied with the judgment, and desire to bring his case to this court. On the contrary, in the sense of the Constitution, his demand in this court is precisely the same that it was in the court below, and is to be ascertained by looking to the complaint, and not by deducting the judgment of the district court from the demand alleged in the complaint. In other words, the *ad damnum* clause in the complaint is the test of jurisdiction in this court as well as in the court below. (*Maxfield v. Johnson*, 30 Cal. 545.)"

The provision of the Constitution of 1879,<sup>20</sup> in regard to the question under consideration, was precisely the same as that of

<sup>20</sup> Article 6, section 4 (quoted in note 3 to section 173, *ante*).

Article 6, section 4, Constitution of Nevada, is partly as follows: "The supreme court shall have appellate jurisdiction . . . in all cases at law . . . in which the demand (exclusive of interest), . . . exceeds three hundred dollars; . . ."

See note 3, section 173, *ante*, for the corresponding provision of the Washington Constitution.

Section 388, *Mills'* Annotated Code of Colorado, authorizes appeals to the supreme court from the district, county and superior courts, "where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to

the sum of one hundred dollars, or relate to a franchise or freehold."

Section 406, *Id.*, provides that "writs of error shall lie from the supreme court to every final judgment of any court of record in this state, . . ."

Section 406a amends the above by increasing the minimum amount to give jurisdiction to two thousand five hundred dollars, "Provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the state, or of the United States, is necessary to the determination of a case; Provided, further, that the fore-

the amendment of 1862, above quoted. And in the case of *Dashiel v. Slingerland*,<sup>21</sup> decided in 1882, the court in bank approved and followed the rule in *Solomon v. Reese*. The action was in the nature of trespass to recover nine hundred dollars damages. The verdict was for two hundred dollars, and the defendant appealed. The respondent moved to dismiss the appeal for want of jurisdiction. But the court held that it had jurisdiction, and Thornton, J., delivering the opinion, after quoting from *Solomon v. Reese*, said:

"It is true that this was said in a case (*Solomon v. Reese*) where the plaintiff appealed, but we are of opinion that the same rule is correct where the defendant appeals. The *demand* referred to in the Constitution and the statute is the amount sued for in the action, exclusive of interest. The defendant makes no demand, unless, probably, when he sets up a counterclaim. The plaintiff makes the demand, and the defendant only seeks to be relieved from the plaintiff's demand. In the case before us the demand is nine hundred dollars, expressed in the *ad damnum* clause. Our judgment is that this court has appellate jurisdiction in this case. The cases cited by counsel for respondent were made under Constitutions or statutes in which the provisions on this matter were manifestly different from our Constitution and statute. *Gordon v. Ross*, 2 Cal. 156, *Doyle v. Seawall*, 12 Cal. 280, and *Votan v. Reese*, 20 Cal. 90, were decided under the Constitution of 1849, and that Constitution provided that the supreme court should have appellate jurisdiction in all cases where '*the matter in dispute*' exceeded two hundred dollars. These cases, so far as they are in conflict with the decision here, are governed by the words '*matter in dispute*' and the matter in dispute when

going limitations shall not apply to writs of error to county courts."

Section 406b established the court of appeals, and section 406d fixed its jurisdiction as follows: "The said court shall have jurisdiction—First—To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

"Second—It shall have jurisdiction, subject to the limitations stated in subdivision three of this section, where the judgment, or in replevin the value found, is two thousand five hundred dollars or less, exclusive of costs.

"Third—It shall have jurisdiction not final in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the state or of the United States is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from or appeals to the court of appeals shall lie to review final judgments within the same time and in the same manner, as is now, or may hereafter be provided by law for such reviews by the supreme court."

<sup>21</sup> 60 Cal. 653.

the defendant appealed was held to be the amount of the judgment recovered against him in the court below. . . . The rule laid down in *Solomon v. Reese* meets our approval. It is just and equitable, as it accords to both plaintiff and defendant an equality of right in prosecuting appeals."

In *Langan v. Langan*,<sup>21a</sup> it was held that the supreme court had jurisdiction of an appeal from an order allowing twenty-five dollars per month alimony, since the order was for a continuing payment, upon which *three hundred dollars* might ultimately be paid. So in *People v. Madden*,<sup>21b</sup> the *ad damnum* clause of the complaint was held to be the test of the jurisdiction of the superior court and the appellate jurisdiction of the supreme court, although on its way through the courts the ultimate question might become merely a few dollars in costs.

In view of these decisions the rule that in all cases the jurisdictional amount is to be determined by the *ad damnum* clause must be regarded as settled.<sup>21c</sup> If the amount of such clause is

<sup>21a</sup> 86 Cal. 132, 24 Pac. 852.

<sup>21b</sup> 134 Cal. 611, 66 Pac. 874.

<sup>21c</sup> See, also, *Sanborn v. Superior Court*, 60 Cal. 425; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *People v. Perry*, 79 Cal. 105, 21 Pac. 423; *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126; *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457; *Myers v. Sierra Valley etc. Co.*, 122 Cal. 669, 55 Pac. 689; *Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530. In this last case the question was as to the jurisdiction of the superior court, but the principle is the same.

The rule in Washington may be said to be a material qualification of that outlined in the text. It was fairly stated in the case of *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835, in the following language:

" . . . In actions of this kind the jurisdictional question is ordinarily determined by the actual value of the property, and not by the value as alleged in the complaint. *Herrin v. Pugh*, 9 Wash. 637, 38 Pac. 213; *Graves v. Thompson*, 35 Wash. 282, 77 Pac. 384. The value in such cases is that found by the court or jury. *Herrin v. Pugh*, *supra*. But where judgment goes for the defendant, there is no finding by the court or jury on the question of value, and

in such cases the value alleged in the complaint is the test of jurisdiction subject to the qualification that the demand shall appear to have been made in good faith for such amount. *Burkhardt v. Elgee*, 93 Wis. 29, 66 N. W. 525, 1137; *Gorman v. Havird*, 141 U. S. 206, 11 Sup. Ct. Rep. 943, 35 L. ed. 717, and cases cited. If the rule were otherwise, a plaintiff dismissed without trial could never obtain a review of his case in this court. But if we are in error in this, we would still be compelled to look to the entire record to ascertain the jurisdictional facts, and could not consider *ex parte* affidavits filed in this court."

Other decisions support this rule. See *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94, 69 Pac. 648; *Chapin v. Kenoyer*, 12 Wash. 536, 41 Pac. 916; *Tom v. Sayward*, 5 Wash. 383, 31 Pac. 976; *McCoy v. Spithill*, 13 Wash. 158, 42 Pac. 546; also *Durand v. Simpson etc. Co.*, 21 Wash. 21, 56 Pac. 846, and *Leavitt v. Carr*, 22 Wash. 361, 60 Pac. 1044; *Fidelity etc. Co. v. Faben*, 51 Wash. 308, 98 Pac. 764, where it was held that the attorney's fees could not be included to make up the minimum necessary to confer jurisdiction.

It is immaterial that the method of review sought is by *certiorari* rather

not sufficient to give jurisdiction, it makes no difference that a counterclaim is set up.<sup>22</sup> Neither interest nor costs can be considered in determining the question of jurisdiction. Following the earlier decisions as to the *ad damnum* clause test, the supreme court in *Henigan v. Ervin* <sup>22a</sup> said:

"Where the demand in suit is merely for money, as in this case, the supreme court has no appellate jurisdiction, unless such demand, exclusive of interest, amounts to three hundred dollars. In this case the demand sued for is simply money, and amounts to only two hundred and twenty-two dollars and twenty cents. For the purpose of testing either the original jurisdiction of the justice of the peace or the appellate jurisdiction of the supreme court, the incidental costs of the plaintiff can no more be deemed a part of the demand than can the interest on the sum of money or value of the property sued for. (*Dunphy v. Guindon*, 13 Cal. 28; *Maxfield v. Johnson*, 30 Cal. 545.) As generally applicable to the appellate jurisdiction of the supreme court, see *Maxfield v. Johnson*, *supra*; *Gorton v. Fernandino*, 64 Cal. 11; *William v. McCartney*, 69 Cal. 556. It has often been held by this court that where jurisdiction depends on the amount in controversy, the *ad damnum* clause or the sum demanded in the complaint is the sole test. (*Dashiel v. Slingerland*, 60 Cal. 653; *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Solomon v. Reese*, 34 Cal. 28.)"

It matters not that the complaint is made up of several counts, each for a specific sum less than the amount required to give jurisdiction, if the total amount sued for gives jurisdiction.<sup>22b</sup>

than appeal; the amount must be within the constitutional provision. *State v. Court*, 6 Wash. 352, 33 Pac. 827; *State v. Court*, 8 Wash. 271, 36 Pac. 27.

But in some instances the decisions are somewhat inharmonious. Thus in *Bleecker v. Satsop etc. Co.*, 3 Wash. 77, 27 Pac. 1073, it was held that it was the amount sued for and not the amount of the judgment rendered. So as to garnishment. *Campbell v. Simpkins*, 10 Wash. 160, 38 Pac. 1039; *Schreiner v. Emel*, 26 Wash. 555, 67 Pac. 228.

<sup>22</sup> See *Simmons v. Brainard*, 14 Cal. 278; *Maxfield v. Johnson*, 30 Cal.

545; *Malson v. Vaughn*, 23 Cal. 61; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126.

<sup>22a</sup> 110 Cal. 37, 42 Pac. 457; and see *Christian v. Superior Court*, 122 Cal. 117, 54 Pac. 518.

<sup>22b</sup> *Ventura Co. v. Clay*, 114 Cal. 242, 46 Pac. 9.

But it is otherwise if the several amounts are sought to be enforced by different plaintiffs upon independent claims. *Garneau v. Port Blakely etc. Co.*, 20 Wash. 97, 54 Pac. 771. Also *Goodyear etc. Co. v. Schreiber*, 29 Wash. 94, 69 Pac. 648.

Where the amount is insufficient to give jurisdiction, the appeal will be dismissed.<sup>23</sup> Where the supreme court has no jurisdiction of the case itself, it would seem that it has no jurisdiction of any order in the case.<sup>24</sup>

The question of the amount in controversy or the value of the property does not arise in equity cases.<sup>25</sup>

The constitutional amendment of 1904 providing for the organization of the district courts of appeal, and defining and limiting their jurisdiction, raised the three hundred dollar limit above outlined to two thousand dollars, as the minimum for the supreme court, and gave to the district courts of appeal jurisdiction of all actions at law in which the demand, exclusive of interest, amounts to three hundred dollars and does not amount to two thousand dollars.<sup>26</sup>

**§ 174a. Cases at Law in Which the Value of the Property Regulates the Jurisdiction.**—The language of the Constitution is: "In all cases at law . . . in which . . . the value of the property in controversy amounts to three hundred dollars."<sup>1</sup>

<sup>23</sup> *Luther v. Ship Appollo*, 1 Cal. 15; *Doyle v. Seawall*, 12 Cal. 280; *Dunphy v. Guindon*, 13 Cal. 28; *Simmons v. Brainard*, 14 Cal. 278; *Crandall v. Blenn*, 15 Cal. 406; *People v. Carman*, 18 Cal. 693; *Poland v. Carrigan*, 20 Cal. 174; *Votan v. Reese*, 20 Cal. 89; *Maxfield v. Johnson*, 30 Cal. 545; *Sweet v. Tice*, 45 Cal. 71; *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084; *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457.

Also *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Lotz v. Mason Co.*, 6 Wash. 166, 32 Pac. 1049; *Moskeland v. Stephens*, 18 Wash. 693, 50 Pac. 933; *National etc. Co. v. Cann*, 39 Wash. 596, 81 Pac. 1054; *State v. Coon*, 40 Wash. 682, 82 Pac. 993; *State v. Freasure*, 39 Wash. 198, 81 Pac. 688; *State v. Cole*, 40 Wash. 474, 82 Pac. 749.

The amount cannot be reduced by amendment, remission, payment or satisfaction, after its determination in the trial court, so as to deprive the supreme court of its constitutional jurisdiction. *Huber v. Brown*, 17 Wash. 4, 48 Pac. 412; *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869; *Dodge v. Corliss*, 28 Wash. 474, 68 Pac. 869; *Taylor v. Spokane etc. Co.*, 32 Wash.

450, 73 Pac. 499; *Fenton v. Morgan*, 16 Wash. 30, 47 Pac. 214; *Puyallup etc. Co. v. Stevenson*, 21 Wash. 604, 59 Pac. 504; *Stewart v. Hanna*, 35 Wash. 148, 76 Pac. 688.

<sup>24</sup> *Gorton v. Ferdinando*, 64 Cal. 11, 27 Pac. 941.

<sup>25</sup> *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; and compare *Miller v. Carlisle*, 127 Cal. 327.

Also *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 140; *Trumbull v. Jefferson Co.*, 37 Wash. 604, 79 Pac. 1105; *Horrell v. California etc. Assn.*, 40 Wash. 531, 82 Pac. 889; *Agnew v. Barto etc. Bank*, 48 Wash. 66, 92 Pac. 885.

<sup>26</sup> Article 6, section 4, Constitution of California.

<sup>1</sup> By the constitutional amendment of 1904 the jurisdiction of the supreme court is limited to cases at law in which the value of the property in controversy amounts to two thousand dollars. And that of the district court of appeals is limited to cases at law in which the value of the property in controversy amounts to three hundred dollars and does not amount to two thousand dollars.



This is the provision which gives the court jurisdiction of suits for the recovery of personal property. In *Astell v. Phillipi*,<sup>1a</sup> it was said that a justice of the peace had jurisdiction of a case where the value of the property was two hundred and ninety-nine dollars, although fifty dollars was claimed as damages for its detention—it being considered that the test of the jurisdiction was the value of the property without regard to the damages. The point, however, was not decided, as it was held proper for the plaintiff on the trial before the justice to strike out the claim for damages. No other case has been found upon the question.

The meaning of the term "cases at law" has been considered in section 173.

**§ 175. Cases of Forcible Entry and Detainer.**—Neither the Constitution of 1849 nor the amendment of 1862 gave jurisdiction of actions of forcible entry and detainer to the supreme court in express terms.<sup>1</sup> In *Small v. Gwinn*,<sup>2</sup> it was said that such cases were "special cases or proceedings." And inasmuch as at that time the jurisdiction of the supreme court as to special cases or proceedings was unquestioned, it may be that jurisdiction of appeals in forcible entry and detainer cases was exercised upon that ground. Afterward, in *Caulfield v. Stevens*,<sup>3</sup> it was said that such cases were cases at law involving the possession of real estate. The language of the court is as follows: "It cannot be denied but that actions, either for a forcible entry or a forcible or unlawful detainer, involve the possession of real property. Their primary object is to obtain that possession of lands and tenements which has been forcibly taken or is forcibly or unlawfully detained. The recovery of rents and damages is incidental to the recovery of possession, and the former cannot be had without the latter. The possession of real property is, therefore, as much involved in these actions as in an action of ejectment." This case was disapproved in *Courtwright v. Bear River Co.*,<sup>4</sup> but not as to the *dictum* above quoted; on the contrary, the latter case contains a *dictum* to the same effect.<sup>5</sup> But whatever may have been the ground upon which the supreme

<sup>1a</sup> 55 Cal. 265.

<sup>1</sup> See note 2 to section 173, *ante*.

<sup>2</sup> 6 Cal. 477; look at *Paul v. Silver*, 16 Cal. 73; and *Quinn v. Kenyon*, 22 Cal. 82.

<sup>3</sup> 28 Cal. 118.

<sup>4</sup> 30 Cal. 573.

<sup>5</sup> See *Courtwright v. Bear River Co.*, 30 Cal. 582.

court exercised jurisdiction in such cases, it is certain that the jurisdiction was exercised. The Constitution of 1879 contains an express provision that the supreme court shall have appellate jurisdiction "in cases of forcible entry and detainer."<sup>6</sup> These words, as above used, include actions of unlawful detainer. Such was the meaning given to them under the old Constitution and laws;<sup>7</sup> and it is reasonable to presume that the framers of the Constitution of 1879 used them in their established signification. The provisions of the statute in relation to appeals in these cases will be given elsewhere.<sup>8</sup>

The constitutional amendment of 1904 took away from the supreme court its former jurisdiction of actions of forcible entry and detainer, and gave it to the district courts of appeals, adding the phrase, "except such as arise in justices' courts." The effect of this change is to eliminate the only exception existing to the prevailing rule against double appeals, actions of forcible entry and detainer being the only ones under our system which might reach the supreme court from justices' courts.<sup>9</sup>

**§ 176. Proceedings in Insolvency.**—Neither the Constitution of 1849 nor the amendment of 1862 gave appellate jurisdiction to the supreme court in proceedings in insolvency in express terms. But such proceedings were considered to be "special cases," and the court exercised jurisdiction over them as such. That they were special cases was decided in *Harper v. Freelon*,<sup>1</sup> *Kohlman v. Wright*,<sup>2</sup> and *Fisk v. His Creditors*.<sup>3</sup> The rule laid down in these cases was approved and followed in *Sturgis v. Shepard*,<sup>4</sup> and was upheld in *People v. Rosborough*,<sup>4</sup> in which case Shafter, J., delivering the opinion, said: "It is true as respondent claims that cases in insolvency are not cases in equity (*Cohen v. Barrett*, 5 Cal. 195), nor do we consider that the jurisdiction in error can be supported as upon the amount of the demand, nor as upon the value of property in controversy. A petition in insolvency looks to a discharge as the principal purpose, and 'oppositions' are interposed solely with a view to defeat it. Were

<sup>6</sup> Article 6, section 4 Constitution of California.

<sup>7</sup> *Caulfield v. Stevens*, 28 Cal. 118; *Brummagin v. Spencer*, 29 Cal. 661; *Johnson v. Chely*, 43 Cal. 299; *Stopplekamp v. Mangeot*, 42 Cal. 316.

<sup>8</sup> See section 202, *post*.

<sup>9</sup> Article 6, section 4, Constitution of California.

<sup>1</sup> 6 Cal. 76.

<sup>2</sup> 6 Cal. 230.

<sup>3</sup> 12 Cal. 281.

<sup>4</sup> 28 Cal. 115.

<sup>4</sup> 29 Cal. 415.

the question a new one, we might doubt our jurisdiction, but it has been settled by long and unbroken usage. The question is broadly within the reasoning in *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717, and furthermore, it was directly decided in *Fisk v. His Creditors*, 12 Cal. 281. The argument in that case has been strengthened rather than weakened by the constitutional amendments."

The Constitution of 1879 provided in express terms that the supreme court shall have appellate jurisdiction "in proceedings in insolvency." The constitutional amendment of 1904 gave it to the district courts of appeals, relieving the higher court in this respect, as in others.<sup>4a</sup>

As in other cases, the particular proceedings from which an appeal can be taken depend upon the provisions of the statute. The statutory provisions on the subject are given elsewhere.<sup>5</sup>

**§ 177. Actions to Prevent or Abate a Nuisance.**—Neither the Constitution of 1849 nor the amendment of 1862<sup>1</sup> gave jurisdiction of actions to prevent or abate a nuisance to the supreme court in express terms. But in *Courtwright v. Bear River Co.*<sup>2</sup> it was held that such actions were "cases in equity," and if that be true, the supreme court had jurisdiction. The Constitution of 1879 expressly provides that the supreme court shall have appellate jurisdiction "in actions to prevent or abate a nuisance." The constitutional amendment of 1904 relieved the supreme court of appeals in this class of cases, and conferred appellate jurisdiction therein upon the district courts of appeals.<sup>3</sup>

**§ 178. Probate Proceedings.**—The Constitution of 1849 did not expressly give to the supreme court jurisdiction of appeals from probate courts.<sup>1</sup> The amendment of 1862 provided that "the supreme court shall have appellate jurisdiction . . . in all cases arising in the probate courts."<sup>2</sup> By virtue of this provision the appellate jurisdiction of the court extended to every case arising in the probate courts, whatever might be its nature. But an "appeal" is the creature of statute, and only exists in the cases

<sup>4a</sup> Article 6, section 4, Constitution of California.

<sup>5</sup> See section 201, *post*.

<sup>1</sup> See note 2 to section 173, *ante*.

<sup>2</sup> 30 Cal. 573.

<sup>3</sup> Article 6, section 4, Constitution of California.

<sup>1</sup> See Laws of 1850, pp. 30, 31.

<sup>2</sup> See note 2 to section 173, *ante*.

provided by the statute.<sup>3</sup> And accordingly it was held that no order in the probate court was appealable unless it was made so by the Practice Act.<sup>4</sup>

The provision of the Constitution of 1879 is somewhat different from that of the previous one. It is "that the supreme court shall have appellate jurisdiction . . . in all such probate matters as may be provided by law." Under this provision the jurisdiction of the supreme court does not extend to cases not provided by law. And consequently the court could not, as formerly, frame a writ for the complete exercise of its jurisdiction in probate proceedings, in cases not provided for by the statute.<sup>5</sup> Under this provision the jurisdiction of the court as well as the right of appeal depends upon the statute. The provisions of the statute will be given in another place.<sup>6</sup>

The amendment to the Constitution of 1904 left probate matters to the jurisdiction of the supreme court, and made no change in the form of the original provision, as above quoted.<sup>7</sup>

**§ 178a. Criminal Causes.**—The constitutional amendment of November 8, 1904, gave to the supreme court appellate jurisdiction "on questions of law alone, in all criminal cases where judgment of death has been rendered"; and to the district courts of appeal, "on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered." This jurisdiction of the district courts is subject to the power given to the higher court to order the transfer of causes pending in the lower court to itself for hearing and decision. This provision applies to criminal appeals as well as to all others, its language being sufficiently comprehensive, apparently, to include all "cases, matters and proceedings pending before" the district courts of appeal.<sup>1</sup>

Briefly stated, this provision confers upon the lower appellate courts the jurisdiction in criminal causes previously held by the supreme court, with the single exception of so-called capital cases, which latter remain with the higher court. With this transfer of

<sup>3</sup> See section 181, *post*.

<sup>4</sup> *Peralta v. Castro*, 15 Cal. 511; *Estate of McKinley*, 49 Cal. 152; *Blum v. Brownstone Brothers*, 50 Cal. 293; *Estate of Smith*, 51 Cal. 563; *Estate of Dunne*, 53 Cal. 631.

<sup>5</sup> As to this power of the court, see

section 181, *post*. It does not appear to have been exercised as to probate proceedings.

<sup>6</sup> See section 200, *post*.

<sup>7</sup> Article 6, section 4, Constitution.

<sup>1</sup> Article 6, section 4, Constitution of California.

jurisdiction went also the special procedure regulating appeals to the supreme court in criminal causes, it being provided by the amendment that:<sup>2</sup>

"All statutes now in force allowing, providing for, or regulating appeals to the supreme court shall apply to appeals to the district courts of appeal, so far as such statutes are not inconsistent with this article, and until the legislature shall otherwise provide."

As provided in the constitutional amendment referred to, this appellate jurisdiction in criminal causes is limited to questions of law alone. The jurisdiction of the trial court in reference to questions of fact is exclusive, and appellate courts are without jurisdiction in cases of this character to review the evidence, although they do have jurisdiction to review questions of law arising out of the evidence.<sup>3</sup> The general rule, as often stated, is that if there is any evidence tending to sustain the verdict of the jury in a criminal case, the appellate court will not consider whether it amounts to proof of the fact found or not, and the verdict will not be disturbed, unless it is so greatly against the preponderance of the evidence as to shock the moral sense, or to make it manifest that the verdict is the result of passion or prejudice. In such case the question presented is one of law, and the appellate court will

<sup>2</sup> Article 6, section 4, Constitution of California. This special procedure is outlined in the Penal Code (sections 1235-1265, inclusive). It covers appeals in all cases which have been prosecuted by indictment or information in a court of record, whether felonies or misdemeanors. A distinction was sought to be drawn in the early history of this practice between these two classes of offenses, and it was contended that inasmuch as the legislature had made no provision for appeals in misdemeanors, none would lie. In *People v. Jordan*, 65 Cal. 644, 4 Pac. 683, however, it was held that such failure on the part of the legislature would not have the effect of nullifying the appellate jurisdiction of the appellate court as conferred by the Constitution, that the court had the power and that it was its duty to prescribe rules of procedure itself to supply the deficiency, and thereupon it did adopt the regulations already provided in the Penal Code for appeals in felony cases. In 1905 the legislature amended section

1235 of the Penal Code so as to include appeals in misdemeanor cases, and no distinction is now made between the lower and the higher grade of public offenses. Statutes and Amendments of 1905, p. 700.

Section 4, article 6, Constitution of Nevada, confers appellate jurisdiction upon the supreme court "on questions of law alone, in all criminal cases in which the offense charged amounts to a felony."

The Constitution of Oklahoma (article 7, section 2) provides that the appellate jurisdiction of the supreme court shall extend to all criminal cases "until a criminal court of appeals with exclusive criminal jurisdiction shall be established by law." Accordingly, the legislature of 1907 (Laws of 1907-08, p. 291 et seq.) created such a court, with such jurisdiction, and outlined the procedure governing its exercise thereof. See section 1900 et seq., Compiled Laws of Oklahoma.

<sup>3</sup> *People v. Lowen*, 109 Cal. 381. 42 Pac. 32.

review the evidence, but in no other case will it do so.<sup>4</sup> In short, the appellate court has no jurisdiction to review the evidence other-

<sup>4</sup> *People v. Wong Chong Suey*, 110 Cal. 117, 42 Pac. 420; *People v. Roemer*, 114 Cal. 51, 45 Pac. 1003; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Ross*, 115 Cal. 233, 46 Pac. 1059; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Wells*, 145 Cal. 138, 78 Pac. 470.

On the general subject of the extent to which the appellate court may go in the consideration of the evidence, see, also, in addition to the above citations, *People v. Lewis*, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.

In *People v. Feld*, 149 Cal. 464, 86 Pac. 1100, the supreme court held that the appellate court was powerless to interfere with the verdict of a jury in a criminal case if there is any evidence tending to support it. Such evidence must be taken as true upon appeal. In *People v. Staples*, 149 Cal. 405, 86 Pac. 886, it was held that where all the evidence in the case was equally compatible with innocence or guilt, there was a total failure of proof, and the question became one of law. "The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict was framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed."

In *People v. Willard*, 150 Cal. 543, 89 Pac. 124, the supreme court said: "This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury. In a case presenting any of these features this court would deal with it as a matter of law." See, also, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Donnolly*, 143

Cal. 394, 77 Pac. 177; *People v. Gonzales*, 143 Cal. 605, 77 Pac. 448. In this last case the supreme court said:

"This court cannot interfere with the verdict of a jury, nor with the action of the court below in refusing a new trial, on the ground that the evidence is insufficient to justify the verdict, unless there was such a lack of evidence as to satisfy us that the court below abused its discretion in denying the new trial."

The same principles have been enunciated in the district courts of appeals. In *People v. Heart*, 1 Cal. App. 166, 81 Pac. 1018, it was held that its jurisdiction covered appeals from criminal prosecutions by indictment or information in the superior courts, where the appeal was on questions of law alone. Where, therefore, there is evidence to sustain a verdict, it was held that no question of law could arise. So where there is conflict of evidence, no question of law can arise. "In cases where there is simply a conflict of evidence on the question as to whether or not the defendant is guilty, this court cannot interfere with the verdict of the jury and the determination of the trial court thereon on motion for new trial." *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553.

Upon the same principle the appellate court is allowed to review an order denying a challenge to a juror upon the ground of actual bias only when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law in the manner suggested in the text. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115; *People v. Wells*, 100 Cal. 227, 34 Pac. 718; *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *People v. Evans*, 124 Cal. 206, 56 Pac. 1024; *People v. Flannelley*, 128 Cal. 83, 60 Pac. 670; *Mono Co. v. Flanagan*, 130 Cal. 105, 62 Pac. 293; *People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618; and see *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991.

wise than for the purpose of considering a question of law; "and the only means in its power for correcting errors is by granting a new trial."<sup>b</sup>

**§ 179. Special Cases and Proceedings.**—Jurisdiction of "special cases and proceedings" has always been expressly granted by the Constitution to some of the lower courts. The Constitution of 1849 provided that the county court should have jurisdiction "in special cases as the legislature may prescribe."<sup>1</sup> The amendment of 1862 provided that the county court should have jurisdiction "of all such special cases and proceedings as are not otherwise provided for."<sup>2</sup> And the Constitution of 1879 provides that the superior court shall have jurisdiction "of all such special cases and proceedings as are not otherwise provided for."<sup>3</sup> The term "special cases" used in the foregoing extracts was defined in *Parsons v. Tuolumne County Water Co.*<sup>4</sup> as follows: "We think that the term 'special cases' was not meant to include any class of cases for which the courts of general jurisdiction have always supplied a remedy. The 'special cases,' therefore, must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity." This definition has been approved in subsequent cases.<sup>5</sup> In accordance with it the following have been held

No distinction is made between civil and criminal cases, however, in this matter.

In *Lombardi v. California Street Ry. Co.*, 124 Cal. 311, 57 Pac. 66, it was held that when a question of fact is presented in such form that but one conclusion can be legally drawn therefrom, it is a question of law and not of fact.

<sup>a</sup> See *People v. Marshall*, 112 Cal. 422, 44 Pac. 718, and cases cited in preceding note.

<sup>b</sup> *People v. Marshall*, 112 Cal. 422, 44 Pac. 718.

<sup>1</sup> Article 6, section 9; see *Laws of 1850*, p. 31.

<sup>2</sup> Article 6, section 8; see *Laws of 1862*, p. 584.

<sup>3</sup> Article 6, section 5.

Section 4, article 6, Constitution of Nevada, confers jurisdiction by appeal, after enumerating various matters of law, equity, etc., and preceding the reference to criminal

causes, "in all other civil cases not included in the general subdivision of law and equity."

Section 4, article 4, Constitution of Washington, contains the usual phrase, "actions and proceedings," without the designation, "special." The legislature of Washington recognizes both "proceedings" and "special proceedings." See note 5, below.

<sup>4</sup> 5 Cal. 43, 63 Am. Dec. 76.

<sup>5</sup> See *Brock v. Bruce*, 5 Cal. 279; *Ricks v. Reed*, 19 Cal. 551; *Appeal of S. O. Houghton*, 42 Cal. 35; *People v. Kern Co.*, 45 Cal. 679; *Bixler's Appeal*, 59 Cal. 550. In *Jacks v. Day*, 15 Cal. 91, the court said that had it not been for previous decisions it would be inclined to hold that "the intent of the sixth section was to leave to the legislature the conferring of jurisdiction upon the county courts in such specially enumerated and defined cases as in its discretion should be confided to these tribunals;

to be "special cases and proceedings," viz.: Election contests,<sup>6</sup> proceedings in eminent domain, under the various acts in relation to that power,<sup>7</sup> proceedings in insolvency,<sup>8</sup> proceedings for widening streets or to change the grade thereof,<sup>9</sup> proceedings to remove a public officer for malfeasance in office,<sup>10</sup> proceedings to annul the election of the directors of a corporation,<sup>11</sup> proceedings under

that the general mass of litigation should be left to the other courts, but that in exceptional instances, where it was thought advisable to vest jurisdiction in the county courts by special enactment, clearly indicating that purpose, the county court might be invested with such powers." But it is to be inferred from the opinion that the court considered that the previous decisions settled the matter; and the definition in *Parsons v. Tuolumne Water Co.* has, as shown by the cases above cited, finally prevailed.

In *Re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. 354, it was said: "It may be said, generally, that any proceeding in a court which was not under the common law and equity practice, either an action at law or a suit in chancery, is a special proceeding."

The supreme court of Washington seems to have followed the same principle, and to have held that actions in insolvency, eminent domain, *habeas corpus*, *quo warranto*, and the like, not being included in the proceedings recognized as ordinary, are "proceedings" as contradistinguished from "actions" as the two words are used in section 4, article 4, of the Constitution of that state. *Cline v. Harmon*, 2 Wash. 155, 26 Pac. 191, 269; *Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189. A garnishment, while auxiliary to the main cause, is a "proceeding" within the meaning of the Washington code (section 1716, Rem. & Bal. Code; section 6500, Bal. Code). *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902. And possibly, that of the Constitution, although that is a point not entirely free from doubt, for the legislature describes *certiorari*, *habeas corpus*, *ne exeat*, *mandamus*, prohibition, etc., as "special proceedings" (see section 999 et seq., Rem. & Bal. Code; 5738, Bal. Code), and in *State v. Gordon*, 8 Wash. 488,

36 Pac. 498, the supreme court departed somewhat from the above view as to the scope of the word "proceeding." "Generally, a 'proceeding' in contemplation of law, means any application, however made, to a court of justice, for the purpose of having a matter in dispute judicially determined. . . . While our legislature has not, in specific terms, defined the meaning of the word 'proceeding,' it has done so, inferentially, in many cases. For example, an application for a writ of mandate is denominated a 'proceeding' (see Code Proc., sec. 745), and so is an application for a writ of *ne exeat* (Id., sec. 754). Whenever a controversy is determined summarily, without the intervention of a jury, the method of disposing of it may be designated as a 'proceeding' in contradistinction to an ordinary trial, which proceeds according to the course of the common law."

<sup>6</sup> *Saunders v. Haynes*, 13 Cal. 145; *Stone v. Elkins*, 24 Cal. 125; *Dorsey v. Barry*, 24 Cal. 449; *Keller v. Chapman*, 34 Cal. 635; *Packard v. Craig*, 114 Cal. 95, 45 Pac. 1033; *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101.

<sup>7</sup> *Gilmer v. Lime Point*, 19 Cal. 47; *S. P. & N. R. R. Co. v. Harlan*, 24 Cal. 334; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Dalton v. Water Commissioners*, 49 Cal. 222; *People v. Pfeiffer*, 59 Cal. 89.

<sup>8</sup> *Harper v. Freelon*, 6 Cal. 76; *Kohlman v. Wright*, 6 Cal. 230; *Fisk v. His Creditors*, 12 Cal. 281; *Sturgis v. Shepard*, 28 Cal. 115; *People v. Rosborough*, 29 Cal. 415.

<sup>9</sup> *Appeal of S. O. Houghton*, 42 Cal. 35.

<sup>10</sup> *Covarrubias v. Supervisors of Santa Barbara*, 52 Cal. 622; and look at *Matter of John J. Marks*, 45 Cal. 199.

<sup>11</sup> *Stewart v. Mahoney Mining Co.*, 54 Cal. 149; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.



the mechanic's lien law of 1861,<sup>12</sup> proceeding in the county court to review proceedings of board of trustees disposing of public lands,<sup>13</sup> will contests,<sup>13a</sup> proceedings under the "Wright Act," or the "Confirmation Act,"<sup>13b</sup> and doubtless under the "McEnerney Act," though this has not been determined, as yet, in express terms. In *Waterman v. Lawrence*,<sup>13c</sup> it was said that a suit in partition was a special proceeding, but the contrary view seems to have been taken in *Goodale v. Fifteenth District Court*.<sup>13d</sup>

As will be perceived from the foregoing, special proceedings comprise a very large and important class of cases, and the extent and importance of the class will be increased as new rights and proceedings to enforce them are created by the legislature. But the Constitution never has, in express terms, conferred appellate jurisdiction of such cases upon the supreme court, although, by the amendment of 1904, such jurisdiction was conferred upon the district courts of appeals.<sup>13e</sup> The provision of the Constitution of 1849 was as follows:<sup>14</sup>

"The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, where the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony in questions of law alone."

This provision, as will be observed, makes no mention of special cases, or of divorces, or of cases where the relief sought is not capable of pecuniary estimation. The deficiency was supplied, however, by the case of *Conant v. Conant*.<sup>15</sup> That was an action

<sup>12</sup> *McNeil v. Borland*, 23 Cal. 144; *Van Winkle v. Stow*, 23 Cal. 457. But otherwise of the ordinary action to foreclose the lien, such as is provided for by the present act. See *Brock v. Bruce*, 5 Cal. 279.

<sup>13</sup> *Ricks v. Reed*, 19 Cal. 551; *Ryan v. Tomlinson*, 31 Cal. 11.

<sup>13a</sup> *Estate of Joseph*, 118 Cal. 660, 50 Pac. 768; *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842; and see *Estate of Dolbeer*, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207.

<sup>13b</sup> *Stats.* 1889, p. 212; and see *In re Central Irr. Co.*, 117 Cal. 382, 49 Pac. 354.

<sup>13c</sup> 19 Cal. 210, 79 Am. Dec. 212.

<sup>13d</sup> 56 Cal. 26. This would seem to be the better view. The code does not create a new right, but simply

regulates an old remedy. If a partition suit be a special proceeding, so is an action to foreclose a mortgage.

*What are not.*—The appointment of a receiver is not (*Whitney v. Buckman*, 26 Cal. 447, 10 Morr. Min. Rep. 428); action to abate a nuisance is not (*Parsons v. Tuolumne Water Co.*, 5 Cal. 43, 63 Am. Dec. 76); application for a writ of *mandamus* is not (*People v. Kern Co.*, 45 Cal. 679, overruling *Jacks v. Day*, 15 Cal. 91); nor is application for writ of *certiorari*. *Wilcox v. Oakland*, 49 Cal. 29.

<sup>13e</sup> Article 6, section 4, Constitution of California.

<sup>14</sup> Article 6, section 4; *Laws of 1850*, p. 30.

<sup>15</sup> 10 Cal. 249, 70 Am. Dec. 717.

of divorce where no question of property was involved. An objection to the jurisdiction of the supreme court was overruled, and Field, J., delivering the opinion, said:

"We do not understand the last words of the first clause of the section as restricting the jurisdiction only to those cases which involve questions of property, or the legality of a tax, toll, impost, or municipal fine. As we read the section the court possesses appellate jurisdiction *in all cases*; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost, or municipal fine is drawn in question. Similar language is used in defining the original jurisdiction of the district courts. The sixth section of the same article declares that 'the district courts shall have original jurisdiction in law and equity, in all civil cases, when the amount in dispute exceeds two hundred dollars exclusive of interest.' It never could have been the intention of the framers of the Constitution to deny to the higher courts, both original and appellate, any jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation—such as suits to prevent threatened injury—respecting the guardianship of children, honorary offices, to which no salary is attached, and the like. And yet to this result the position of the respondent directly leads. We think the construction contended for too narrow, and not imperatively required by the language of the Constitution."

The jurisdiction of the court of appeals in special cases depended upon this decision, which was not questioned while the clause upon which it was decided remained in force. In 1863 the amended judiciary article went into operation, and as then amended, section 4 was as follows:<sup>16</sup>

"The supreme court shall have appellate jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the probate courts; and also, in all criminal cases, amounting to felony, on questions of law alone."

<sup>16</sup> See Laws of 1862, p. 583.

This clause contains a more extended enumeration of the grounds of jurisdiction, and thus took away much of the pressure which induced the decision in *Conant v. Conant*. In the case of *Knowles v. Yeates*,<sup>17</sup> however, which was an election contest, it was held that "as to the point under consideration these corresponding sections of the old and new Constitutions are substantially the same, so that the opinion and judgment in *Conant v. Conant* may be regarded to be quite as applicable to the case before us as it would have been had the Constitution in the particular noticed remained unchanged." And the court endeavored to fortify the position taken in *Conant v. Conant*, by a long argument to the effect that it must have been the intention of a free people to invest the court of last resort with jurisdiction over matters of such importance as special proceedings, divorce cases, and cases in which the subject of litigation is not capable of pecuniary estimation.

The jurisdiction of the supreme court in special cases, established by *Conant v. Conant*, and affirmed in *Knowles v. Yeates*, was exercised without question in numerous cases;<sup>18</sup> and the legislature has always provided that an appeal could be taken to the supreme court "from a final judgment in an action or *special proceeding*."<sup>19</sup> And it might well have been considered by the profession that the question was settled. But the whole matter was opened up, and

<sup>17</sup> 31 Cal. 82.

<sup>18</sup> As to election contests, see *Doane v. Scannell*, 7 Cal. 393; *Dickinson v. Van Horn*, 9 Cal. 207; *Saunders v. Haynes*, 13 Cal. 145; *Searcy v. Grow*, 15 Cal. 117; *Brodie v. Campbell*, 17 Cal. 11; *Whipley v. McKune*, 12 Cal. 352; *Dorsey v. Barry*, 24 Cal. 449; *Casgrave v. Howland*, 24 Cal. 457; *Bourland v. Hildreth*, 26 Cal. 161; *Walther v. Rabolt*, 30 Cal. 185; *Norwood v. Kenfield*, 30 Cal. 394; *S. C.*, 34 Cal. 329; *Knowles v. Yeates*, 31 Cal. 82; *Sprague v. Norway*, 31 Cal. 173; *Day v. Jones*, 31 Cal. 261; *Webster v. Byrnes*, 34 Cal. 273; *Keller v. Chapman*, 34 Cal. 635; *Mills v. Sargent*, 36 Cal. 379; *Packard v. Craig*, 114 Cal. 95, 45 Pac. 1033; *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101.

As to proceedings in eminent domain under various acts, see *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 74; *S. C.*, 7 Cal. 577; *Gilmer v. Lime Point*, 18 Cal. 229; *S. C.*, 19 Cal. 47; *Stanford v. Worn*, 27 Cal. 171; *S. F. & S. J. R. R. Co. v. Mahoney*, 29

Cal. 112; *S. F. & A. S. R. R. Co. v. Caldwell*, 31 Cal. 367; *C. P. R. R. Co. v. Pearson*, 35 Cal. 247; *S. F. & A. W. Co. v. Alameda Water Co.*, 36 Cal. 639; *S. P. R. R. Co. v. Reed*, 41 Cal. 256; *C. P. R. R. v. Frisbie*, 41 Cal. 356; *W. P. R. R. Co. v. Tevis*, 41 Cal. 489; *S. P. & N. R. R. Co. v. Harlan*, 24 Cal. 334; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *Koppikus v. State Capitol Com.*, 16 Cal. 248.

As to proceedings in insolvency, see *Sharp v. His Creditors*, 10 Cal. 418; *Fisk v. His Creditors*, 12 Cal. 281; *Shawl v. His Creditors*, 19 Cal. 597; *Moore v. His Creditors*, 10 Cal. 691; *Bennett v. Creditors*, 22 Cal. 38; *Schloss v. His Creditors*, 31 Cal. 201; *Grow v. His Creditors*, 31 Cal. 328; *Wilson v. His Creditors*, 32 Cal. 406; *Sanborn v. His Creditors*, 37 Cal. 609.

And see the miscellaneous cases given in the beginning of this section.

<sup>19</sup> See statutes quoted in section 182; and see section 52, California Code of Civil Procedure.

the long-settled doctrine of the court overturned in the Appeal of S. O. Houghton.<sup>20</sup> That was a proceeding to change the grade of a street. The majority of the court (Rhodes, C. J., dissent) held that the court had no appellate jurisdiction in special cases. The opinion of Crockett, J., disposed of the question by saying that the case was a special proceeding, and not a "case at law," that, therefore, the court had no jurisdiction, no reference being made to previous decisions. The opinion of Wallace, J., is to the effect that the jurisdiction of the court is confined by the Constitution to cases in equity and cases at law of a defined character, that the proceeding in question was neither the one nor the other, but no reference was made to the previous decisions. The opinion of Temple, J., however, reviews the previous cases, and discusses the subject very fully. That learned justice said:

"In *Knowles v. Yeates*, 31 Cal. 82, this court held that the Constitution gives the court appellate jurisdiction in special cases. They rely to some extent upon *Conant v. Conant*, 10 Cal. 249, 18 Am. Dec. 717. I have never been satisfied with the reasoning in *Knowles v. Yeates*, and although the court have often entertained appellate jurisdiction in similar cases, where the question has not been raised, I do not understand that it has been expressly affirmed. In *Day v. Jones*, 31 Cal. 261, decided at the same term, the case of *Conant v. Conant* was an action of divorce, in which the rights of property were involved. It was contended that the supreme court had no jurisdiction, because it did not fall within the classes mentioned in section 4, article 6, of the Constitution as it then stood. It conferred upon the supreme court appellate jurisdiction 'in all cases where the matter in dispute exceeds

<sup>20</sup> 42 Cal. 35. The act authorizing the proceeding expressly provided that the judgment of the county court should be "final and conclusive," which was interpreted to mean that no appeal could be taken. And one ground of the decision was that an appeal could not be taken in the face of this prohibition. It is too clear for argument, however, that the legislature cannot take away the constitutional jurisdiction of the court; and while it may take away the particular machinery of an "appeal," the court has power to frame proper machinery for the exercise of its jurisdiction. But the provision that the judgment of the county

court should be "final and conclusive" applies as directly to writs of error or any writ or process that could be framed to bring the case up, as it does to an "appeal." It does not apply to the particular machinery of an appeal, but to all machinery for bringing up the case for review. If the court had jurisdiction over that class of cases, such a provision by the legislature could be of no force. Therefore, the only ground upon which the correctness of the decision can be maintained is that the court has constitutional jurisdiction over special cases.

hundred dollars,' and where the legality of any tax, toll, etc., was in question. The court say in effect that this was not intended to define and therefore to restrict the jurisdiction of the court, but merely to limit that jurisdiction in cases capable of pecuniary computation. No such construction can possibly be given to the language of the Constitution as amended. That section now reads as follows: 'The supreme court shall have appellate jurisdiction in all cases in equity; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; also in all cases arising in the probate courts; and also in all criminal cases amounting to felony on questions of law alone. The court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices have power to issue writs of *habeas corpus* to any part of this state upon petition on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme court, or before any district court or any county court in the state, or before any judge of said courts.' The qualifying clauses cannot possibly apply to 'cases in equity' nor to cases arising in probate courts. If the doctrine of *Knowles v. Yeates* be correct, these provisions in the Constitution are perfectly meaningless. Cases in equity were certainly not mentioned for the purpose of limiting the jurisdiction of this court to such cases as involved an amount greater than three hundred dollars. The rules by which this section of the Constitution must be construed are familiar and obvious. In the absence of circumstances which indicate a different rule of construction the enumeration of the cases to which the appellate jurisdiction of the court extends excludes others. In *Knowles v. Yeates* the court did not, by 'rational conjecture' or otherwise, in my opinion, supply the presumed intention of the framers of that instrument; but they have stricken out words which have an obvious meaning, and which in an important matter affect the character of the instrument. The very able judge who wrote the opinion in *Knowles v. Yeates* evidently felt that the case of *Conant v. Conant* was not altogether in point, for he has fortified his position by a lengthy and eloquent argument, but from the reasoning

of which I differ *toto coelo*. A provision of the Constitution, which I think clear beyond the possibility of doubt, is set aside, partly because it was thought that a free people in forming a government for their protection and to secure to themselves the blessings of liberty must have intended to provide an appeal, in cases of grave concern, to the court of highest authority. An appeal to this court, of course, affords a great degree of protection to the citizens, but certainly the framers of the Constitution have shown that they did not consider such right essential to secure the liberties or property of citizens. There is no appeal in criminal cases not amounting to felony, and yet the citizen may be fined to the extent of thousands of dollars and kept for years in jail under a conviction for a misdemeanor."

The doctrine of the Appeal of Houghton did not receive much consideration; for the profession continued to take and the court to entertain appeals in special cases;<sup>21</sup> and in the Stockton R. R. Co. v. Galgiani the case was overruled. The Stockton R. R. Co. v. Galgiani was an appeal from a judgment of the county court confirming the report of commissioners in a proceeding to condemn land. An objection to the jurisdiction of the supreme court was made, but Niles, J., delivering the opinion, said:

"Whether, under the provisions of article 6, section 4, of the Constitution, an appeal lies to this court in special cases cannot be considered at this day as an open question. In Knowles v. Yeates, 31 Cal. 82, and Day v. Jones, 31 Cal. 261, this point was directly presented and decided. In numerous other instances this court has entertained jurisdiction in special cases. (See cases cited by Mr. Chief Justice Rhodes in Houghton's Appeal, 42 Cal. 35.) In view of these cases we do not think a reconsideration of the question at this time would be profitable, and hold that this court has jurisdiction of this appeal."

According to the report of this case both Crockett and Wallace, JJ., concurred in this decision; and from this fact the profession may well have concluded that subsequent reflection had convinced them of the error of their views in the Appeal of Houghton. After the decision, as before, the court continued to entertain appeals in special cases.<sup>22</sup>

<sup>21</sup> See *Minor v. Kidder*, 43 Cal. 229; *Kirk v. Rhoads*, 46 Cal. 398; *California Pacific R. R. Co. v. Armstrong*, 46 Cal. 85; *United States v. Land in Monterey County*, 47 Cal. 515; *Spencer*

*Creek Water Co. v. Vallejo*, 48 Cal. 70; *Templeton v. Coburn*, 48 Cal. 563.

<sup>22</sup> *Election Contests: Wyman v. Lemon*, 51 Cal. 273; *Misch v. Mayhew*, 51 Cal. 514; *Crawford v. Dunbar*,

In 1879 the people adopted an entirely new Constitution, the provision of which in relation to the jurisdiction of the supreme court is as follows:<sup>23</sup>

"The supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone."

As will be observed, the framework of this provision is the same as those of the previous Constitution, the only difference being that more grounds of jurisdiction are enumerated. It would seem, therefore, that the decisions of *Conant v. Conant*, *Knowles v. Yeates*, *Day v. Jones*, and *Stockton R. R. Co. v. Gagliani*, above cited, ought to apply to it; and accordingly there are several instances in which the court, as constituted by the Constitution of 1879, has entertained appeals in special cases.<sup>24</sup> But in the recent case of *Bixler's Appeal*,<sup>25</sup> the doctrine of the *Appeal of Houghton* was revived, and upon the authority of that case the court held that it had no jurisdiction of appeals in special cases. The case involved proceedings in relation to the formation of a swamp land district. The opinion of department one contains the following:

"It may also be admitted (we expressly decline so to decide) that a proceeding to form a reclamation or swamp-land district, or to set off lands from such districts, or to consolidate districts

52 Cal. 36; *Tilson v. Ford*, 53 Cal. 701; *Donnelly v. Potter*, 55 Cal. 474; *Coffey v. Edmonds*, 58 Cal. 521; *Preston v. Culbertson*, 58 Cal. 198.

*Eminent Domain*: *Matter of Market Street*, 49 Cal. 546; *Loomis v. Andrews*, 49 Cal. 239; *S. P. R. R. Co. v. Wilson*, 49 Cal. 396; *N. P. R. R. Co. v. Reynolds*, 50 Cal. 90; *Wilmington C. & R. Co. v. Domingues*, 50 Cal. 505; *Con. Channel Co. v. C. P. R. R. Co.*, 51 Cal. 269; *Ventura Co. v. Thompson*, 51 Cal. 577; *Delphi School Dist.*

*v. Murray*, 53 Cal. 29; *City of San Jose v. Freyschlag*, 56 Cal. 8; *Cummings v. Peters*, 56 Cal. 593.

*Proceedings to Remove Officer for Malfeasance*: *Covarrubias v. Supervisors of Santa Barbara*, 52 Cal. 622.

*To Annul Election of Directors of a Corporation*: *Stewart v. Mahoney Mining Co.*, 54 Cal. 149.

<sup>23</sup> Article 6, section 4.

<sup>24</sup> See later cases cited in note 22 above.

<sup>25</sup> 59 Cal. 550.

is a 'special case or proceeding,' *judicial* in nature, of which the superior court has jurisdiction—the case or proceeding not being 'otherwise provided for.' (Const., art. 6, sec. 5.) . . . This court has no jurisdiction of such appeal. (Const., art. 6, sec. 4; Appeal of S. O. Houghton, 42 Cal. 35.) To what is said in the Appeal of S. O. Houghton, we may add that it is clear that 'special cases or proceedings' are not included in 'cases at law,' in which this court is given appellate jurisdiction by the fourth section of article 6 of the Constitution, because in the fifth section of the same article 'special cases and proceedings' are spoken of as constituting a separate and distinct class from such 'cases at law.' In section 4 of article 6—the section which enumerates the classes in which the supreme court has appellate jurisdiction—are mentioned all the classes of civil cases in which the superior court is given jurisdiction (by the fifth section of the same article), except 'actions of divorce and annulment of marriage,' and 'special cases and proceedings,' and except also that the appellate jurisdiction of the supreme court is declared to extend to probate matters only where an appeal is provided by law. Unless actions of divorce or for annulment of marriage, or special cases and proceedings, are included within some other class of those enumerated, it would seem very clear that it was not the intention of the Constitution to confer upon the supreme court appellate jurisdiction in actions of divorce, or for annulment of marriage, or in special cases and proceedings. If, indeed, we could clearly see that actions for divorce were included within one of the classes previously mentioned, or that special cases were so included, we might hold that the class thus included would be appealable, notwithstanding it was specifically and separately mentioned in the section of the Constitution which treats of the superior courts; that it was specifically and separately mentioned *ex abundanti cautela*, and only lest it might otherwise be supposed *not* to be included in the classification which precedes it. Whatever bearing this suggestion may have upon the question whether, under our system of laws, suits for a divorce or for an annulment of marriage can be entertained by courts of *equity*, to be resorted to by a party to a civil contract (marriage) as a means of relieving himself or herself of its obligations, it has no force when applied to 'special cases and proceedings.' These are neither cases in equity nor cases at law involving the validity of a tax, etc."



The court then proceeds to distinguish Houghton's Appeal from *De Witt v. Duncan*, and *Spencer Creek Water Co. v. Vallejo*, and states that "the decision in the Appeal of Houghton, at least as construed in *Spencer Creek Water Co. v. Vallejo*, *has never been overruled*," and that "the present case comes clearly within the rule laid down in Houghton's Appeal, even if that rule be limited as it is apparently sought to be limited in *Spencer Creek Water Co. v. Vallejo*." And the appeal was dismissed.

It is to be observed of this case that it does not proceed upon any difference between the provision of the Constitution of 1879 and the provision previously in force, but follows the line of reasoning in Houghton's Appeal, and relies upon the authority of that case, which it states "has never been overruled." It was evidently not brought to the attention of the department that in the *Stockton R. R. Co. v. Galgiani*, two of the three judges who rendered the decision in Houghton's Appeal concurred in overruling it, and there have been subsequent instances in which appeals in special proceedings have been entertained,<sup>26</sup> although there are other cases, or at least one other, in which the supreme court declined to consider an appeal, upon the authority of Houghton's and Bixler's Appeals. This was *In re Curtis*,<sup>27</sup> which was a *quasi* criminal action under the authority of section 772, Penal Code, but in this case the *crux* of the decision was clearly the summary character of the proceeding, rather than the indisposition of the court to recognize an appeal in a special proceeding. And this distinction seems to have been made in later cases.<sup>28</sup>

As above stated, the amendment of 1904 disposes of all past difficulty by providing specifically for appellate jurisdiction in the district courts of appeals "in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the supreme court)." No mention is made in the clauses conferring and defining the jurisdiction of the supreme court of special proceedings, *eo nomine*.

<sup>26</sup> *California Southern Ry. Co. v. Kimball*, 61 Cal. 90; *Lorenz v. Jacobs*, 63 Cal. 73.

<sup>27</sup> 108 Cal. 661, 41 Pac. 793.

<sup>28</sup> It was held in the case of *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, that special proceedings in general were appealable under the provisions of sections 52 and 939, Code of Civil

Procedure, inferring, however, as a proviso, failure of the legislature to make any such proceeding summary, and the judgment of the superior court final. This decision was approved in the subsequent case of *People v. San Luis Obispo*, 152 Cal. 261, 92 Pac. 481.

§ 180. **Divorce Cases.**—The Constitution has never in express terms conferred upon the supreme court jurisdiction of appeals in divorce cases. In the case of *Conant v. Conant*,<sup>1</sup> however, it was held that the court had jurisdiction of such appeals, and since that decision the jurisdiction was exercised in numerous cases. The case of *Conant v. Conant*, and the subsequent decisions in relation to the rule laid down by it, have been fully considered in the preceding section. But the jurisdiction of the court in divorce cases (unlike its jurisdiction in special proceedings) does not depend entirely upon that case. By the amendment of 1862 the court was given jurisdiction in cases in equity, and in *Lyons v. Lyons*<sup>2</sup> it was declared that a divorce case is a "case in equity." The decision in *Lyons v. Lyons* was followed in the later cases of *Sharon v. Sharon*,<sup>2a</sup> and *Harron v. Harron*,<sup>2b</sup> in both of which the jurisdiction of the appellate court was credited to the equity character of the proceeding. In the first of these cases the proposition was fully discussed, and that case is regarded as finally disposing of the matter in this state, and is believed to be the correct view. It is true that in England (until recently) the jurisdiction in divorce cases was in the ecclesiastical courts. But this was upon the idea that marriage was a religious as well as a civil tie, and that therefore it was a matter for the "spiritual courts." This is not recognized in California. The code provides that "marriage is a personal relation arising out of a *civil contract*,"<sup>3</sup> and a divorce case may be regarded as a suit for the cancellation of the contract. The words "cases in equity" include extensions of the principles of equity to new cases.<sup>4</sup>

<sup>1</sup> 10 Cal. 249, 70 Am. Dec. 717.

<sup>2</sup> 18 Cal. 447.

<sup>2a</sup> 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

<sup>2b</sup> 123 Cal. 508, 56 Pac. 334.

<sup>3</sup> Section 55, Civil Code of California.

<sup>4</sup> See section 171, *ante*.

## CHAPTER XXVIII.

## WHAT MAY BE APPEALED FROM—FINAL JUDGMENTS.

- § 181. Extent to which the right of appeal depends upon legislative provision.
- § 182. Legislative provisions in relation to appeals from final judgments.
- § 183. What is the judgment to be appealed from.
- § 184. What is a final judgment.
- § 185. Appeal from a part of a judgment.
- § 186. What may be reviewed on an appeal from the judgment.

**§ 181. Extent to Which the Right of Appeal Depends upon Legislative Provision.**—As has been shown, the legislature can neither increase nor diminish the constitutional jurisdiction of the appellate courts.<sup>1</sup> But the Constitution does not provide any rules of procedure according to which the jurisdiction is to be invoked, nor does it determine the particular stages in a cause at which the proceedings may be brought up for review, nor the periods within which, nor the parties by whom, proceedings for review may be taken. These matters are left to the legislature, whose provision on the subject, in order to be effectual, must be exclusive.<sup>2</sup> Accordingly, it has been held that where the statute

<sup>1</sup> See section 170, *ante*.

<sup>2</sup> See, generally, *Humiston v. Smith*, 21 Cal. 129. In the recent case of *Estate of McPhee*, 154 Cal. 385, 97 Pac. 878, in considering objections to the new and alternative method of appeal, the supreme court said:

"What the method and procedure in taking an appeal shall be is a matter for the determination of the legislature, and that it can prescribe in the exercise of its plenary powers over the subject for taking an appeal without any service of the notice thereof is so clear as to admit of no doubt."

Again, with respect to the failure of the legislature to provide for an undertaking on appeal by such new and alternative method:

"It was a matter solely for the legislature to determine whether it would require such a bond to be given."

The necessity for legislative regulations is usually implied in the Constitution itself. Thus the Montana Constitution (section 3, article 8) provides: "The appellate jurisdiction of

the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." Section 1, article 7, of the Oregon Constitution, provides as follows: "The judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law. . . ."

Unless an appeal is taken and perfected under the limitations and regulations prescribed by statute, the supreme court is without jurisdiction to entertain it. *Featherman v. Granite Co.*, 28 Mont. 462, 72 Pac. 972. And see *State v. Court*, 24 Mont. 539, 63 Pac. 395; *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.

"The Constitution grants appellate jurisdiction to the supreme court, to be exercised under 'such regulations and limitations as may be prescribed by law.' Constitution, article 8, sections 2, 3, 15. In pursuance of this

has provided an appeal, no other remedy can be allowed.<sup>3</sup> But in case of the failure of the legislature to provide any appeal whatever from the proceedings in a cause of the class over which the court is given jurisdiction by the Constitution, the court itself has power to frame such writs as may be "necessary or proper to the complete exercise of its appellate jurisdiction."<sup>4</sup> As, therefore, the legislature cannot by positive enactment increase or diminish the jurisdiction of the court as defined by the Constitution, so it cannot paralyze such jurisdiction by failing to provide machinery and occasion for its exercise. But there must be some regulation as to the proceedings which may be reviewed, and as to the manner of such review, either by the legislature or by the court; and if there be none such, the jurisdiction cannot be exercised. This is commonly (though inadequately) expressed by saying that no right of appeal exists except where given by the statute. This proposition, as is elsewhere shown, has been frequently affirmed with reference to interlocutory orders,<sup>5</sup> and has been decided with reference to final judgments. Thus in *Warner v. Hall*,<sup>6</sup> the supreme court denied an application for a writ of *certiorari*, and Bennett, J., delivering the opinion, said:

grant, and as furnishing methods for the exercise of the jurisdiction granted, the legislature has enacted statutes providing how appeals may be taken, determining of what the record on such appeal shall consist, and how such records shall be certified to this court. Substantial compliance with these provisions is necessary to give this court the right to exercise the jurisdiction granted." *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121.

The constitutional grant of appellate jurisdiction is not usually self-executing. It requires the intervention of the legislature to make it effective. See *Portland v. Gaston*, 38 Or. 533, 63 Pac. 1051; *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158.

The rule is otherwise, however, as to such grants of original jurisdiction as are included in the Constitutions along with the grants of appellate and revisory jurisdiction under consideration. This has been held with regard to the grant of power to issue the writ of *habeas corpus* in the Washington

Constitution (section 4, article 4). See *In re Rafferty*, 1 Wash. 382, 25 Pac. 465.

An appeal, although authorized by constitutional provision in terms that are general, is statutory, and cannot be extended beyond the terms of the statute. *State v. Security Co.*, 23 Or. 410, 43 Pac. 162; *School District v. Irwin*, 34 Or. 431, 56 Pac. 413; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

But although not self-executory, the appellate jurisdiction of the supreme court or other courts of appeals whose powers are defined by the Constitution is such that if the legislature should fail or neglect to make the regulations required, the courts themselves would be empowered to do so. See section 182, note 16.

<sup>3</sup> *Haight v. Gay*, 8 Cal. 297; and see *Sacramento etc. R. R. Co. v. Harlan*, 24 Cal. 334.

<sup>4</sup> See section 301, *post*.

<sup>5</sup> See section 188, *post*.

<sup>6</sup> 1 Cal. 90.

"The Constitution has not enumerated the courts from whose judgment an appeal will lie to the supreme court, and the statutes have not conferred upon us appellate jurisdiction over judgments of the county courts. It is true the Constitution declares that this court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars, and that the statute has empowered us to issue writs of *certiorari* where they may be necessary in the exercise of our jurisdiction. (Act to organize the supreme court passed Feb. 14, 1850, sec. 7, Const., art. 6, sec. 4.) But the court cannot exercise jurisdiction conferred by the Constitution until the mode in which it shall be exercised is prescribed by statute. We entertain appeals from the district courts because the statute has provided means by which, and defined the manner in which, they may be brought before us and determined. But no such provision has been made in relation to judgments of the county courts, and until that is done I cannot see how we can properly review them."

In the subsequent case of *White v. Lighthall*,<sup>7</sup> the same learned justice, delivering the opinion upon a similar application, said:

"The supreme court is strictly an appellate court having no original jurisdiction. Its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals. The legislature has conferred upon us no power to review judgments of the county courts on appeal, or in any other way. It is true that we may issue writs of *certiorari*, but only to courts from which judgments on appeal may be taken. The county court is not one of these. The legislature has not provided any practice by which a judgment of the county court may be reviewed by us. The Constitution is sufficiently broad to authorize the legislature to make provision for such a case, but they have not prescribed the *quo modo* in which an appeal may be taken, and we have no power to enact laws."

At the time these cases were decided the supreme court had no power to issue writs of *certiorari* except in aid of its appellate jurisdiction;<sup>8</sup> and the refusal to issue the writ seems to have been placed upon the ground that the court had no appellate jurisdiction over judgments of the county court, because no ap-

<sup>7</sup> 1 Cal. 347. See, also, *Middleton v. Gould*, 5 Cal. 190. And as to appeals in criminal causes, see *People v. Schuster*, 40 Cal. 627.

<sup>8</sup> See article 6, section 4; *Laws of 1850*, p. 30.

peal had been provided by the statute. At that time the power of the court to frame process proper for the exercise of its constitutional jurisdiction in cases where no process had been provided by the legislature does not seem to have been understood,<sup>9</sup> and the language quoted must be taken with some limitation; but the cases may be regarded as authority upon the proposition that the constitutional jurisdiction of the court cannot be exercised in the absence of process provided by some competent authority. The rule upon the subject was very clearly stated by Wallace, J., in his concurring opinion in the Appeal of S. O. Houghton.<sup>10</sup> That was an appeal taken from the judgment of the county court confirming the report of commissioners assessing the benefits and damages accruing by reason of the change of the grade of a street. The majority of the court (as far as can be made out from the report) rested their decision upon the ground that the supreme court had no appellate jurisdiction over "special cases and proceedings"; but they seem to have been also of opinion that the appeal should be dismissed, because the statute authorizing the proceeding provided that the judgment of the county court should be "final and conclusive."<sup>11</sup> Wallace, J., in his concurring opinion, said:

"Independently of rules adopted by this court on the subject (and there are none), an appeal as mere procedure is defined by statute; it is essentially the creature of the statute, and may be accorded or withheld, restrained, enlarged, or wholly abrogated by legislative enactment. It cannot be affirmed to have any existence, except as found in the expression of the legislative will. The Constitution has not undertaken to define it, or to secure its benefits, to any person as against the legislative control. While that instrument has defined the cases to which the appellate jurisdiction of this court extends, it has not attempted to provide, in any wise, for the mere instrumentalities through which that jurisdiction is to be exercised. It has left that subject wholly at large, and to be provided by the legislature, through statutes enacted, or, in default of them, by this court, through rules adopted for that purpose. The jurisdiction of this court, as defined by the Constitution, it is true, is in no sense

<sup>9</sup> See note 4 above.

<sup>10</sup> 42 Cal. 35.

<sup>11</sup> See, also, *People v. Fowler*, 9 Cal. 85; *San Francisco v. Certain*

*Real Estate*, 42 Cal. 513; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Bixler's Appeal*, 59 Cal. 550.

dependent upon legislative provisions for its appropriate exercise. It exists, and is capable of effective assertion, independently of legislative aid as to the procedure through which it is to be exerted. In general, but not always, the proceedings by which causes reached this court have pursued the provisions in that regard prescribed by the statutes of the state; for in general, but not always, these provisions have been found to be sufficient for the due exercise of the appellate power of the court over the subject committed to it by the Constitution. In the year 1854, however, the legislature, having failed to provide any means by which judgments rendered upon applications made for writs of *habeas corpus* might be reviewed here, and the means provided by legislation for the review of certain judgments rendered in the county courts having failed of their purpose, this court nevertheless exercised its appellate power over such judgments, through the instrumentality of appeals and writs of error prescribed and regulated under its own rules, and by its own authority. (*Vide* Rules of Supreme Court of California, adopted October term, 1854, vol. 6, Cal. R.) But whether it be under a statute or under a rule of court, it is clear that, unless the one or the other has authorized an appeal to be taken in cases of a particular class or character, no appeal in such cases can be entertained here, even though such cases be in themselves within the appellate jurisdiction of the court as defined by the Constitution."

The proposition that there must be some machinery for the exercise of the constitutional jurisdiction is well illustrated by the decisions in relation to appeals from the probate court under the old Constitution. Under that Constitution the supreme court had appellate jurisdiction "*in all cases arising in the probate court.*"<sup>12</sup> But notwithstanding this, it was held that appeals could be taken from probate proceedings only in the cases provided by the statute.<sup>13</sup>

With the exception, however, of the instance mentioned in the above extract from the opinion of Wallace, J., in the appeal of S. O. Houghton, the machinery provided by the legislature has been found sufficient for "the complete exercise of the appellate jurisdiction of the court. And it is not probable that similar

<sup>12</sup> See section 178, *ante*.

<sup>13</sup> *Peralta v. Castro*, 15 Cal. 511; *Blum v. Brownstone Bros.*, 50 Cal.

293; *Estate of McKinley*, 49 Cal. 152; *Estate of Smith*, 51 Cal. 563; *Estate of Dunne*, 53 Cal. 631.

occasions will often arise. For all practical purposes, therefore, the question whether a right of appeal exists in any case is simply a question whether the statute provides one. Statutes in relation to appeals are to be liberally construed in favor of the right."<sup>14</sup>

The remainder of this chapter, and several succeeding ones, will be devoted to a consideration of the question as to what appeals are provided by the statute.

**§ 182. Legislative Provisions in Relation to Appeals from Final Judgments.**—It will conduce to clearness to give separately the provisions in relation to the different courts.

1. *Appeal from Final Judgments in the County Courts.*—The act "concerning the courts of justice of this state and judicial officers," passed in 1853,<sup>1</sup> was construed to provide merely "what this court can review upon appeal when the cause is regularly before it," and not as providing for bringing the cause up.<sup>2</sup>

The Practice Act as first enacted did not provide any appeal from the county courts to the supreme court. Its provision was for an appeal from the county to the district court.<sup>3</sup> This provision was held to be unconstitutional.<sup>4</sup> In 1854, section 359 of the Practice Act was amended so as to read as follows:<sup>5</sup>

"Sec. 359. An appeal may be taken to the supreme court from a final judgment of the county court in all cases where the amount in dispute exceeds two hundred dollars, or where the legality of any tax, toll, or impost, or municipal fine is in question."

In 1866 this section was amended so as to read as follows:\*

"Sec. 359. An appeal may be taken to the supreme court from a final judgment of the county court: *firstly*, in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; in an action wherein the legality of any tax, impost, assessment, toll, or municipal fine is in question; and in any special case within the appellate

<sup>14</sup> Appeal of S. O. Houghton, 42 Cal. 35; Fairchild v. Doten, 42 Cal. 125.

<sup>1</sup> Laws of 1853, p. 288. - Amended in 1854. Laws of 1854, p. 28. After the constitutional amendments of 1862, an entirely new act was passed in place of the above. See Laws of 1863, p. 333.

<sup>2</sup> Middleton v. Gould, 5 Cal. 190; and look at Warner v. Hall, 1 Cal. 90; White v. Lighthall, 1 Cal. 347.

<sup>3</sup> See Laws of 1851, pp. 108, 109; and Laws of 1853, p. 277.

<sup>4</sup> Caulfield v. Hudson, 3 Cal. 389.

<sup>5</sup> Laws of 1854, p. 65.

\* Laws of 1865-66, p. 846.



jurisdiction of the supreme court over which the legislature may require said county court to exercise jurisdiction. . . . ”

This section stood until the adoption of the Code of Civil Procedure. The provision of the code as first enacted was as follows:

“Sec. 966. An appeal may be taken to the supreme court from the county courts in the following cases:—

“1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency, and in any special proceeding. . . . ”

In 1874 this section was amended so as to read as follows:

“Sec. 966. An appeal may be taken to the supreme court from the county courts in the following cases:

“1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; and in any special cases and proceedings; and in cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand exclusive of interest, or the value of the property in controversy amounts to three hundred dollars.”

This section stood until the Constitution of 1879 went into effect, by which the county courts were abolished and the new courts were established.

## 2. *Appeals from Final Judgments in the District Courts.*—

There has always been a provision allowing an appeal from a final judgment in a district court. The provision of the act of 1851 was as follows:†

“Sec. 347. An appeal may be sent to the supreme court from the district courts and the superior court of the city of San Francisco in the following cases: *first*, from a final judgment rendered in an action or special proceeding commenced in those courts, or brought into those courts from another court.”

In 1854 this section was amended, but no change was made in the first subdivision, except to substitute the word “taken” for the word “sent.”\* In 1863 the section was amended so as to

† Laws of 1851, p. 106. The act “concerning the courts of justice of this state, and judicial officers” was construed to provide merely “what the court can review on appeal when the cause is regularly before it,” and not

to provide for bringing the cause up. *Middleton v. Gould*, 5 Cal. 190. As to this act, see Laws of 1853, p. 288, and Laws of 1854, p. 28; also Laws of 1863, p. 333.

\* Laws of 1854, p. 64.

leave out the words "and the superior court of the city and county of San Francisco," but without changing the first subdivision in any other respect.<sup>9</sup> In 1866 the section was amended so as to substitute the word "entered" for the word "rendered," but no other change was made in the subdivision under consideration.<sup>10</sup> The Code of Civil Procedure reproduced the first subdivision as amended in 1866.<sup>11</sup> And no further change was made until after the Constitution of 1879.

3. *Appeals from Final Judgments in the Superior Courts.*—By the Constitution of 1879 the jurisdiction of the district, county, and probate courts was given to the superior courts, created by that instrument. And in 1880 the legislature made the following provision in relation to appeals from judgments in the new courts:

"Sec. 963. An appeal may be taken to the supreme court from a superior court in the following cases:—

"1. From a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from another court. . . . " <sup>12</sup>

<sup>9</sup> Laws of 1863, p. 756.

<sup>10</sup> Laws of 1865-66, p. 707.

<sup>11</sup> Section 963, California Code of Civil Procedure.

<sup>12</sup> The remaining subdivisions relate to appeals from orders.

Corresponding sections of other codes are as follows: Section 1493 (section 284), Revised Statutes of Arizona: "An appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases, . . . ." and sections 1212 and 1214 specify the particular judgments and orders appealable.

Section 7098, Revised Code of Montana, is the same as the California section quoted in the text. Section 1716, Rem. & Bal. Code of Washington (section 6500, Bal. Code), is in part as follows:

"Any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any and every of the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding.<sup>1</sup> From the final judgment entered in any action or proceeding, and an appeal from any such final judgment shall also bring

up for review any order made in the same action or proceeding either before or after the judgment, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such order sufficiently for the purposes of a review thereof."

Section 5109, Compiled Statutes of Wyoming, is as follows: "A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court for errors appearing on the record."

Section 4807, Revised Codes of Idaho, section 3425, Cutting's Compiled Laws of Nevada, section 7204, Revised Codes of North Dakota, are substantially the same as section 939 of the California code, which corresponds to the section under consideration in fixing the time within which appeals may be taken, but the statutes of those states do not contain specific provisions authorizing appeals in terms similar to those of section 963 of the California Code of Civil Procedure.

See section 548, Lord's Oregon Laws; section 2685, subsection 161, Compiled Laws of New Mexico. See,

There are other provisions in relation to the *time* of taking appeals, of which the language is similar to that of the above provisions. These are given in another place.<sup>13</sup>

It will be observed in relation to the provisions above given that the sections in relation to appeals from the county court specified the actions and proceedings in which final judgments were appealable; while the provisions in relation to district courts did not specify any actions or proceedings, but provided that an appeal could be taken from a final judgment in *any* action or proceeding commenced in those courts or brought into them from other courts. The provision in relation to superior courts is, in this respect, similar to those in relation to district courts.<sup>12a</sup>

The code also contains the following provision:

"Sec. 936. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, *and not otherwise.*"

This section corresponds to section 333 of the old Practice Act.<sup>14</sup> It must be interpreted to mean merely that the provisions of the code in relation to the time and manner of taking appeals, and their effect when taken, etc., shall apply only to appeals given by the code.<sup>14a</sup> For, as has been shown, the legislature has no power either to increase or diminish the jurisdiction of the appellate courts;<sup>15</sup> and in case of the failure of the legislature to provide proper machinery for the exercise of such jurisdiction, the court has power to provide by its rules whatever machinery may be proper. The power is given by the Constitution, and

also, sections 338, 406, 406a, 406c and 406d, Mills' Annotated Code of Colorado. See note 20, section 174, *ante*.

Section 6067, Compiled Laws of Oklahoma, provides for the reversal, vacation or modification of judgments or orders, "any intermediate order involving the merits of the action, or some portion thereof," and sundry special orders.

Section 439, Code of Civil Procedure of South Dakota, provides for appeals generally from the circuit to the supreme court, and section 440 provides that no writ of error shall be necessary to bring up any judgment to the supreme court for review.

Section 3300, Revised Statutes of Utah, authorizes appeals from final judgments. If the case is in equity, the appeal may be on questions of both law and fact; in cases at law, on questions of law alone.

<sup>13</sup> See chapter 30, herein.

<sup>12a</sup> The provisions of the codes in regard to appeals to the supreme court have been, by the constitutional amendment of 1904, made applicable to appeals to the district court of appeals.

<sup>14</sup> See Laws of 1851, p. 104; Laws of 1854, p. 64.

<sup>14a</sup> Look at *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323.

<sup>15</sup> See sections 170, 181, *ante*.

any prohibition by the legislature upon its exercise could be of no effect.

§ 183. **What is the Judgment to be Appealed from.**—Under the old Practice Act, it was customary to draw up the judgment in writing, in the form intended to be entered, and after receiving the signature of the judge, to file such draft with the clerk.<sup>1</sup> This proceeding was held to constitute rendition of judgment, and was the act or proceeding whereby the rights of the interested parties were finally determined. Nothing further was required to make the judgment so rendered effectual for all purposes whatever. So little significance was attached to the subsequent act of entry—the mere ministerial act of the clerk having no effect whatever upon the legality or validity of the judgment—that it was held that it might be performed at any time convenient to the clerk, even after the adjournment of the term.<sup>2</sup> The judgment as rendered, rather than the judgment as entered, constituted the act which defined all rights and remedies based thereon, and initiated all subsequent proceedings of every description. The judgment as rendered was the judgment to be appealed from, and the time within which the appeal was required to be taken was regulated by the rendition and not the entry of the judgment.\* The practice in this respect has been so com-

<sup>1</sup> See *Casement v. Ringgold*, 28 Cal. 335; also *Gray v. Palmer*, 28 Cal. 416; *Genella v. Belyea*, 32 Cal. 159; *Peck v. Courtis*, 31 Cal. 207.

<sup>2</sup> *Casement v. Ringgold*, 28 Cal. 335.

See, also, *Schenk v. Birdseye*, 2 Idaho, 141 (130), 6 Pac. 128; *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537; *Talbot v. Garretson*, 31 Or. 256, 49 Pac. 978; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901.

No appeal can be taken from a judgment until it has been entered. *Oliver v. Kootenai Co.*, 13 Idaho, 281, 90 Pac. 107; and see, to same effect, *Robson v. Colson*, 9 Idaho, 215, 72 Pac. 951; *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67. And the same rule has been applied to appeals from new trial orders. *Tootle v. French*, 3 Idaho, 1, 25 Pac. 1091; *Arthur v. Mounce*, 4 Idaho, 487, 42 Pac. 509; *Trull v. Modern Woodmen*,

12 Idaho, 318, 85 Pac. 1081, 10 Ann. Cas. 53.

A judgment is final when rendered, and entry by the clerk can add nothing to this character of finality. Rendition is the judicial act of the court; entry, the ministerial act of the clerk. *California etc. Co. v. Patterson*, 1 Nev. 150; *Kahoe v. Blethen*, 10 Nev. 445. The function of the clerk in entering a judgment is ministerial, and may be done without judicial direction. *Graydon v. Thomas*, 3 Or. 250; *Crawford v. Beard*, *supra*.

\* It is not to be understood from this that even under the Practice Act an appeal might be taken from a judgment that had never been entered, although language was sometimes used which might be regarded as authorizing such a course. No case has been found which goes to this extent. There are many cases which decide the point that an appeal

pletely reversed—the judgment as entered has so entirely superseded in importance the judgment as rendered—that rendition of the judgment has become little else than a mere episode, having no significance apart from the fact that the judgment as entered must coincide with the judgment as rendered in every particular. The entry of judgment, rather than the rendition

must be taken within a year from the rendition of the judgment; in other words, that the time to take such an appeal begins to run from rendition of the judgment, and not from its entry. This was first held in *Gray v. Palmer*, 28 Cal. 416, and this case was followed in many others. Among which see *Peck v. Courtis*, 31 Cal. 207; *Genella v. Belyea*, 32 Cal. 159; *Wetherbee v. Dunn*, 36 Cal. 249; *Webster v. Cook*, 38 Cal. 423; *McCourtney v. Fortune*, 42 Cal. 387. But in *Gray v. Palmer*, and in most of the other cases the appeal was taken after the entry of the judgment, but not within a year from its rendition. And in all of them the decision was *adverse* to the validity of the appeal, and hence they cannot be authority for the validity of an appeal taken before any judgment is entered. The cases seem to relate solely to the time in which an appeal from the judgment must be taken. They are not inconsistent with the proposition that while it was necessary that the appeal should be taken within a year from the rendition of the judgment, it was also necessary that it should not be taken until after its entry. The section in relation to the time for taking appeals remained unchanged until the adoption of the Code of Civil Procedure. But soon after the decision in *Gray v. Palmer*, the section allowing an appeal from the district court to the supreme court was amended so as to substitute the word "entered" for the word "rendered." As then amended the section was as follows: "An appeal may be taken to the supreme court from the district courts in the following cases: 1. From a final judgment entered in an action or special proceeding," etc. Laws of 1865-66, p. 707, sec. 347; for the section as it stood before that time, see Laws of 1863, p. 756. This amendment is in accordance with the views above set

forth. The statute, as amended, allowed an appeal only from a judgment entered; but another section provided that the appeal should be taken within a year from the time the judgment was rendered. If the above be not correct, it follows that an appeal "from the judgment" could be taken from the findings of fact and conclusions of law. For the filing of such findings is frequently the only "rendition" of judgment. It is not believed that an appeal "from the judgment" could have been taken from such findings. Look at *Thompson v. Lynch*, 43 Cal. 482. The difficulty about an appeal from the judgment before any judgment is entered is this: that the record on appeal from the judgment is the judgment-roll, which can have no existence until after the judgment is entered. See beginning of the above section.

An appeal can be prosecuted from a judgment only. *Gray v. Cederholm*, 2 Idaho, 41 (34), 3 Pac. 12; *Stebbins v. Savage*, 5 Mont. 253, 5 Pac. 278; *Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755.

In accordance with the rule that it was the judgment as rendered rather than the judgment as entered that determined the rights of the parties, it was held in *Boyd v. Steele*, 6 Idaho, 625, 59 Pac. 21, that the omission of the clerk to enter a judgment of dismissal did not defeat plaintiff's rights, and that the dismissal did not remain in abeyance until entry of judgment. So it has been held error to refuse a motion to direct entry of judgment by the clerk *nunc pro tunc*, as of the date of rendition. *Parrott v. McDevitt*, 14 Mont. 203, 36 Pac. 193; and see, to same effect, *Quartz etc. Co. v. Patterson*, 53 Or. 85, 96 Pac. 551; *People v. Court*, 33 Colo. 77, 79 Pac. 1014; *Oberndorfer v. Moyer*, 30 Utah, 325, 84 Pac. 1102. It is otherwise, however, if the rights of third

thereof, has become the *sine qua non*, without which the judgment as rendered is ineffectual for any purpose.<sup>4</sup>

It is not to be understood that the reversal of practice above described was accomplished at a single bound. It was rather brought about by a slow process of development. There were minor changes from time to time in the Practice Act itself, preceding the adoption of the code; then, following the latter step, were numerous separate amendments to the various sections involved, the last of which, in 1907, by making entry essential to the effectiveness of the judgment in every particular,<sup>5</sup> and fixing entry instead of rendition of judgment as the point of commencement of the sixty-day period within which appeals from the judgment on the ground of insufficiency of the evidence must be taken,<sup>6</sup> removed the last vestige of the old practice from the statute-book.

persons has intervened. See *Harvey v. Whitlach*, 1 Mont. 713. The rule as recognized practically everywhere is that omission to enter judgment at the time of its rendition does not affect its force or validity, except in favor of one who has been misled thereby. *King v. Higgins*, 3 Or. 406.

The principle upon which the right to enter a judgment *nunc pro tunc* is based was suggested in *Sears v. Kilbourne*, 28 Wash. 194, 68 Pac. 450, where it was said that, except in certain well-defined cases, a court could not render a judgment *nunc pro tunc*, such rendition being the correction or review of a judicial act; although the right to enter a judgment *nunc pro tunc* is not denied.

<sup>4</sup> Section 664, California Code of Civil Procedure.

<sup>5</sup> See section 664, Code of Civil Procedure of California.

<sup>6</sup> See section 939, subdivision 1, Code of Civil Procedure of California.

The change in practice here noted has not been followed in all other jurisdictions. Nor is the entry of the judgment made the universal point when the time begins to run against the appellant. Section 1496, Revised Statutes of Arizona, requires an appeal to be "taken at the term of court at which the final judgment or order is rendered, . . . or within twenty days after the expiration of the term." Section 388, *Mills' Annotated Code of Colorado*, requires appeals to be

"prayed" "within five days after the time of rendering the judgment or decree." Section 4807, Revised Codes of Idaho, is identical with the California section as it existed prior to the amendment of 1907, and if the appellant desires the evidence to be reviewed on his appeal from the judgment, he must still take his appeal within sixty days after rendition. In section 3425, *Cutting's Compiled Laws of Nevada*, the time to take the appeal from the judgment is within one year after rendition. Section 5122, *Compiled Statutes of Wyoming*, in limiting the time within which an appeal from the judgment may be prosecuted, provides, "No proceeding to reverse, vacate, or modify a judgment or final order shall be commenced unless within one year after the rendition of the judgment," etc.

This conservatism has not been copied in some of the other Pacific Coast states, however, and Montana, in particular, has progressed far in following the example of California. By an amendment adopted in 1899, a section taking the place of section 1723 of the Code of Civil Procedure, and designated as section 7099, Revised Codes, was adopted, fixing entry of judgment as the point when the time to take an appeal begins to run, in all cases, and omitting all reference to an appeal from the judgment for the purpose of reviewing the evidence. So, subsection 161, section 2685, *Compiled Laws of New*

Nor is it to be understood that the new practice has deprived the act of rendition of its essential character as the judicial act, the act of the court; or that anything has been added thereby to the ancient and well-understood characteristics of the act of entry to make it either more or less than the mere ministerial act it has always been.<sup>7</sup> The total result of the change of practice is to give to the act of entry of judgment a casual importance, suggested by manifest convenience, such as formerly belonged by force of the statute alone to rendition. The well-defined distinction that has always existed between the two acts of rendition and entry must still be recognized and maintained. Rendition is still the act of the court; entry, that of the clerk.<sup>8</sup> It is still

Mexico, and section 3136, fix the time to take appeals in actions under the code and at common law, in the one case, within twelve months after entry, and in the other, within one year after rendition of judgment. Section 7204, Revised Code of North Dakota, fixes the time at entry of judgment. Section 550, subdivision 5, Lord's Oregon Laws, provides that if the appeal be not taken at the time of rendition of judgment, it shall be taken within six months after entry. Section 1718, Rem. & Bal. Code of Washington (section 6502, Bal. Code), provides that appeals from final judgments must be taken within ninety days after entry thereof.

<sup>7</sup> The act of entering the judgment is often referred to as the ministerial act of the clerk, and sometimes the court has specifically held, as was done in *Gray v. Palmer*, 28 Cal. 416, *Crim. v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074, *San Joaquin etc. Co. v. West*, 99 Cal. 345, 33 Pac. 928, *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24, *McMahon v. Hetch-Hetchy Ry. Co.*, 2 Cal. App. 400, 84 Pac. 350, and perhaps other cases, that the entering of the judgment by the clerk is a ministerial act. See *Casement v. Ringgold*, 28 Cal. 335; *Peck v. Courtis*, 31 Cal. 207; *Genella v. Belyea*, 32 Cal. 159; *In re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 823, 19 Pac. 431, 1 L. R. A. 567; *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515; *Baker v. Brickell*, 102 Cal.

620, 36 Pac. 950; *Hall v. Justice's Court*, 5 Cal. App. 133, 89 Pac. 870.

In the recent case of *Central Trust Co. v. Mining Co.*, 30 Nev. 437, 97 Pac. 390, quoting from the earlier case of *Linville v. Scheeline*, 30 Nev. 106, 93 Pac. 225, it was said: "This court has repeatedly held that the decision of the court is the announcement by the court of its judgment, and is distinct from the findings"; and citing the following cases: *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237; *Robinson v. Benson*, 19 Nev. 331, 10 Pac. 441; *State v. Cheney*, 24 Nev. 222, 52 Pac. 12; *Robinson v. Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 706; *Sholes v. Stead*, 2 Nev. 107; *Howard v. Richards*, 2 Nev. 128, 90 Am. Dec. 520; *Telegraph Co. v. Patterson*, 1 Nev. 150. Also, "The practice in this state, however, of regarding the oral announcement by the court of its judgment as the decision, has been so thoroughly recognized by the bench and bar that it would not now be proper to announce a different rule."

<sup>8</sup> In *McLaughlin v. Doherty*, 54 Cal. 519, it was held that a judgment is rendered when it is ordered by the court, and entered when actually entered in the judgment-book. So in *Thomas v. Anderson*, 55 Cal. 43, it was held that a judgment is rendered when entered in the minutes, and entered when entered in the judgment-book. In *Re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 823, 19 Pac. 431, 1 L. R. A. 567, it was held that there is a plain dis-

as necessary as it has always been that the judgment as entered should coincide accurately with the judgment as rendered.<sup>9</sup> The clerk has not been invested with any more judicial discretion than he formerly had. He is no more at liberty under the modern practice to enter a judgment at variance with that rendered by the court, or one either more or less in accord with his own personal views rather than in accord with the verdict or decision, than he was under the former practice. It is possible that the requirement as to time of entry is still to be regarded as directory;<sup>10</sup> but if so, there is assuredly no greater degree of liberality in this respect than formerly existed. He must certainly enter the judgment when directed or requested to do so, as under the old practice.<sup>11</sup> If there has been any material change in this respect, it has been in the direction of greater promptitude.

It thus appears that it is no less necessary now than formerly to be able to point out definitely the act of rendition of the judgment. The code provides that "upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, . . . setting out the verdict at length, and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it."<sup>12</sup> Also, where the trial is by the court, and a question of fact is involved, "its decision must be given in writing and filed with the clerk."<sup>13</sup> No express statutory pro-

tection between rendition and entry of judgment. The court pronounces judgment; the clerk performs the ministerial duty of entering it. The judgment rendered is the judgment entered. Rendition, performed by the court, must be first in order of time, preceding entry, performed by the clerk, etc.

<sup>9</sup> See *Watson v. S. F. R. R. Co.*, 50 Cal. 523; *Patochi v. Central Pacific etc. Co.*, 52 Cal. 90; *McMahon v. Hetch-Hetchy Ry. Co.*, 2 Cal. App. 400, 84 Pac. 350.

<sup>10</sup> See *National Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Churchill v. Louie*, 135 Cal. 608, 87 Pac. 1052.

<sup>11</sup> See *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 823, 19 Pac. 431, 1 L. R. A. 567; *Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950.

<sup>12</sup> Section 628, California Code of Civil Procedure.

See, also, section 202, *Mills' Annotated Code of Colorado*; section 4400, *Revised Codes of Idaho*; section 3270, *Cutting's Compiled Laws of Nevada* (section 175, *Civil Practice*); section 2685, subsection 132, *Compiled Laws of New Mexico*; section 7037, *Revised Codes of North Dakota*; section 5802, *Compiled Laws of Oklahoma*; section 151, *Lord's Oregon Laws*; section 274, *Code of Civil Procedure of South Dakota*; section 3166, *Compiled Laws of Utah*; section 361, *Rem. & Bal. Code of Washington* (section 5014, *Bal. Code*); section 4622, *Compiled Statutes of Wyoming*.

<sup>13</sup> Section 632, *California Code of Civil Procedure*.

See, also, section 1406, *Revised Statutes of Arizona*; section 4406, *Revised Codes of Idaho*; section 6763, *Revised Codes of Montana* (section



vision has been made prescribing what preliminary record may be made of the decision of the court where no question of fact is involved, as in the case of a default, or an agreed statement of facts, or where findings are waived; but the court has said that an entry by the clerk of the decision of the court in its minutes is the proper practice.<sup>14</sup>

The various acts above described have been held to be the acts which constitute rendition of judgment under the modern practice. Thus it has been said that the verdict is equivalent to findings of fact and conclusions of law,<sup>14a</sup> and that section 664 of the Code of Civil Procedure is equivalent to an express direction of the court to the clerk to enter judgment in accordance therewith; that the rights of the parties are definitely determined thereby, and that there is no question as to the form and substance of the judgment to be entered thereon; and that, therefore, nothing remains to be done but the mere ministerial duty of the clerk in entering the judgment required by the statute.<sup>15</sup> It is true, only a general verdict meets these conditions; but the effect of section 628 of the same code is to place special verdicts alongside of general verdicts when accompanied by "the judgment rendered thereon," and they must be so accompanied sooner or later. Unless the judgment of the court as to the law applicable to the facts found therein is appended to the special verdict at the time of its entry in the minutes of the court, as required by section 628, there must be an order showing that such judg-

1111, Code of Civil Procedure); section 3277, Cutting's Compiled Laws of Nevada (section 182, Civil Practice); section 2685, subsection 132, Compiled Laws of New Mexico; section 7039, Revised Codes of North Dakota; section 158, Lord's Oregon Laws; section 277, Code of Civil Procedure of South Dakota; section 3168, Compiled Laws of Utah; section 367, Rem. & Bal. Code of Washington (section 5029, Bal. Code); section 4515, Compiled Statutes of Wyoming.

<sup>14</sup> See *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *San Jose etc. Co. v. San Jose etc. Co.*, 126 Cal. 322, 58 Pac. 824; and see below.

<sup>14a</sup> And *vice versa*, *State v. Yellow Jacket Co.*, 5 Nev. 415. Also *Flegel v. Koss*, 47 Or. 366, 83 Pac. 847; *Bruce v. Phoenix etc. Co.*, 24 Or.

486, 34 Pac. 16; *Williams v. Gallick*, 11 Or. 337, 3 Pac. 469; *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172; *Bartel v. Matthias*, 19 Or. 482, 24 Pac. 918; *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687; and see *Kyle v. Rippey*, 19 Or. 186, 25 Pac. 141; *Halloek v. Portland*, 8 Or. 29; *Ferguson v. Reiger*, 43 Or. 505, 73 Pac. 1040.

<sup>15</sup> See *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515; and see *Casement v. Ringgold*, 28 Cal. 335; *Gray v. Palmer*, 28 Cal. 416, for an early application of the same principle.

It has been said that the findings are deemed a special verdict. *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273; and that the conclusions of law are in the nature of a general verdict. *Wiley v. Morrow*, 1 Wash. Ter. 474.

ment has been postponed; and, as above suggested, sooner or later the judgment must be rendered, and when so rendered it is required to be entered in the minutes, and thereupon, with the verdict, becomes the judgment of the court as rendered.

So, as to entry of the decision of the court in the minutes, or filing the same, as the case may be, the supreme court, in *Crim v. Kessing*,<sup>16</sup> made use of the following language:

"Under the system of practice which prevailed in this state prior to the adoption of the codes in 1872, findings were not essential to the entry or validity of a judgment (Practice Act, sec. 180); and under that system it was held that the entry in the clerk's minutes of the decision as announced by the court constituted 'rendition of judgment.' (*Gray v. Palmer*, 28 Cal. 416; *Genella v. Relyea*, 32 Cal. 159.) But under the provisions of the Code of Civil Procedure, whenever findings are required there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all cases be waived. Whenever they are waived, or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system."

And in the later case of *San Joaquin etc. Co. v. West*,<sup>17</sup> it was held that the decision of the court, consisting of the findings of

<sup>16</sup> 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074. And see to like effect. In *re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567.

<sup>17</sup> 99 Cal. 345, 33 Pac. 928. In numerous decisions the supreme court has held that "rendition of judgment" took place when findings were filed and judgment ordered. See *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; and *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689; *Wood v. Etiwanda etc. Co.*, 122 Cal. 152, 54 Pac. 726. And see section 19, *ante*, as to meaning of *decision*; also section 204, *post*.

And see *Work v. Northern Pacific Co.*, 11 Mont. 513, 29 Pac. 280, where it was held that where it was the custom of the court to enter its judgments in a book known as "Journal of Proceedings," an entry therein

was sufficient as between the parties, and an appeal might be taken therefrom, and the time within which such appeal might be taken would begin to run from such entry.

In *Dukes v. Commissioners*, 17 Idaho, 736, 107 Pac. 491, the court said: "... There is nothing in the statute requiring that the judgment should be written upon a separate piece of paper from the findings." Manifestly, the judgment is here deemed synonymous with conclusions of law.

Where, however, the legislature has provided a different practice as to the rendition and entry of judgment, or there are statutory requirements governing the same, the rule may be different. Thus section 158, Lord's Oregon Laws, requires the decision of the court, stating the findings and conclusions separately, as in the Cali-

fact and the conclusions of law, given in writing and filed with the clerk, under section 632, amounts, in law to a rendition of the judgment.

fornia code, to be entered in the journal, "and judgment entered thereon accordingly." Manifestly something else is required beyond the findings and conclusions. "The statute requires that, upon the trial of an issue of fact by the court, its decision shall be given in writing, which shall state the facts found and the conclusions of law separately. These, again, are required to be entered in the journal, and judgment is rendered thereon," etc. *State v. Gutridge*, 46 Or. 215, 80 Pac. 98.

The practice in Washington has been thus outlined, in *Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389:

"There is a clear distinction between the making or rendering of a judgment and its entry. The judgment is made or rendered when the court announces it or signs the judgment, as is the common practice, and returns the signed judgment to counsel. It is entered when it is placed of record by the clerk. Section 4722, 2 Ballinger's Annotated Codes and Statutes, provides, '(4) He (the clerk) shall also provide and keep a well-bound book, to be called the order book or journal, in which he shall record the daily proceedings of the court, and enter all verdicts, orders, judgments and decisions thereof, from which shall be read every morning in open court the proceedings of the previous day, which shall be signed by the judge.' Section 5115 (section 431, Rem. & Bal. Code) provides: 'When a trial by jury has been had, judgment shall be entered in conformity to the verdict within five days after the filing of the verdict, unless a motion for a new trial shall have been filed, or unless the court orders the case to be reserved for argument or further consideration, or grant a stay of proceedings. In all other cases the judgment shall be entered on the day when it is given.' Section 5119 (section 435, Rem. & Bal. Code) provides: 'All judgments shall be entered by the clerk, in the journal, shall specify clearly the amount to

be recovered, the relief granted, or other determination of the action.' The substance of these sections is that it is the duty of the clerk to enter the judgment in the journal on the day it is rendered, unless directed otherwise. It is the common practice, however, for attorneys to prepare the judgment entry and hand the same to the judge for his signature. When signed, it is returned to the counsel, who thereafter pays to the clerk the fee which the statute requires for the rendition of the judgment; and the clerk thereupon files the judgment thus signed, and at his convenience copies the same into the journal as of the day of the filing. In this cause the judgment was filed on the same day it was rendered. When the judgment was signed by the court it was rendered, and, when it was filed by the clerk, became effective as a judgment. An execution might then have issued upon it. The fact that the clerk did not actually spread it upon the journal on that day but waited seven days thereafter, did not delay the operation of the judgment for any purpose. The duty of copying the order was a ministerial duty, and imperative upon him. Under the statutes, *supra*, while the legislature may have recognized the distinction between the rendition of a judgment and its entry, the latter was required to be done upon the same day as the former, so that for all practical purposes, if the law is complied with, the rendition and entry of judgment are simultaneous in point of time; that is to say, they are both required to be done on the day. It is often impracticable, on account of accumulation of business, for the clerk to comply with this law at the time designated; and, since the actual entry of the judgment on the journal is but a mere ministerial duty, the judgment is not thereby avoided. To hold that a judgment is not entered when it is filed, and that the clerk may keep it for a number of days awaiting his convenience

Section 664 of the California Code of Civil Procedure, as amended in 1907, is as follows:<sup>17a</sup>

"When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, *within twenty-four*

or pleasure in transcribing it upon the journal, would be to hold that it is within the power of the clerk to delay indefinitely the time in which an appeal may be taken, and to leave the actual entry uncertain, and resting in the memory of the clerk, or his deputy who transcribes it, or, if the date it is actually written on the journal is the date of the entry, then the requirement that it shall be entered on the day it is given is of no effect." See, also, *National etc. Assn. v. Simpson*, 21 Wash. 16, 56 Pac. 844.

The effect of this decision would seem to be to eliminate all distinction between rendition and entry of judgment, so far as the same may be said to affect the time to take an appeal therefrom; and, notwithstanding the effect of section 1817, Rem. & Bal. Code (section 6502, Bal. Code), is to require appeals from judgments to be taken within ninety days from the date of entry, the result is that the time really begins to run from rendition. And this result was very clearly pointed out by Justice Anders, in his dissenting opinion, and was the result of the court's decision. The question was raised on a motion to dismiss. The judgment was actually spread upon the record on the 9th of April, while the receipt for the rendition fee was dated on the 6th, the execution docket bore date April 6th, and the entry in the journal bore the same date. The notice of appeal was dated July 9th. If entry was made on the date of filing for entry, which was theoretically the date of rendition, the notice was too late; otherwise it was in time. The court held it was too late.

The court has had occasion to distinguish this decision upon several occasions. *Sears v. Kilbourne*, 28 Wash. 194, 68 Pac. 450; *Barthrop v. Tucker*, 29 Wash. 666, 70 Pac. 120; *State v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974. And the distinction between rendition and entry as applied to final judgments

has been as often clearly maintained; but, in so far as the court held that the ninety-day period within which an appellant must take his appeal begins to run upon the date when the judgment is filed for record, rather than upon the date when it is actually spread upon the record, it does not seem to have been reversed. See *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033, where it was held that the date of the judgment was the date of its filing.

<sup>17a</sup> See section 224, Mills' Annotated Code of Colorado; section 4450, Revised Codes of Idaho; section 6800, Revised Codes of Montana (section 1190, Code of Civil Procedure); section 3294, Cutting's Compiled Laws of Nevada (section 199, Civil Practice); section 5931, Compiled Laws of Oklahoma; section 3191, Compiled Laws of Utah; section 4622, Compiled Statutes of Wyoming.

Section 431, Rem. & Bal. Code of Washington (section 5115, Bal. Code), contains substantially the same provisions. Also section 435, Rem. & Bal. Code (section 5119, Bal. Code).

Section 151, Lord's Oregon Laws, provides that the clerk shall file the verdict at once, if such as the court may receive, and that it shall be entered in the journal "substantially," under the directions of the court. That is, while the court cannot amend the verdict in any material manner (*Fiore v. Ladd*, 29 Or. 528, 46 Pac. 144), the judge may direct the entry of the verdict in such phraseology as shall substantially record the verdict. It is not to be understood that the common-law right of the court to correct such errors in the verdict as escaped the vigilance of the jury, or such as resulted from the lack of technical training on their part, is abridged by this statutory provision. *Osborne v. Morris*, 21 Or. 367, 28 Pac. 70.

Section 196 provides that "all judgments shall be entered by the clerk in the journal." Section 201

*hours after the rendition of the verdict. . . . If the trial has been had by the court, judgment must be entered by the clerk in conformity to the decision of the court, immediately upon the filing of the decision."*

When, therefore, a verdict has been received and recorded in the minutes of the court,<sup>18</sup> or a decision of the court has been filed,<sup>19</sup> or, where findings are not required or are waived, a de-

provides that when the trial is before the court without a jury, "judgment shall be entered by the clerk in conformity with the findings within the day the findings are filed."

Section 7070, Revised Codes of North Dakota, provides, "Judgment upon an issue of law, or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof," and section 7079 provides for entry in the judgment-book, specifying clearly the relief granted or the determination of the action otherwise.

Section 2685, subsection 132, Compiled Laws of New Mexico, provides, "Upon the rendition of any verdict, or the making of findings in a case tried by the court, judgment shall be immediately rendered thereon, unless notice is given at the time of the intention of the party to make a motion for a new trial."

The Arizona practice does not make specific provision for the time and manner of entering judgment, whether upon verdict or otherwise, except that section 1442, Revised Statutes, provides that "a judgment may be entered in term time or vacation."

Section 309, Code of Civil Procedure of South Dakota, provides as follows: "Judgment upon an issue of law, or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof."

Section 316: "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict or decision. It becomes a complete and effective judgment when rendered by the court, attested by the clerk and filed in his office."

Section 317: "An order becomes

complete and effective as such when made in writing, signed by the court or judge, attested by the clerk and filed in his office."

<sup>18</sup> See section 628, California Code of Civil Procedure.

<sup>19</sup> See sections 632 and 633, California Code of Civil Procedure. A "decision" as understood here consists of both findings of fact and conclusions of law. It seems to have been sometimes doubted whether express conclusions of law are necessary, but if so, such doubt must be removed. Some expression or implication as to the law applicable to the findings of fact cannot be dispensed with, any more than it can be dispensed with in case of a special verdict. No particular form of words is necessary. Thus in *Murphy v. Snyder*, 67 Cal. 451, 8 Pac. 2, "Let judgment be entered in accordance with the foregoing findings," was held sufficient. Again, "Let judgment and decree be entered accordingly," was accepted in *Rea v. Haffenden*, 116 Cal. 596, 48 Pac. 716. There are cases which contain even more liberal opinions on the point. See *Miller v. Hicken*, 92 Cal. 229, 28 Pac. 339; *Spencer v. Duncan*, 107 Cal. 423, 40 Pac. 549; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. In *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66, and in *Mentone Irrigation Co. v. Riverside etc. Co.*, 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222, it was said that the conclusions of law are merged in the judgment, and that the latter supersedes the former.

But conclusions are necessary. In *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211, the court made use of the following language on the point: "Section 633 of the Code of Civil Procedure requires the court, in giving the decision, to state the facts found

cision of the court is entered in the minutes, it becomes the duty of the clerk to enter judgment, in conformity therewith, in the one case within twenty-four hours, and in the others, immediately, without further direction from the court,<sup>20</sup> and without waiting for a request to that effect from the parties to the action.<sup>21</sup>

and the conclusions of law separately, and provides that after the decision has been given, judgment must be entered 'accordingly.' The judgment which is to be entered 'upon the decision' is the sentence of the court in conformity with the conclusions of law, and must find its basis therein. . . . The conclusions of law resulting from the facts found form the basis of the judgment, and until they have been made the decision of the case has not been given. The findings of fact are in the nature of a special verdict and the conclusions of law to be drawn therefrom need not be made at the same time as the findings themselves, but may be reserved by the court for argument or further consideration, as is provided in the case of a special verdict in section 628 of the Code of Civil Procedure; and if made at the same time with the findings of fact, they may be changed at any time prior to the entry of judgment. *Condee v. Barton*, 62 Cal. 1; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074. Inasmuch, therefore, as the judgment is to be entered 'upon the decision' and must find its basis in the conclusions of law, which are to be a part of the decision, it follows that the trial of the action is not completed until a decision has been given which states the conclusions of law upon which the judgment is to rest." See, also, *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139, where a recital of fact in the findings was disregarded, not being in the judgment.

<sup>20</sup> As stated in the text, a general verdict is itself a direction to the clerk as to what judgment should be entered. It is equivalent to findings of fact and conclusions of law, and section 664 is equivalent to an express direction of the court to the clerk to enter judgment in accordance therewith. The rights of the parties are definitely determined

thereby, and there is left open no question as to the form or the substance of the judgment, and therefore, nothing can be said to remain except the mere ministerial act of the clerk. The entry in the minutes thus constitutes the rendition, and entry in the judgment-book, the entry of the judgment. See *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515; and see *Casement v. Ringgold*, 28 Cal. 335; *Gray v. Palmer*, 28 Cal. 416.

In the case of the special verdict, which is in effect a mere finding of fact, the law applicable to the fact so found must be appended to the verdict before the rendition of judgment can be said to be complete, and until such judgment is entered in the minutes, entry in the judgment-book is not authorized.

<sup>21</sup> Prior to 1907, subdivision 6 of section 581, Code of Civil Procedure of California, authorized the dismissal of an action upon motion of the losing party where the successful party neglected for six months to ask for the entry of judgment. The subdivision was repealed, however, by the amendment of 1907; at the same time the amendment of section 664 appended to that section the last two sentences, requiring the clerk to enter judgment immediately after the filing of the decision, and providing that "In no case is a judgment effectual for any purpose until so entered." The courts have not rendered any decision going to the length of the statement made in the text, but it is believed to be supported by principle, and it is certainly sustained by the opinion of the code commissioners in the following language: "Subdivision 6, concerning the dismissal of an action because the party entitled to judgment neglects to make demand therefor within six months, is omitted, because the changes made in section 664 require the judgment to be entered by the clerk without any demand by either

In other words, the judgment having been rendered by the court, in the manner outlined, section 664 is equivalent to a positive direction to the clerk to perform the ministerial duty of entering the judgment in the book kept for that purpose.<sup>22</sup> The verdict, or the decision, as the case may be, shows what judgment the successful party is entitled to have entered, and drawing up and recording the same is, as suggested, a mere ministerial duty, involving the exercise of no judicial discretion whatever. The judgment need no longer be written out, as formerly, nor is it required to have the judge's signature attached.<sup>23</sup> No

party." Nor can any question of costs be said to interfere with immediate entry by the clerk without a request by an interested party, as formerly, since the costs are required to be paid in advance up to and including the filing of the judgment-roll, when the complaint is filed and the defendant enters appearance. See section 4300a, Political Code.

As to Washington practice, see *Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389, quoted in note 17, *supra*.

<sup>22</sup> Section 668, California Code of Civil Procedure (section 201, Practice Act) prescribes as follows: "The clerk must keep with the records of the court, a book to be called the 'judgment-book,' in which judgments must be entered."

See, also, section 228, Mills' Annotated Code of Colorado; section 4454, Revised Codes of Idaho; section 6804, Revised Codes of Montana (section 1194, Code of Civil Procedure); section 3298, Cutting's Compiled Laws of Nevada (section 203, Civil Practice); section 7078, Revised Codes of North Dakota; section 6239, Compiled Laws of Oklahoma; section 315, Code of Civil Procedure of South Dakota; section 3195, Compiled Laws of Utah.

<sup>23</sup> See *Clink v. Thurston*, 47 Cal. 21; *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211; and see Cal. S. R. B. Co. v. S. P. R. B. Co., 67 Cal. 59, 7 Pac. 123. Of course, there are times when a signed memorandum is of service in determining what has been adjudged, and in its absence it may not be pos-

sible for the clerk to perform his ministerial duty. *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211.

An impression seems to prevail among some practitioners that a decree in equity must be signed by the judge; and most of the clerks of courts refuse to enter a decree unless signed by the judge. This impression is entirely erroneous. The code makes no distinction between judgments and decrees, and both derive their validity and existence from the same provisions. Now, since these provisions do not require a judgment in an action at law to be signed (*Clink v. Thurston*, 47 Cal. 21), how can they be construed to require the signing of a bill in equity? The term "decree" is not mentioned in this portion of the code. It is frequently used by the legislature, but "not as a designation of something different from a judgment but rather a judgment of a particular character." See *McGarrahan v. Maxwell*, 28 Cal. 75.

The notion that decrees in equity must be signed probably arose in this way: Through carelessness or unskillfulness in drawing findings, the "conclusions of law" often failed to fully inform the clerk as to what decree was to be entered. In this difficulty it became a habit of clerks to require the attorneys for the successful party to draw the decree to be entered, and in order to prevent the attorneys from putting clauses in the decree which the judges did not intend, it became the practice for the attorneys to get the judge to mark the draft "correct," or to affix his signature in token of its correctness. And after a while the clerks became imbued with the idea

express direction is a necessary prerequisite for the purpose of conferring authority to make the entry.

Prior to the amendment of 1907, whereby the concluding sentence, "In no case is a judgment effectual for any purpose until so entered," was added to section 664, it was the established rule that a judgment became effective in every essential particular from the moment of its rendition. Thus, a decree of divorce was held to be operative at once upon its rendition, and that the failure of the clerk to enter the judgment did not have the effect of postponing such operation.<sup>24</sup> The effect of the amendment has not received construction at the hands of the appellate courts, but it is believed that, upon principle, mere postponement of entry of judgment can have no effect upon the essential characteristics of a judgment as rendered. Being the action of the court, it is difficult to believe that it was the purpose of the legislature to deprive the court of its natural functions, and to suspend the judicial character of its actions or make them dependent upon the act of a mere ministerial official. It is suggested that the intent of the law-making body was merely to adopt a convenient rule of practice by fixing entry of judgment rather than rendition as the point of initiation of subsequent proceed-

that in no case could they enter a decree unless signed. The theory of the statute, however, is that the conclusions of law at the end of the findings should state what relief the successful party is entitled to, both in actions at law and in equity. In either case the judgment or decree should be that the party have the relief to which he is declared to be entitled by the conclusions of law.

But it is the almost invariable custom in this state for decrees in equity to be signed; and, where the judge does sign the decree, the signature is intended "to give the clerk a surer means of correctly entering what has been adjudged." See *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567; *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775.

It is said to be immaterial whether a judgment be reduced to writing or be in writing when rendered, or afterward, in the absence of a statutory requirement to that effect. If the

clerk accepts a draft of the judgment from the prevailing party, it is for his own convenience. He is under no obligation to offer it to the losing party for his acceptance. Nor is it necessary for him to submit it to the judge for a like purpose. "The court renders judgments, but the clerk records them. He is the recording officer of the court, and his records import absolute verity. There is no law in this territory requiring the judge to sign journal entries prepared by counsel and intended to be recorded. . . . The practice which has prevailed of submitting journal entries to the judge for his signature is in aid of the clerk, and for his information and protection." *Boynton v. Crockett*, 12 Okl. 57, 69 Pac. 869.

The signature of the judge to the journal entry is not necessary to make it valid. *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380; *Ainsworth v. Territory*, 3 Wash. Ter. 270, 14 Pac. 590.

<sup>24</sup> See note 3, *supra*.



ings. However this may be, until the amendment receives judicial construction, the question must be regarded as an open one.<sup>24a</sup>

After judgment has been entered in the manner above outlined it is the further duty of the clerk to attach together and file the pleadings, a copy of the judgment entered by him, and the other papers designated by section 670 of the Code of Civil Procedure.<sup>25</sup>

It thus appears that whatever may have been the former rule of procedure, or however the courts may construe the recent amendments affecting the time and manner of entering judgment and the effect of judgment prior to entry, it is certain that, whether signed or unsigned, in writing or *in esse* in the decision of the court or the verdict of a jury, or whether there is or is not an order for judgment,<sup>25a</sup> or a request for entry thereof, or whether or not the clerk enters judgment within the time designated by section 664, until actually entered in the judgment-book, no appeal can be taken therefrom, and that the judgment to be appealed from is the judgment as entered under the provisions of that section;<sup>26</sup> and

<sup>24a</sup> Previous to the amendments referred to, it was well understood that the failure of the clerk to perform his duty would not affect the validity of the judgment (see *Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950; *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218), or even suspend its operation. See *In re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431; *Otto v. Long*, 144 Cal. 144, 77 Pac. 885. This doctrine was based upon the principle that the rendition of the judgment was judicial; the entry, merely ministerial. See *Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109. But it was also the established rule that a judgment was not final until entry in the judgment-book. See note 3, *supra*. The court can, at any time before entry of the judgment, change its conclusions of law upon the facts. *Condee v. Barton*, 62 Cal. 1; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52. The manifest inconsistencies of these various decisions and rules are of a

minor character, and do not affect the general principle that validity and intrinsic force of the judgment rests upon the fact that it was rendered rather than that it was entered, and for this reason it is difficult to discern any fundamental change wrought by the last sentence of section 664, "In no case is a judgment effectual for any purpose until so entered," beyond that suggested in the text with respect to the practice.

<sup>25</sup> There can be no such thing as a judgment-roll until after the judgment is entered. Section 670, California Code of Civil Procedure. But after the judgment is entered, the fact that the clerk neglected his duty of attaching together the requisite papers does not prevent there being a "judgment-roll." See *Sharp v. Lumley*, 34 Cal. 611.

<sup>25a</sup> See *Macnevin v. Macnevin*, 63 Cal. 186, for distinction between order for judgment and judgment itself. Also *Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755.

<sup>26</sup> In *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868, Justice Angellotti, for the court, said: "Section 668 of the Code of

this is true notwithstanding the fact that the rendition is the judicial and entry the ministerial act.<sup>27</sup>

Section 963, quoted in the preceding section, provides that an appeal may be taken from the final judgment of a superior court "entered in an action, or special proceeding." And section 939 provides that:

"An appeal may be taken: -

"1. From a final judgment in an action or special proceeding, commenced in the court in which the same is rendered, within six months after the *entry* of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days from the *entry* of the judgment;

"2. From a judgment rendered on appeal from an inferior court, within ninety days after the *entry* of such judgment;

"3. . . . from an interlocutory judgment, . . . hereafter made or entered in any action for divorce or to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and ordering an accounting; from an

Civil Procedure provides: 'The clerk must keep with the records of the court, a book to be called the "judgment-book," in which judgments must be entered.' This section by its terms includes all final judgments in civil actions, and in the absence of provision elsewhere applicable to the judgment here involved, must govern."

See section 204, *post*, as to distinction between entry of judgments and entry of orders in the minute-book, as affecting appeals therefrom; and also as to the possible exception to the rule here stated in section 581, Code of Civil Procedure.

<sup>27</sup> See note 24a, *supra*.

Since the entry of the judgment is, by our practice, made the initial point of commencement of so many rights and remedies, no more important duty can be conceived in the whole range of duties of the clerk than that of keeping a correct and readily available record of the exact time when such entry was made. Unfortunately, this importance is not always recognized, and it sometimes becomes necessary to determine from a mass of loose

and indifferent practices whether the judgment was actually entered at the date indorsed in the record. It has been said with some show of reason that the record date ought to be accepted as conclusive. This rule, if it is to be accepted as a rule, should, however, be confined to cases where entry is made and the record thereof indorsed in an orderly and logical course of business. There is serious question whether it should be accepted at all. Aside from the character of *prima facie* verity which this record shares with all public records, no reason suggests itself why its truth should require the support of legal conclusion, unless it be, as is sometimes intimated, the well-worn one of public policy.

Whatever controversy there may be upon this point, it is well settled that the *prima facie* correctness of the certificate date must be overturned, as in other cases, by positive evidence, and the burden is upon him who attacks its verity. See *Menzies v. Watson*, 105 Cal. 112, 38 Pac. 641.

interlocutory judgment in actions for partition of real property; . . . , within sixty days after the . . . interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk." <sup>28</sup>

These sections seem plain. The thing to be appealed from is the judgment which is entered by the clerk. Interlocutory judgments are different from judgments in other actions, in that they are not required to be entered in the judgment-book, but only to be entered in the minutes or filed with the clerk. But even in such cases the judgment must be entered in the minutes or filed with the clerk before an appeal from it can be taken. The party cannot appeal from the findings and conclusions of law which are signed by the judge and filed;<sup>29</sup> and in ordinary actions the judgment must be entered in the judgment-book, as is above shown. Until there is such entry no appeal from the judgment can be taken. In *McLaughlin v. Doherty*,<sup>30</sup> the order for judgment was made October 7th; the notice of appeal "from the judgment" was served and filed on October 17th; but the judgment was not entered by the clerk until October 29th. The appeal was dismissed, and Sharpstein, J., delivering the opinion of department two, said:

"Section 939 of the Code of Civil Procedure provides that 'an appeal may be taken from the final judgment . . . within one year after the *entry* of judgment.' This appeal is from a final judgment. Prior to the adoption of the code, section 336 of the Practice Act authorized an appeal to be taken from a final judgment 'within one year after the *rendition* of the judgment.' In

<sup>28</sup> See note, 6, *supra*, for synopsis of sections of other codes corresponding to section 939 of the California Code of Civil Procedure. As to section 963, see section 7098, Revised Codes of Montana.

<sup>29</sup> *Lorenz v. Jacobs*, 53 Cal. 24; *Miller v. Sharp*, 54 Cal. 590. See, also, *Gray v. Cederholm*, 2 Idaho, 34, 3 Pac. 12; *Stebbins v. Savage*, 5 Mont. 253, 5 Pac. 278; *Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755.

<sup>30</sup> 54 Cal. 519. See, also, *Preston v. Hearst*, 54 Cal. 595; *Trenouth v. Farrington*, 54 Cal. 273; *Thomas v. Anderson*, 55 Cal. 43; *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189; *Schroder v. Schmidt*, 71 Cal. 399, 12 Pac. 302; *Tyrrell v.*

*Baldwin*, 72 Cal. 192, 13 Pac. 475; *Onderdonk v. San Francisco*, 75 Cal. 535, 17 Pac. 678; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657 (decided prior to amendment of 1907 changing "rendition" to "entry" in last line of subdivision 1 of section 939, Code of Civil Procedure, the court holding that although the appeal was taken within sixty days from entry, it was not taken within sixty days from rendition of judgment, and hence the evidence could not be reviewed); *Home v. Kaplan*, 84 Cal. 486, 24 Pac. 119; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689; *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2; *Wells v. Kreyenhagen*, 117 Cal. 329, 49 Pac. 128; *Wood v. Etiwanda etc. Co.*, 122 Cal. 152, 54 Pac. 726; and see section 204, *post*.

Gray v. Palmer, 28 Cal. 416, this provision of the Practice Act was before this court for a construction, and the court in its opinion defined with precision and minuteness the distinction between the *rendition* and the *entry* of a final judgment within the meaning of that act. The distinction which the court drew between the two was that a judgment is *rendered* when ordered by the court and *entered* when actually entered in the judgment-book. 'We cannot,' says the court, 'resist the conclusion that the terms "*rendition*" and "*entry*" are used in different senses, and to express the idea appropriate to those words respectively.' This decision was cited and approved afterward in many other cases by the same court before the enactment of the code. The legislature must be presumed to have been familiar with these decisions, and to have had them in view when it changed the clause as above stated. It adopted the definitions which the court had given to the two words by substituting one for the other. It in effect enacted that thereafter an appeal must be taken within one year after the *entry* instead of within one year after the *rendition* of a judgment, and that both the '*entry*' and the '*rendition*' of a judgment had been correctly defined by this court. Unless we hold that the words '*rendition*' and '*entry*' mean one and the same thing, we must fix upon one or the other as the time after which an appeal may be taken. If a judgment is '*entered*' when '*rendered*' within the meaning of the code, then this appeal was taken after the *entry* of the judgment; otherwise not. Section 936 of the Code of Civil Procedure provides that 'a judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, *and not otherwise*.' One of the requirements of that title is that an appeal be taken '*within one year after the entry of the judgment*.' If we are correct in our view of what constitutes an entry of a judgment, this appeal was taken *before* and not *after* the entry, and therefore must be dismissed."

An appeal from the judgment, therefore, must be taken from the judgment which is entered, and cannot be taken from the findings, or from the order for judgment, or from the verdict.<sup>30a</sup>

<sup>30a</sup> People v. Hill, 1 Cal. App. 414, 82 Pac. 398.

That an order for judgment is not a judgment, and cannot be made the subject of an appeal, was held in State v. District Court, 32 Mont. 37, 79 Pac. 546. A minute entry direct-

ing judgment to be entered for defendant was held in Lisker v. O'Rourke, 28 Mont. 129, 72 Pac. 416, 755, not to be a judgment. An entry on findings of fact and conclusions of law, with an order for judgment on which no final order or judgment was

Aside from the necessity of prosecuting the appeal from the judgment as *rendered*, or as *entered*, as the case may be, the appeal must always be from the final judgment rather than from an interlocutory or intermediate one.<sup>20b</sup>

ever entered, was held in *Thornburg v. Gutridge*, 46 Or. 286, 80 Pac. 100, not to be such a final order as might be reviewed under section 547, B. & C. Comp..

But the successful party cannot deprive his adversary of an appeal by failing or neglecting to have a rendered judgment entered. *Hynes v. Barnes*, 30 Mont. 25, 75 Pac. 523.

<sup>20b</sup> As to the finality of the judgment or order as determining its appealability, see section 184, *post*.

No appeal lies except from the final order, decision, or judgment. *Gentz's Estate v. Galles*, 14 N. M. 341, 93 Pac. 702. An appeal will not lie from an interlocutory order. *De Harrison v. Perea*, 11 N. M. 505, 70 Pac. 558.

Section 6, article 7, Constitution of Oregon, provides expressly that "the supreme court shall have jurisdiction only to revise the final decisions of the circuit court"; and under this provision the supreme court has held that "finality must be put to the suit by the circuit court before it can be reviewed in the supreme court." *Shirley v. Bireh*, 16 Or. 1, 18 Pac. 344. The jurisdiction of the supreme court has been held to be restricted to the revision of final decrees alone. *Conrad v. Packing Co.*, 34 Or. 337, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021. An order to be appealable must be one which not only affects a substantial right, but one which in effect determines the action. *State v. Brown*, 5 Or. 119; *Wolfer v. Hurst*, 47 Or. 158, 80 Pac. 419, 82 Pac. 20; *Basche v. Pringle*, 21 Or. 24, 26 Pac. 863. An appeal does not lie from an order sustaining a demurrer to a complaint, such order not being a determination of the action. *Giant etc. Co. v. Oregon etc. Co.*, 54 Or. 325, 101 Pac. 209, 103 Pac. 501; *State v. Brown*, *supra*; *State v. Security etc. Co.*, 28 Or. 410, 43 Pac. 160. But if the party whose pleading is held insufficient on demurrer declines to

amend or to file a new pleading, standing thereon, so that judgment goes against him, such judgment is final and appealable. *Hendy etc. Works v. Portland Savings Bank*, 24 Or. 60, 32 Pac. 1036; *Kearns v. Follansby*, 15 Or. 597, 16 Pac. 478; *Willis v. Marks*, 29 Or. 493, 45 Pac. 293; *Brownell v. Salem etc. Co.*, 48 Or. 526, 87 Pac. 770.

The Constitution of Utah expressly limits the appellate jurisdiction of its supreme court to final judgments, and this has been construed to inhibit it from entertaining appeals from new trial orders. See note 21d, section 184, *post*. And, by implication, the provision of the Constitution, section 9, article 8, limiting its appellate jurisdiction in this way, has been held to exclude its jurisdiction to entertain appeals from any save final judgments. *North Point etc. Co. v. Utah etc. Co.*, 14 Utah, 155, 46 Pac. 824; *Eastman v. Gurrey*, 14 Utah, 169, 46 Pac. 828; and see cases cited in note 21d, section 184, *post*, in connection with the reference to appeals from new trial orders.

The rule limiting appellate jurisdiction to final judgments alone does not, however, rest upon the necessity for express constitutional limitations; although most all codes contain similar provisions. The following decisions illustrate the universality of the rule, even in the absence of such limitations. A writ of error under the practice acts of Colorado will lie only to review a final judgment in a cause, and will not lie to an intermediate order. *Daniels v. Miller*, 8 Colo. 542, 9 Pac. 18. See, also, as to the necessity of finality of character to permit an appeal, *Hamilton v. Fowler*, 11 Colo. App. 175, 52 Pac. 746.

In *Spicer v. Simms*, 6 Ariz. 347, 57 Pac. 610, it was held that the rule limiting the appellate jurisdiction of the supreme court to final judgments was not affected by a special provision of

A modification of a judgment on motion for new trial is in effect a new judgment.<sup>21</sup>

An appeal may be taken from a *void* judgment.<sup>22</sup>

**§ 184. What is a Final Judgment.**—The term “final judgment” is used in different senses. As remarked by Sawyer, J., in *Hills v. Sherwood*,<sup>1</sup> “a judgment may be a ‘final adjudication’ in different senses. It may be final as to the court which renders it without being final as to the subject matter. ‘The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced in.’ (United States v. Schooner Peggy, 1 Cranch, 103, [2 L. ed. 49].) Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of an appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to an appeal, and liable to be reversed.” The present inquiry is as to what judgments are final with reference to the court pronouncing them, or, in other words, what judgments are final within the meaning of the statute allowing appeals from final judgments.<sup>1a</sup>

The definition of a judgment given by the code is as follows: “A judgment is the final determination of the rights of the parties in an action or proceeding.”<sup>2</sup> But this does not throw much light

the statutes giving the court appellate jurisdiction of new trial orders.

It has been held that the phrase “final judgment” is intended to cover those determinations of courts which come within the common-law designation, and not to include probate orders or decrees. See *In re Kelly's Estate*, 31 Mont. 356, 78 Pac. 579, 79 Pac. 244.

<sup>1</sup> *Mann v. Haley*, 45 Cal. 63; but look at *Clark v. Dunnam*, 46 Cal. 204.

<sup>2</sup> *Livermore v. Campbell*, 52 Cal. 75; *Bond v. Pacheco*, 30 Cal. 530; *Huerstal v. Muir*, 62 Cal. 479. And see *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 140; *Trullinger v. Todd*, 5 Or. 36; *Deering v. Quivey*, 26 Or. 556, 38 Pac. 710; *Oregon etc. Co. v. Eastlack*, 54 Or. 196, 102 Pac. 1011; *Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724, 93 Pac. 696, 15 L. R. A., N. S., 1034; *Gaar etc. Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867. See *Levan v. Richards*, 4 Idaho, 667,

43 Pac. 574, where it was said, incidentally and arguendo, that no appeal would lie from a void judgment.

<sup>1</sup> 33 Cal. 474; look at *Appeal of S. O. Houghton*, 42 Cal. 35.

<sup>1a</sup> In the present connection it is not necessary to consider the question of the finality of the judgment otherwise than as it affects the appealability thereof, and incidentally as it is affected by the appeal itself. In *Gilmore v. American C. I. Co.*, 67 Cal. 366, 7 Pac. 781, the court said: “Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it.”

As to the effect of an appeal upon the finality of a judgment, see chapter 36, *post*.

<sup>2</sup> Section 577, California Code of Civil Procedure. This has always been

upon the question under consideration. And in order to ascertain what are final judgments, or what are "final determinations of the rights of the parties," recourse must be had to the decisions.

The first case in our reports in relation to the matter is *Loring v. Illsley*.<sup>3</sup> That action was to obtain restitution of the possession of a vessel. The judgment directed such restitution unless the defendant should pay a certain sum of money within a fixed period. It was held to be a "final judgment," and that an appeal could be taken. And Bennett, J., delivering the opinion, said:

"What, then, is the distinction between an order and a final judgment? The former is a decision made during the progress of a cause, either prior or subsequent to final judgment, settling some point of practice, or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. The latter is the determination of the court upon the issue presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject matter in litigation, and puts an end to the suit."

Afterward, in *Belt v. Davis*,<sup>4</sup> the above definition was declared to be too narrow. In *Belt v. Davis* the action was to set aside a judgment on the ground that it had been obtained by "collusion, venality, and corruption." The determination of the court below was that the judgment should be set aside, and a new trial had. This determination was held to be a final judgment, and therefore appealable. And Bennett, J., delivering the opinion, said:

"In the case of *Loring v. Illsley*, decided at the March term of this court, we ventured from recollection, unaided by authorities, of which there were then none at our command, to give a definition of an order as distinguished from a final judgment. We find on looking into the authorities that the definition there attempted,

the definition. See *Laws of 1851*, p. 73, sec. 144.

See, also, section 442, *Mills' Annotated Code of Colorado*; section 4350, *Revised Codes of Idaho*; section 6710, *Revised Codes of Montana* (section 1000, *Code of Civil Procedure*); section 3242, *Cutting's Compiled Laws of Nevada* (section 147, *Civil Practice*); section 7000, *Revised Codes of North Dakota*; section 5916, *Com-*

*piled Laws of Oklahoma*; section 179, *Lord's Oregon Laws*; section 236, *Code of Civil Procedure of South Dakota*; section 3183, *Compiled Laws of Utah*; section 404, *Rem. & Bal. Code of Washington* (section 5080, *Bal. Code*); section 4606, *Compiled Statutes of Wyoming*.

<sup>3</sup> 1 Cal. 24.

<sup>4</sup> 1 Cal. 134.

although sufficiently broad to cover the case then under consideration, is too restricted, and that the term 'final judgment' has a somewhat more comprehensive meaning. The case of *Beach v. Fulton Bank*, 2 Wend. 225, and the case of *McVickar v. Walcott*, 4 Johns. 510, cited by the counsel for the appellant, are not in point. The former was an appeal from an order of the chancellor, denying an application made by the appellants to open the proofs in the cause, for the purpose of re-examining witnesses; and the latter was an appeal from an order of the chancellor refusing to dissolve an injunction. In each case, the appeal was, confessedly, from an *interlocutory order*, and was entertained solely by virtue of the statute then in force, which expressly extended the appellate jurisdiction of the court for the correction of errors to *interlocutory orders* of the court of chancery.

"On the other hand, the supervisory control of the court of errors over the proceedings of the supreme court of New York reached only to final judgments, and the decisions in such cases, therefore, are entitled to consideration in determining the question under discussion. In *Yale v. People*, 6 Johns. 602, which went up to the court of errors from a decision of the supreme court refusing to allow a *habeas corpus*, it was held that whenever a decision was made in the supreme court, which was final, and of which a record could be made, and which decided the rights of property or personal liberty, the court of errors had jurisdiction. In *Clason v. Shotwell*, 12 Johns. 31, on an indictment for a forcible entry and detainer, no return could be obtained to a *certiorari*, by reason of the death of the justice before whom the proceedings were had, and the supreme court investigated the cause on affidavits and awarded a restitution. The court of errors held that it might review the proceedings on the evidence presented to the court below; and it was said that the true inquiry in determining the question whether the decision under review was an order or a final judgment was whether the judicial proceeding constituted a cause by itself, and had received its final decision in the supreme court; if so, the case contemplated by the Constitution existed, and the cause might be brought before the court of errors for revision. The rule as finally settled in that court is that every definitive sentence or decision of the supreme court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically



called a record, is a judgment within the meaning of the law, and as such, subject to the revisory jurisdiction of the court of errors. (Graham on Juris. 602.) The rule is the same when applied to the jurisdiction of the supreme court of the state of New York in reviewing the final judgments of inferior courts, and is in no respect different from the common-law rule as established by the court of king's bench in England; according to which, by a final judgment is to be understood, not a final determination of the rights of the parties, but merely of the particular suit. Thus, for instance, a judgment of nonsuit other than where the plaintiff submits to a voluntary nonsuit is a final judgment, even though no costs be awarded against the plaintiff, inasmuch as he is aggrieved by being defeated of his right of action in that suit, and of his costs in prosecuting it. (Graham on Juris. 233.) In strict accordance with the rule as thus given is the decision of the supreme court of the United States in *Weston v. City Council of Charleston*, 2 Pet. 449. [7 L. ed. 481]. The twenty-fifth section of the Judiciary Act of the United States enacted that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, might be re-examined and reversed or affirmed in the supreme court. It was held under this act that the words 'final judgment' in the above section must be understood as applying to all judgments and decrees which determine the particular cause, and that it was not requisite that such judgments should finally decide upon the rights which are litigated. This appears, then, to be the correct rule, so far as it can be expressed in any general definition, without reference to the particular nature of each individual case; but the remark of Senator Sandford in *Clason v. Shotwell*, above cited, is worthy of being borne in mind in connection herewith, 'that this question is not to be determined by technical definitions and verbal criticisms on the terms and phrases in which judgments have been or may be expressed.' "

The principle affirmed in *Belt v. Davis* seems to be this: that in determining the question whether or not a judgment is final within the meaning of the statute in relation to appeals, matters of form are to be disregarded, and matters of substance alone considered, and that the judgment is "final" if it dispose of the action or proceeding in which it was made, so far as the court which made it is concerned, without reference to the question whether the claims of the parties may not be litigated in some other action or proceeding.

This case has been several times approved and followed. Thus in *Zoller v. McDonald*,<sup>5</sup> it was held that an order of a county court, dismissing an appeal from a judgment of a justice of the peace in an action of forcible entry and detainer, was in effect a final judgment, and could be appealed from; and the court said: "It matters not in what form the determination of a suit is put, so that it embodies the final action of the court it is sufficient. (*Belt v. Davis*, 1 Cal. 134.)" So in *Sacramento etc. R. R. Co. v. Harlan*,<sup>6</sup> an order confirming the report of commissioners assessing damages in a proceeding to condemn land was held to be a final judgment, and Sawyer, J., delivering the opinion, said: "The action of the court confirming the report of the commissioners was the definitive sentence or decision of the court by which the merits of the matter in dispute in the special proceedings were determined; and this determination appears to us to possess all the essential attributes of a final judgment within the definition given in *Belt v. Davis*, 1 Cal. 137." <sup>7</sup>

The following are applications of the principle stated.

A proceeding before the district judge, under the act of 1850, to test the validity of the directors of a railroad corporation was held to be a final judgment.<sup>8</sup> So a judgment upon an award is a final judgment, and is appealable.<sup>9</sup> So a judgment directing the removal of the president and secretary of a corporation, and enjoining the corporation from transacting further business, and appoint-

<sup>5</sup> 23 Cal. 136. An order dismissing an action is a final judgment. See *Dowling v. Polack*, 18 Cal. 625; *Leese v. Sherwood*, 21 Cal. 151; *Zoller v. McDonald*, 23 Cal. 136; and look at *McLeran v. McNamara*, 55 Cal. 508; and *People v. Pfeiffer*, 59 Cal. 89. But an order setting aside a dismissal, it seems, is not. *Dimick v. Derringer*, 32 Cal. 488; *Gates v. Walker*, 35 Cal. 289. As to *Dimick v. Derringer*, see section 196, *post*, in relation to special orders made after final judgment.

<sup>6</sup> 24 Cal. 334. This case was approved and followed in *S. F. & S. J. R. Co. v. Mahoney*, 29 Cal. 112, and *Phillips v. Pease*, 39 Cal. 582. In *Phillips v. Pease*, the court, after saying that the order confirming the report was a final judgment, added: "Nor do we think this necessarily depends upon the question whether the award and judgment are binding upon the company to take the land and pay

the award; and upon the point whether it would have this effect we express no opinion."

<sup>7</sup> But where the statute authorizing a proceeding to condemn land provided that the district court should appoint three commissioners to appraise the land, and that "upon judgment being rendered for the condemnation of said springs and lands, and appraising the value thereof, and upon filing in said proceeding a written certificate by the governor approving said valuation, the controller shall draw his warrant, etc., it was held that until the governor approved the valuation, there was no final judgment and no appeal could be taken. *People v. Pfeiffer*, 59 Cal. 89. The act under which the proceeding was had is in *Laws of 1875-76*, p. 816.

<sup>8</sup> *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

<sup>9</sup> *Fairchild v. Doten*, 42 Cal. 125.

ing a receiver to take entire charge of the affairs of the corporation, and decreeing that one of the directors pay certain money over to the corporation, and certain money to the plaintiff (a stockholder), and that the receiver sell certain stock, and collect all moneys due to the corporation, and pay the expenses, etc., and bring the balance into court, was held to be a final judgment, and therefore appealable.<sup>10</sup> So where one Jones brought an action against his copartners, and obtained a judgment "for a dissolution of the partnership, and ordering a sale of all its property and effects, out of the proceeds of which it directed to be paid: First, the expenses of the sale. Second, any balance due to the receiver. Third, Jones' costs and disbursements in the action, taxed at five hundred and eighty-eight dollars and five cents. Fourth, to Jones, on account of an indebtedness of the partnership to him, the sum of eighteen thousand nine hundred and sixty-four dollars. Fifth, if there remained any of the proceeds after satisfying these sums, it was to be distributed amongst the copartners in certain proportions fixed by the decree," an appeal was entertained by the supreme court, and the judgment affirmed, with a slight modification; and in a subsequent controversy growing out of the execution of the judgment, the question arose as to whether the decree was "final," and the court held that it was, saying: "The plaintiff in this action treated the decree as final when he prosecuted an appeal from it. If it was not final, his appeal should have been dismissed on that ground. But we entertained the appeal and decided the cause, and in justice the plaintiff should not be estopped to deny the finality of the decree. But we entertain no doubt that it was final. It ascertained and adjudged that a certain sum of money was due to Jones, and determined the whole matter in litigation. Nothing thereafter remained to be done except to execute the decree by a sale of the property, and a distribution of the proceeds in the manner fixed by the decree itself. This was a ministerial duty, and nothing was left for the court to do except to see that the decree was properly executed. It comes fully within the definition of a final judgment as defined by section one hundred and forty-four of the Practice Act."<sup>11</sup> But a decree dissolving a partnership and settling the proportionate interest of each partner, and directing an account to be taken before a commissioner appointed for that purpose (which account was sub-

<sup>10</sup> Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508. As to this case see note below.

<sup>11</sup> Clark v. Dunnam, 46 Cal. 204.

ject to the approval of the court), and a sale of the entire estate and division of the proceeds, was held not to be a final judgment. And Burnett, J., delivering the opinion, after the citation of authorities, said: "In the cases mentioned above, the sum due to the party was specifically ascertained and specifically stated. In the present case the fact of partnership and original proportion of each partner in the partnerships were settled; but the partnership accounts had to be taken, and the question whether any of the real estate should be sold, and what portion remained open. The decree had not ascertained any specific sum as due to any one or more of the partners. It was evidently not a final decree, but interlocutory. This decree was necessary before any accounts could be taken, and the present relative rights of the parties determined. The decree did not settle their *present* condition, but only the original terms of the partnership. It might turn out upon the accounts being taken that Eaton and William H. Gray had received their full share, conceding that the decree was correct as to the original terms of the partnership. In such case no appeal would be necessary."<sup>12</sup> The foregoing extract clearly shows the distinction between *Gray v. Palmer*, and the cases of *Neall v. Hill* and *Clark v. Dunnam*, above cited. In the latter cases there was no reference to take an account;<sup>13</sup> the sums to be paid were ascertained in the trial before the court, and fixed by the decree, and nothing remained but to see that the decree was obeyed. But in *Gray v. Palmer*, the decree claimed to have been final did not ascertain the sums due between the parties. It merely established a partnership, directed the assets to be sold, and referred the question of what was due between the parties to a master. Where the rights of the parties are ascertained by an interlocutory decree, and the question as to the state of the accounts is referred, not only is there no final decree while this question is undetermined, but even when the report has been filed and confirmed, it still remains for the court to decree upon the whole case.<sup>14</sup>

<sup>12</sup> *Gray v. Palmer*, 9 Cal. 616.

<sup>13</sup> In *Neall v. Hill*, Cope, J., delivering the opinion, said: "The fact that the judgment provided for the taking of an account does not destroy its effect as a final adjudication of the rights of the parties." But according to the report no account appears to have been ordered. And the remark of the learned justice is merely a *dictum*.

<sup>14</sup> See *Harris v. S. F. & S. R. Co.*, 41 Cal. 393. In that case the report

of the referee was confirmed, and it would seem that some general direction that the plaintiff should have judgment must have found its way into the minutes. The court, per Temple, J., said: "The confirmation of the report, and the order that judgment be entered for the plaintiff, was not the rendition of the judgment within the meaning of the three hundred and thirty-sixth section of the Practice Act, and of the decision in

The later cases, however, deal with the subject in a more practical way. The application of the principle that substance rather than form is to be looked to in the determination of what are and what are not final judgments within the meaning of the code, is undoubtedly of great utility in differentiating orders, so called, whether interlocutory or not, which may or may not be appealable, *eo nomine*, from orders which are in effect final judgments, and appealable because they are so; but it must be conceded that it does not afford much assistance in arriving at a definition of judgments which are final for purposes of appeal, sufficiently practical to be utilized as a general test. Subdivisions 2 and 3, of section 963 of the Code of Civil Procedure, make a large number of orders appealable, *eo nomine*, without regard to their character. Subdivision 1, however, provides for appeals from judgments, in general, which are "final," and the cases must be examined for a definition of "final judgment" which shall be more widely applicable than that suggested in *Belt v. Davis* and the other cases above cited. This is not minimizing the importance of the principles there stated, for the books contain many instances where the judgment as entered is final in form, yet, in substance, is manifestly not so.

In *Nolan v. Smith*,<sup>14a</sup> the supreme court held that there must be an express adjudication of the subject of the controversy as to all of the parties plaintiff and all of the parties defendant before it can be said that a final judgment has been reached. In other cases,<sup>14b</sup> it has been held that the courts will discourage litigation piecemeal, and that so far as the appellate courts are concerned, only one final judgment will be recognized in a single action or suit. In *Rochat v. Gee*,<sup>14c</sup> the order was merely a partial settlement of a

*Gray v. Palmer*, 28 Cal. 416. Something more remained to be done than the mere clerical duty of entering judgment. The court had not pronounced judgment upon the facts found, or determined the particular relief to which they entitled the plaintiff." See, also, *Johnston v. Dopkins*, 6 Cal. 83; *Baker v. Baker*, 10 Cal. 527.

<sup>14a</sup> 137 Cal. 360, 70 Pac. 166. This was a judgment for costs. In an action against a justice of the peace and his sureties a demurrer as to the principal was overruled and sustained as to the sureties, who had judgment for their costs. The plaintiff endeavored to appeal from this portion

of the order while allowing the action to remain in the condition left by it. The court held that the order was not a final determination within the meaning of section 963, subdivision 1, California Code of Civil Procedure.

<sup>14b</sup> *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670; *Illinois T. & S. Bank v. Alvord*, 99 Cal. 407, 33 Pac. 1132; *Stockton etc. Works v. Insurance Co.*, 98 Cal. 557, 33 Pac. 633; *Fox v. Hale & Norcross Co.*, 112 Cal. 568, 44 Pac. 1022.

<sup>14c</sup> 91 Cal. 355, 27 Pac. 670. It must not be overlooked, however, that there is a class of cases which seems to form an exception to the rule re-

receiver's account, and was not by its terms made payable by any party, nor was it enforceable against any party by execution, nor payable out of any definite fund. The appellant claimed that it was a final adjudication, but the court did not agree with him. In the case of *Grant v. Superior Court*,<sup>144</sup> decided soon afterward, the court

ferred to, limiting all actions to one final judgment. For example, in divorce proceedings, applications for alimony are seldom wanting; and, only less often, applications for counsel fees and costs of prosecuting or defending the suit, suit money, as it is sometimes called. Such applications cannot be considered as separate suits, but they have all the earmarks of proceedings which lead to separate judgment, which, when granted, have nothing to do with the final judgment in the case. Such a judgment is a final judgment, from which a separate appeal may be prosecuted, distinct from the appeal from the divorce decree. See *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *S. C.*, 75 Cal. 1, 16 Pac. 345; *White v. White*, 86 Cal. 212, 24 Pac. 1030; *Hite v. Hite*, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227, 45 L. R. A. 793; *Baker v. Baker*, 136 Cal. 302, 68 Pac. 971. Such an order is not reviewable from the final judgment. *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

And there are other cases which are apparently exceptional in character. Thus in *Los Angeles v. Los Angeles City Water Co.*, 134 Cal. 121, 66 Pac. 198, an order settling the accounts of a receiver, and directing the payment of his compensation by one of the parties to the action, was held to be a final judgment, although made before there had been a final judgment in the action in which he was appointed. Such an order was held to be a final determination of the rights of the parties to the matter then before the court. It was a final judgment upon a collateral matter arising out of the action, but in no wise dependent upon the final determination of the issues involved therein. It neither affected, nor was affected by, such final determination. See, also, *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604; *Hav-*

*meyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627. In *Grant v. Superior Court*, it was said that an order fixing the compensation of the receiver of a street railway company, whose appointment was in excess of the jurisdiction of the court, could, of itself, injure no one; but that, if, in addition to fixing the compensation, the order had provided for its payment out of the fund in his hand, such order would be a final judgment, and anyone interested in the fund would be aggrieved, and might appeal therefrom. In *Havemeyer v. Superior Court* it is to be found a list of cases where the question of the appealability of various orders as final judgments was discussed in connection with the remedy by prohibition.

The supreme court of Montana, in *State v. Court*, 28 Mont. 227, 72 Pac. 613, without going into the principles involved, expressly adopted the view of the California court in *Sharon v. Sharon*, *supra*, and, applying those principles in a case involving the compensation of a receiver whose appointment had been, by a decree of the supreme court, rendered nugatory, held that an order allowing the receiver compensation, counsel fees, etc., was a final judgment under subdivision 1 of section 1722, Code of Civil Procedure, and appealable within a year after its rendition, and not an order "with respect to a receivership" under subdivision 2 of that code, requiring an appeal to be initiated within sixty days. See, also, to the same effect, *In re Finklestein*, 13 Mont. 425, 34 Pac. 847; *State v. Court*, 14 Mont. 396, 40 Pac. 66; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Chandler v. Cushing et. Co.*, 13 Wash. 89, 42 Pac. 548; *Patterson v. Ward*, 6 N. D. 359, 71 N. W. 543.

<sup>144</sup> 106 Cal. 324, 39 Pac. 604.

referred to the order in *Rochat v. Gee*, as lacking one essential element of a final judgment; i. e., it was not enforceable against anybody, and imposed no liability upon anybody. No one was deprived of any advantage nor subjected to the imposition of any burden by reason of such an order. In other words, there was no "aggrieved party" within the meaning of the code, and consequently there can be no appeal. For purposes of appeal, therefore, whatever may be the form or the substance of the order in other respects, this is essential.

It may be said, therefore, that in general a judgment or order is final if it contains what may properly be said to be an adjudication of the rights of all the parties to the action, whether plaintiffs, defendants or interveners,<sup>140</sup> as to the subject matter of the controversy. But this is true only in a general sense, and there are many elements in the proposition which elude the most conscientious efforts in framing a definition which may be regarded as sufficiently comprehensive, and which is to be obtained from the cases alone.<sup>141</sup>

<sup>140</sup> It is well settled that the rights and interests of the principal parties may become, in the course of the proceedings, subservient entirely to the rights and interests of the interveners, and that, in the end, the latter may become the chief parties to the controversy to the exclusion of the nominal plaintiff and defendant.

In *Dusing v. Nelson*, 7 Colo. 184, 2 Pac. 922, it was said: "If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final it must end the particular suit in which it is entered." And see to the same effect, *Hagerman v. Moore*, 2 Colo. App. 83, 29 Pac. 1014; *Higgins v. Brown*, 6 Colo. 148.

<sup>141</sup> In the case of *In re Smith*, 98 Cal. 636, 33 Pac. 744, the term "final judgment," as used in the first subdivision of section 963, California Code of Civil Procedure, was held to signify only those final judgments which were known as such at common law, and that the same does not apply to statutory orders and judgments referred to in the third subdivision of the same section.

For convenience, the cases are gathered elsewhere. Those dealing

with interlocutory orders are to be found in section 187, *post*; with special orders after judgment in section 196, *post*; and with final judgments in the latter part of this section.

And see as to distinction between final judgments of dismissal and orders for dismissal under section 581, Code of Civil Procedure, *Wood, Curtis & Co. v. Missouri Pac. Co.*, 152 Cal. 344, 92 Pac. 868.

The rule in Montana was stated in *Arnold v. Sinclair*, 11 Mont. 556, 28 Am. St. Rep. 489, 29 Pac. 340, where it was held that if after the decree in equity is entered no further questions could come before the court except such as are necessary for carrying the decree into effect, the decree is final within the meaning of the code. This doctrine was repudiated in *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. Rep. 201, 37 L. ed. 1169; but was upheld in *Bryant v. Davis*, 22 Mont. 534, 57 Pac. 143.

See, also, as to the Montana rule, note 14c, *supra*.

In *Forrester v. Boston etc. Co.*, 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211, in deciding that a judgment was none the less final because it directed an accounting and allowing an attorney's fee, said: "We do not think that this reservation of itself changes

The earlier decisions are not very clear upon the point as to whether an order refusing to permit an intervention is a final judgment or not. In *Wenborn v. Boston*,<sup>15</sup> it was held not to be a final judgment, and it was said that "the remedy of the appellants is by an appeal from the final judgment when rendered." In *Coburn v. Smart*,<sup>16</sup> the party appealed both from the judgment and from the order refusing his application to intervene, and the court appear to have entertained both appeals; but the point as to the appealability of the refusal to permit an intervention was not considered. An order denying an intervention was in a later case carried to the supreme court by exception, but was refused consideration on the ground that no appeal by the intervener had been taken.<sup>16a</sup> The point was disposed of in a recent case, however, upon clear and logical grounds. Justice Shaw, for the court, in *Dollenmeyer v. Pryor*,<sup>16b</sup> with respect to the objection that the party asking the appeal from the order should await the final judgment between the parties, and appeal from that, or, at all events, procure the entry of a more formal judgment denying his motion from which he might appeal, said:

the character of the judgment. It is either a final judgment or no judgment. Section 1000 of the Code of Civil Procedure reads as follows: 'A judgment is the final determination of the rights of the parties in an action or proceeding.' Section 1820 of the same code reads: 'Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order.' In *Re Rose's Estate*, 80 Cal. 166, 22 Pac. 86, the court considered provisions of the California code identical with section 1000 and 1820, above, and reached the conclusion that there is no distinction between a judgment and a final judgment, and that every direction of a court in writing must fall within the definition of the term 'judgment or order.'

In *State v. Court*, 28 Mont. 445, 72 Pac. 867, holding that an order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant, is not a final determination from which an appeal would lie, the court said: "The order has none of the essential characteristics of a final judgment. It is not to be executed

by a writ or other process; nor is any act required of any of the parties by the doing of which he would be injured in the meantime, in the sense, at least, that he would be finally deprived of any substantial personal or property right, or suffer an invasion thereof, unless he can prosecute an appeal directly from the order itself. From this point of view it does not fall within the principle of the case of *State ex rel. Heinz v. District Court*, 28 Mont. 227, 72 Pac. 613 (see note 14c, *supra*), but is merely an interlocutory or intermediate order, and falls within the class of orders which may be reviewed upon appeal from the final judgment in the case, upon exception reserved, under section 1742 of the Code of Civil Procedure. . . ."

A judgment is not final while a motion for new trial made within the time allotted by law is pending and undisposed of. *Everett v. Jones*, 32 Utah, 489, 91 Pac. 360.

<sup>15</sup> 23 Cal. 321.

<sup>16</sup> 53 Cal. 742.

<sup>16a</sup> *Grand Grove v. Duchain*, 105 Cal. 219, 38 Pac. 947.

<sup>16b</sup> 150 Cal. 1, 87 Pac. 616.



"We can perceive no merit in this objection. The record shows that the order, or judgment, denying the application to intervene was entered before the appeal was taken. It clearly shows that the court had determined the right of the intervener. . . . The most verbose statement could not state the determination more accurately or effectually. So far as the intervener and his rights in that action were concerned, it was final. We see no good end to be secured by requiring him to await judgment between the other parties after a trial in which he could not participate. It ended the litigation as to him, and he should be allowed an immediate appeal. (*Stich v. Goldner*, 38 Cal. 608; *People v. Pfeiffer*, 59 Cal. 89; *Donner v. Palmer*, 45 Cal. 180.) Anything in *Wenborn v. Boston*, 23 Cal. 321, contrary to this rule must be considered as overruled by these later decisions."

An order dismissing an intervention already allowed is a final judgment.<sup>17</sup>

The following have been held to be final judgments and not orders: Orders confirming and refusing to confirm sales under partition decrees; <sup>17a</sup> an order dismissing an action for failure to serve the summons within the statutory time; <sup>17b</sup> an order dismissing an action for failure to prosecute the same with proper diligence; <sup>17c</sup>

<sup>17</sup> *Stich v. Goldner*, 38 Cal. 608; and look at *People v. Pfeiffer*, 59 Cal. 89.

<sup>17a</sup> *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. So also are orders confirming or refusing confirmation of sales of real estate in probate proceedings (*Estate of Leonis*, 138 Cal. 194, 71 Pac. 171), but for a different reason. In the first class of cases the order is in effect a final judgment and appealable because it is so, while in the latter the order is an order in probate proceedings and appealable as being within the designation, "against or in favor of directing the partition sale or conveyance of real property," in section 963, California Code of Civil Procedure, subdivision 3.

If the purchasers under such sales have the right of appeal, as a matter of course the tenants in common may also appeal. *Gordan v. Graham*, 153 Cal. 297, 95 Pac. 145.

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<sup>17b</sup> See note 17c, below.

<sup>17c</sup> See *Marks v. Keenan*, 140 Cal. 33, 73 Pac. 751; *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352; *Swortfiguer v. White*, 141 Cal. 576, 75 Pac. 172. If the dismissal referred to here and in the previous note (17b) is a dismissal under section 581, Code of Civil Procedure, the appeal may be prosecuted from the entry in the minutes, and the time to take the appeal must be held to run from such entry, rather than from the entry in the judgment-book (*Matthai v. Kennedy*, 148 Cal. 699, 84 Pac. 37; and see section 204, *post*); but if the dismissal is made upon the general ground of laches, and without regard to the provisions of the section cited, as also in the case of a dismissal after demurrer sustained for the failure of the plaintiff, or his refusal, within a reasonable time, to amend his complaint, the judgment to be appealed from is the judgment entered in the judgment-book, and the time begins to run, as

an order striking out affidavits in support of a motion for a new trial;<sup>17d</sup> an order refusing a writ of mandate;<sup>17e</sup> an order setting aside an information and discharging the defendant;<sup>17f</sup> an order granting an application for alimony;<sup>17g</sup> an order admitting to citizenship;<sup>17h</sup> a judgment by default as entered by the clerk;<sup>17i</sup> and others.<sup>17m</sup>

An order sustaining<sup>18</sup> or overruling<sup>19</sup> a demurrer is not a final judgment. An order entering a default<sup>20</sup> or refusing to set aside a default<sup>20a</sup> is not a final judgment. An order *denying* a motion for a nonsuit is not a final judgment.<sup>21</sup> An order granting or denying

in the case of judgments in general, from such entry. See Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 Pac. 868, as to the distinction here pointed out.

See note 5, *supra*.

<sup>17d</sup> Gay v. Torrance, 143 Cal. 169, 76 Pac. 973.

<sup>17e</sup> People v. Thompson, 66 Cal. 398, 5 Pac. 686.

<sup>17f</sup> People v. More, 68 Cal. 500, 9 Pac. 461, but an order on its own motion dismissing a criminal action, while undoubtedly final in its nature, is not appealable. See People v. More, 71 Cal. 546, 12 Pac. 631.

<sup>17g</sup> And the same may be said of orders granting or refusing motions for suit money. Such orders may be said to form an exception to the rule that only a single final judgment is permissible in each action. See cases cited in note 14c, *supra*.

<sup>17h</sup> Tinn v. United States District Attorney, 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152.

<sup>17i</sup> Jameson v. Simonds Saw Co., 144 Cal. 3, 77 Pac. 662.

<sup>17m</sup> See People v. Center, 9 Pac. C. L. J. 766.

<sup>18</sup> Moulton v. Ellmaker, 30 Cal. 527; Sutter v. San Francisco, 36 Cal. 112; Daniels v. Lansdale, 38 Cal. 567; Hibberd v. Smith, 39 Cal. 145; Agard v. Valencia, 39 Cal. 292; Ashley v. Olmstead, 54 Cal. 616; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; and see Moraga v. Emeric, 4 Cal. 308.

Also Hagerman v. Moore, 2 Colo. App. 83, 29 Pac. 1014; Mowbray v. Denver etc. Co., 2 Colo. App. 128, 29 Pac. 1016; Tripp v. Magnus, 1 Wash. 22, 23 Pac. 805; Potvin v. McCorvey,

1 Wash. 389, 25 Pac. 330, 12 L. R. A. 150; Cutler v. Hinman, 14 N. M. 62, 89 Pac. 267; Andrews v. Loveland, 1 Colo. 8.

<sup>19</sup> Look at Moraga v. Emeric, 4 Cal. 308; Agard v. Valencia, 39 Cal. 292. Such orders were appealable under the act of 1851 and up to 1854. See Burgoyne v. Perry, 3 Cal. 50. See Heilbron v. Irrigation Co., 76 Cal. 8, 17 Pac. 932, where it was held that such orders might be reviewed on appeal from the judgment but not on appeal from an order on motion for new trial. See, also, Foster v. Bowles, 138 Cal. 449, 71 Pac. 495.

Also Gaines v. Cyrus, 23 Or. 403, 31 Pac. 833; Smith v. McEvoy, 8 Utah, 58, 29 Pac. 1030; Olsen v. Newton, 3 Wash. 429, 30 Pac. 450; Smith v. Seattle etc. Co., 6 Wash. 295, 32 Pac. 1073; Jones v. Quayle, 3 Idaho, 640, 32 Pac. 1134; Armor v. Lyon, 1 Colo. 7.

<sup>20</sup> Ricketson v. Torres, 23 Cal. 636; Scotland v. East Branch M. Co., 56 Cal. 625. But such an order may be reviewed on appeal from the final judgment. Hallock v. Jaudin, 34 Cal. 167.

<sup>20a</sup> Tregambo v. Comanche M. & M. Co., 57 Cal. 501; or setting aside a default. Savage v. Smith, 154 Cal. 325, 97 Pac. 821; but see Gibson v. Superior Court, 83 Cal. 643, 24 Pac. 152, where *certiorari* was refused on the ground that the order was appealable.

Also Bowen v. Webb, 34 Mont. 61, 85 Pac. 739; Territory v. Las Vegas Grant, 6 N. M. 87, 27 Pac. 414.

<sup>21</sup> Christie v. Christie, 53 Cal. 26; Witkowski v. Hern, 82 Cal. 604, 23

a motion in arrest of judgment is not a final judgment.<sup>21a</sup> It would seem that a judgment upon a plea of former conviction is not a final judgment.<sup>21b</sup> An order dismissing a criminal action, made by the superior court of its own motion, is not appealable, although it is undoubtedly a final judgment.<sup>21c</sup> An order refusing to dismiss a motion for a new trial is not a final judgment.<sup>21d</sup> An order substituting a party plaintiff is not a final judgment.<sup>22</sup> In an action to settle the accounts of a trustee, an order directing the trust funds to be paid into court, reserving the question of distribution among the beneficiaries, is not a final judgment.<sup>23</sup> An order directing a receiver to "distribute the funds in his hands under and in the order mentioned in the decree heretofore made in this cause, the sum of five thousand dollars, to the parties entitled to the same," is not a final judgment.<sup>24</sup> An order sustaining or overruling exceptions to the report of a referee appointed to take an account is not a final judgment.<sup>25</sup> A decree in partition determining the rights

Pac. 132. It has been suggested that an order *granting* a nonsuit should be held to be appealable as being a final judgment, on the ground that it amounts to a dismissal of the action, dismissal being a final judgment. See notes 5 and 17c, *supra*. In *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189, however, the court seemed to hold otherwise, saying: "There is no appeal allowed by law from an order of nonsuit. Nor does the law allow an appeal from a judgment of nonsuit. If it should be urged that the judgment of nonsuit is the final judgment from which an appeal is allowed, the plain reply is that the transcript does not show that a final judgment has ever been entered. No appeal can be taken from a final judgment until it has been entered." Aside from the question of entry of judgment, it would seem to be the true principle. An order of nonsuit has many times been defined as an error of law occurring at the trial, and reviewable as such on appeal from both judgment and new trial order. It has never been regarded as an independent judgment requiring entry in the judgment-book, or elsewhere, as such.

But see *Lalande v. McDonald*, 2 Idaho, 307 (283), 13 Pac. 347; *Kleinschmidt v. McAndrews*, 4 Mont. 8, 2 Pac. 286; S. C., 4 Mont. 223,

5 Pac. 21, where the contrary seems to have been decided.

<sup>21a</sup> *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; *People v. Majors*, 65 Cal. 100, 3 Pac. 401; *People v. Henry*, 77 Cal. 445, 19 Pac. 830; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *People v. Ford*, 138 Cal. 140, 70 Pac. 1075; *People v. Jackson*, 138 Cal. 462, 71 Pac. 566; *People v. Cadot*, 138 Cal. 527, 71 Pac. 649; *People v. Matuszewski*, 138 Cal. 533, 71 Pac. 701; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

<sup>21b</sup> *People v. Majors*, 65 Cal. 100, 3 Pac. 401; S. C., 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597; *People v. Smith*, 121 Cal. 355, 53 Pac. 802.

<sup>21c</sup> *People v. More*, 71 Cal. 546, 12 Pac. 631.

<sup>21d</sup> *Griess v. Investment Co.*, 93 Cal. 411, 28 Pac. 1041.

<sup>22</sup> *Welch v. Allen*, 54 Cal. 211.

<sup>23</sup> *Williams v. Conroy*, 52 Cal. 414.

<sup>24</sup> *Adams v. Woods*, 21 Cal. 165; but see *Adams v. Woods*, 18 Cal. 30.

<sup>25</sup> *Johnston v. Dopkins*, 6 Cal. 83; *Baker v. Baker*, 10 Cal. 527; *Harris v. S. F. G. R.*, 41 Cal. 393; *Peck v. Courtis*, 31 Cal. 207.

of the parties, and appointing commissioners to make partition in accordance with the decree and report their proceedings to the court, is not a final decree and (before the statute of 1864) could not be appealed from,<sup>26</sup> but was reviewable on appeal from the judgment entered on the confirmation of the report.<sup>27</sup> After the statute of 1864 an appeal was allowed from the interlocutory decree,<sup>28</sup> and as a consequence such decree could not be reviewed on appeal from the final judgment.<sup>29</sup> An order setting aside an order settling the account of an assignee of an insolvent debtor, as reported by a referee appointed in an action by creditors to set aside and vacate a fraudulent assignment, is not a final judgment.<sup>30</sup>

As to whether an order denying a motion for relief under section 473, Code of Civil Procedure, from the consequences of a failure to present a statement or bill of exceptions in time, and its accompanying order refusing to settle the statement on the ground suggested by the first order, are final judgments, is not quite clear; but they are believed to be final judgments, and the former, at least, is appealable.<sup>31</sup>

In *Martin v. Zellerbach*,<sup>30</sup> which was an action at law, an equitable defense set up by the answer was disposed of, but no disposition was made of the action at law. The supreme court doubted whether there was a final judgment, but the question not being raised by counsel, it entertained the appeal.<sup>31</sup>

<sup>26</sup> *Gates v. Salmon*, 28 Cal. 320; *Hastings v. Cunningham*, 35 Cal. 549; *Peck v. Vandenberg*, 30 Cal. 11; *Peck v. Curtis*, 31 Cal. 207.

<sup>27</sup> *Peck v. Vandenberg*, 30 Cal. 11.

<sup>28</sup> *Peck v. Curtis*, 31 Cal. 207; *Regan v. McMahon*, 43 Cal. 625; *Gates v. Salmon*, 28 Cal. 320; *Lorenz v. Jacobs*, 53 Cal. 24.

<sup>29</sup> *Hihn v. Peck*, 30 Cal. 280; *Lorenz v. Jacobs*, 53 Cal. 24; *Regan v. McMahon*, 43 Cal. 625; *Barry v. Barry*, 56 Cal. 10; and look at section 195.

<sup>30</sup> *Etchebarne v. Roeding*, 89 Cal. 517, 26 Pac. 1079.

<sup>31</sup> See section 146, *ante*.

<sup>30</sup> 38 Cal. 300.

<sup>31</sup> The following are decisions of the supreme court of the United States upon the question of final judgment or not:

1. *Instances, final judgments, and decrees*: *Ray v. Law*, 3 Cranch, 179, 2 L. ed. 404; *Weston v. City Council of Charleston*, 2 Pet. 449, 7 L. ed.

481; *The Wabash & Erie Canal Co. v. Beers*, 1 Black, 54, 17 L. ed. 41; *Milwaukee R. R. Co. v. Soutter*, 2 Wall. 440, 17 L. ed. 860; *Withenbury v. United States*, 5 Wall. 819, 18 L. ed. 613; *Thomson v. Dean*, 7 Wall. 342, 19 L. ed. 94; *R. R. Co. v. Bradleys*, 7 Wall. 575, 19 L. ed. 274; *New Orleans R. R. v. Morgan*, 10 Wall. 256, 19 L. ed. 892; *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036; *French v. Shoemaker*, 12 Wall. 86, 20 L. ed. 270; *Commissioners of Tippecanoe Co. v. Lucas*, 3 Otto, 108, 23 L. ed. 822; *Sage v. R. R. Co.*, 6 Otto, 712, 24 L. ed. 641.

The following cases contain illustrations of orders and judgments held appealable, as being final, in the various state courts:

*Arizona*: *Putnam v. Putnam*, 2 Ariz. 259, 14 Pac. 356.

*California*: (Illustrations in the text, and previous notes.)

*Colorado*: *Bean v. People*, 6 Colo. 98; *Denver etc. Co. v. Jackson*, 6

The supreme court, at one time, seemed to have held that the code practice did not dispense with interlocutory judgments, or forbid

Colo. 340; *Atkinson v. Tabor*, 7 Colo. 195, 3 Pac. 64; *Tombay etc. Co. v. Court*, 23 Colo. 441, 48 Pac. 537; *Standley v. Hendrie etc. Co.*, 25 Colo. 376, 55 Pac. 723; *Marean v. Stanley*, 34 Colo. 91, 81 Pac. 759; *Ryan v. Geigel*, 39 Colo. 355, 89 Pac. 775; *Sprague v. Locke*, 1 Colo. App. 171, 28 Pac. 142; *Clames v. Fox*, 6 Colo. App. 377, 40 Pac. 843; *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303; *In re Currier's Estate*, 19 Colo. App. 245, 74 Pac. 340.

*Idaho*: *First National Bank v. Bunting*, 7 Idaho, 387, 63 Pac. 694; *Oliver v. Kootenai Co.*, 13 Idaho, 281, 90 Pac. 107.

*Montana*: *Fredericks v. Davis*, 6 Mont. 457, 13 Pac. 124; *Barber v. Briscoe*, 9 Mont. 341, 23 Pac. 726; *Blue Bird etc. Co. v. Murray*, 9 Mont. 468, 23 Mont. 1022; *Arnold v. Sinclair*, 11 Mont. 556, 28 Am. St. Rep. 489, 29 Pac. 340; *Appeal of Kane*, 12 Mont. 197, 29 Pac. 424; *Ryan v. Maxey*, 15 Mont. 100, 38 Pac. 228; *State v. Court*, 32 Mont. 20, 79 Pac. 410; *Palmer v. Spaulding*, 34 Mont. 1, 85 Pac. 369; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

*Nevada*: *Costello v. Scott*, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.

*New Mexico*: *Texas etc. Co. v. Orman*, 3 N. M. 308, 9 Pac. 253; *Lohman v. Cox*, 9 N. M. 503, 56 Pac. 286; *Neher v. Crawford*, 10 N. M. 725, 65 Pac. 156.

*Oklahoma*: *Farris v. Henderson*, 1 Okl. 384, 33 Pac. 380; *Fenton v. White*, 4 Okl. 472, 47 Pac. 472; *Ryland v. Arkansas etc. Co.*, 19 Okl. 435, 92 Pac. 160.

*Oregon*: *Mitchell v. Powers*, 17 Or. 491, 21 Pac. 451; *Scheffelin v. Weathered*, 19 Or. 172, 23 Pac. 898; *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851; *William Deering & Co. v. Creighton*, 26 Or. 556, 38 Pac. 710; *Rockwell v. Portland etc. Co.*, 35 Or. 303, 57 Pac. 903; *Therkelsen v. Therkelsen*, 35 Or. 75, 54 Pac. 885, 57 Pac. 373; *Marquam v. Ross*, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; *State v. O'Day*, 41 Or. 495, 69 Pac. 542.

*Utah*: *Jones v. New York L. Ins. Co.*, 14 Utah, 215, 47 Pac. 74; *Ogden v. Bear Lake etc. Co.*, 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305; S. C., 18 Utah, 279, 55 Pac. 385; *Victor etc. Co. v. Bank*, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72; *Sandberg v. Victor etc. Co.*, 18 Utah, 66, 55 Pac. 74; *In re Auerbach's Estate*, 23 Utah, 529, 65 Pac. 488; *Wilson v. Meyer*, 23 Utah, 529, 65 Pac. 488; *In re Tasanen's Estate*, 25 Utah, 396, 71 Pac. 984; *Diamond etc. Co. v. Trust Co.*, 25 Utah, 396, 71 Pac. 984; *Continental etc. Co. v. Jones*, 31 Utah, 403, 88 Pac. 229.

*Washington*: *Northern Pac. Co. v. Black*, 3 Wash. 327, 28 Pac. 538; *State v. Court*, 3 Wash. 696, 29 Pac. 202; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *In re Fraach*, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771; *Dexter etc. Co. v. Schwabacher etc. Co.*, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771; *Slater v. Stevens Co. Bank*, 12 Wash. 488, 41 Pac. 168; *Chandler v. Cushing etc. Co.*, 13 Wash. 89, 42 Pac. 548; *Lough v. Davis Co.*, 30 Wash. 204, 94 Am. St. Rep. 848, 70 Pac. 491, 59 L. R. A. 802; *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945; *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004; *Johnson v. Joslyn*, 47 Wash. 531, 92 Pac. 413.

*Wyoming*: *Gramm v. Fisher*, 3 Wyo. 395, 29 Pac. 377; *Anderson v. Matthews*, 8 Wyo. 307, 57 Pac. 156; *Porter v. State*, 16 Wyo. 131, 92 Pac. 385.

2. *Instances, judgments, and decrees not final*: *Gibbons v. Ogden*, 6 Wheat. 448, 5 L. ed. 302; *The Palmyra*, 10 Wheat. 502, 6 L. ed. 376; *Chesapeake Co. v. Union Bank*, 8 Pet. 259, 8 L. ed. 937; *Brown v. Swann*, 9 Pet. 1, 9 L. ed. 29; *Smith v. Trabue*, 9 Pet. 4, 9 L. ed. 30; *Levy v. Fitzpatrick*, 15 Pet. 167, 10 L. ed. 699; *Lea v. Kelly*, 15 Pet. 213, 10 L. ed. 715; *Amis v. Smith*, 16 Pet. 303, 10 L. ed. 973; *Miners' Bank v. United States*, 5 How. 213, 12 L. ed. 121; *Van Ness v. Van Ness*, 6 How. 62, 12 L. ed.

appeals therefrom as from final judgment. If so, however, the point was cleared up by subsequent decisions, and it is now well settled that appeals from interlocutory decrees cannot be recognized

344; *Perkins v. Fourniquet*, 6 How. 206, 12 L. ed. 406; *Pulliam v. Christian*, 6 How. 209, 12 L. ed. 408; *Barnard v. Gibson*, 7 How. 650, 12 L. ed. 857; *United States v. Girault*, 11 How. 22, 13 L. ed. 587; *Ayers v. Carver*, 17 How. 591, 15 L. ed. 179; *Verden v. Coleman*, 18 How. 86, 15 L. ed. 272; *Craighead v. Wilson*, 18 How. 190, 15 L. ed. 332; *Beebe v. Russell*, 19 How. 283, 15 L. ed. 668; *Farrelly v. Woodfolk*, 19 How. 288, 15 L. ed. 670; *Holcombe v. McKusick*, 20 How. 552, 15 L. ed. 1020; *McCargo v. Chapman*, 20 How. 555, 15 L. ed. 1021; *Steamer Republic*, 21 How. 386, 16 L. ed. 160; *United States v. Fossatt*, 21 How. 445, 16 L. ed. 186; *Tracy v. Holcombe*, 24 How. 426, 16 L. ed. 742; *Humiston v. Stainthorp*, 2 Wall. 106, 17 L. ed. 905; *Barton v. Forsyth*, 5 Wall. 190, 18 L. ed. 545; *Wheeler v. Harris*, 13 Wall. 51, 20 L. ed. 531; *R. R. Co. v. Swasey*, 23 Wall. 405, 23 L. ed. 136; *R. R. Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103; *Butterfield v. Usher*, 1 Otto, 246, 23 L. ed. 318; *A. & P. R. Co. v. Hopkins*, 4 Otto, 11, 24 L. ed. 48; *Green v. Fisk*, 13 Otto, 518, 26 L. ed. 486.

The following cases illustrate the rule that judgments and orders not final are not, in themselves, separately reviewable on appeal, or by proceedings in error, but require to be reviewed, if at all, on appeal or error from the final judgment in the main action or proceeding:

*Arizona*: *Putnam v. Putnam*, 2 Ariz. 259, 14 Pac. 356; *Bogan v. Pignataro*, 3 Ariz. 383, 29 Pac. 652.

*California*: (Illustrations in the text, and in preceding notes.)

*Colorado*: *Owens v. Going*, 7 Colo. 85, 1 Pac. 229; *Stevens v. Solid etc. Co.*, 7 Colo. 86, 1 Pac. 904; *Rule v. Gunner*, 12 Colo. 591, 21 Pac. 905; *Wheeler v. Garrett*, 13 Colo. 140, 21 Pac. 1021; *Londoner v. People*, 15 Colo. 246, 25 Pac. 183; *Lipe v. Fox*, 21 Colo. 140, 40 Pac. 353; *Denver v. Monash*, 21 Colo. 453, 42 Pac. 662; *Green v. Thatcher*, 31 Colo. 363, 72

Pac. 1078; *In re Emanuel's Estate*, 31 Colo. 440, 72 Pac. 1079; *Hagerman v. Moore*, 2 Colo. App. 83, 29 Pac. 1014; *Winscott v. Shelton*, 5 Colo. App. 357, 38 Pac. 595; *Clemes v. Fox*, 6 Colo. App. 377, 40 Pac. 843; *Green v. Hughes*, 9 Colo. App. 61, 47 Pac. 401; *In re Arapahoe etc. Co.*, 10 Colo. App. 66, 50 Pac. 45; *Flint v. Powell*, 10 Colo. App. 66, 50 Pac. 45; *Thomas v. Thomas*, 10 Colo. App. 170, 50 Pac. 211; *In re People's Savings Bank*, 18 Colo. App. 294, 71 Pac. 397.

*Idaho*: *Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.

*Montana*: *Territory v. Morehouse*, 8 Mont. 310, 21 Pac. 663; *Nelson v. Donovan*, 14 Mont. 78, 35 Pac. 227; *Butte etc. Co. v. Frank*, 24 Mont. 506, 62 Pac. 922; *Montana etc. Co. v. Boston etc. Co.*, 27 Mont. 288, 70 Pac. 1114, 22 Morr. Min. Rep. 471; *Spencer v. Mungus*, 28 Mont. 357, 72 Pac. 663; *State v. Court*, 28 Mont. 445, 72 Pac. 867; *Kinman v. Scheuer*, 30 Mont. 73, 75 Pac. 690; *Raymond v. Raymond*, 32 Mont. 170, 79 Pac. 1056; *Chicago etc. Co. v. White*, 36 Mont. 437, 93 Pac. 350; *Kenyon v. Cannon*, 36 Mont. 437, 93 Pac. 350.

*New Mexico*: *Bucher v. Thompson*, 7 N. M. 599, 38 Pac. 250; *Lyndonville etc. Bank v. Folsom*, 10 N. M. 306, 62 Pac. 976; *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933; *Machen v. Keeler*, 11 N. M. 413, 68 Pac. 937.

*Oklahoma*: *Hadley v. Ulrich*, 1 Okl. 380, 33 Pac. 705; *Healy v. Loofbourrow*, 2 Okl. 458, 37 Pac. 823; *Easton v. Broadwell*, 8 Okl. 442, 58 Pac. 506; *McMaster v. People's Bank*, 13 Okl. 326, 73 Pac. 496.

*Oregon*: *Wilder v. Reed*, 46 Or. 54, 78 Pac. 1027.

*Utah*: *Kelly v. Kershaw*, 5 Utah, 300, 14 Pac. 808; *Jones v. New York L. Ins. Co.*, 11 Utah, 401, 40 Pac. 702; *In re Kelsey*, 12 Utah, 393, 43 Pac. 106; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. 153; *Musser v. Edmunds*, 23 Utah, 425, 64 Pac. 1105; *Popp v. Daisy etc. Co.*, 22 Utah, 457, 63 Pac.

under our practice, as final judgments, but only in the cases provided by statute.<sup>32</sup>

185; In re Williamson's Estate, 26 Utah, 50, 72 Pac. 2; Honerine etc. Co. v. Tallerday etc. Co., 30 Utah, 449, 85 Pac. 628.

*Washington:* Lilienthal v. Wright, 1 Wash. 1, 23 Pac. 801; Danforth v. Paxton, 1 Wash. 6, 23 Pac. 801; Gower v. Gower, 1 Wash. 16, 24 Pac. 29; Wells v. Northern Pac. Co., 2 Wash. 303, 5 Pac. 215; Jennings v. Bartels, 2 Wash. 306, 24 Pac. 678; Sander etc. Co. v. Yealer's Estate, 2 Wash. 429, 27 Pac. 269; Green v. Williams, 6 Wash. 260, 33 Pac. 588; Schlotfeldt v. Bull, 13 Wash. 242, 43 Pac. 33; National etc. Assn. v. Simpson, 21 Wash. 16, 56 Pac. 844; Peters v. Lewis, 28 Wash. 366, 68 Pac. 869; Nash v. Wakefield, 30 Wash. 556, 71 Pac. 35; Vaktaren Pub. Co. v. Pacific Tribune etc. Co., 41 Wash. 355, 83 Pac. 426; In re Sinclair's Estate, 44 Wash. 119, 86 Pac. 1117; Albin v. Seattle etc. Co., 46 Wash. 420, 90 Pac. 435; State v. Court, 48 Wash. 671, 94 Pac. 472.

*Wyoming:* Collins v. Stanley, 15 Wyo. 282, 123 Am. St. Rep. 1022, 88 Pac. 620; Greenawalt v. Natrona etc. Co., 16 Wyo. 226, 92 Pac. 1008.

Other citations illustrating the rule of finality, as governing the appealability of orders, are made in the various sections of the chapter on "Orders." See chapter 29, herein.

<sup>32</sup> Thompson v. White, 63 Cal. 505. The first edition of this treatise was published shortly after the decision in this case, and the learned author took occasion to question the correctness of that decision in the following language:

(Text:) "In a recent case it has been held by department one of the supreme court that the code provides for interlocutory decrees. The soundness of this decision seems questionable.<sup>32</sup> But if there are such things they are certainly not appealable."

(Note:) "<sup>32</sup> *Interlocutory Decrees.*—In the case of Thompson v. White, 63 Cal. 505, department one of the supreme court held that the code provided for interlocutory decrees in equity cases. The facts of the case were as follows: A judge of a district

court, after passing upon a portion of the issues made by the pleadings (the remainder of the issues being expressly reserved), made an 'interlocutory decree' and an order of reference, and went out of office. His successor held that, inasmuch as all of the issues had not been tried, there had been a mistrial, and that the 'interlocutory decree' was of no validity, and made an order setting aside all the proceedings subsequent to the trial, and restoring the cause to the calendar for trial *de novo*. This order was reversed on appeal, the supreme court holding that interlocutory decrees were not unprovided for by our system, and, as it would seem, that the judge ought to have gone on and determined the remaining issues of fact, and then made his final decree upon the two sets of findings together.

"It is submitted with deference that the court overlooked the distinction between a judgment or decree and an order. The opinion says: 'There is no magic in a name. An interlocutory decision of a court of equity is as efficacious when called an order as when called a judgment or decree. Whether it be called an interlocutory decree, or a decretal order, or simply an order, it is in substance the same.' Now, it is quite true that there is no magic in a name, and that we might call an 'interlocutory decision' by any name we might fancy, without in any degree changing the thing. But it is equally true that we cannot do away with an inherent distinction between things by simply calling them by the same name. And there is a distinction between judgment and decrees on the one hand, and orders on the other, which is certainly not a mere affair of words. And the distinction is this: that a judgment or decree is a decision upon the issues raised by the pleadings, which an order is not. As above stated the opinion seems to overlook this distinction. Reduced to logical form the reasoning of the court is this: there is no substantial difference between interlocutory decrees and orders; but the code provides for orders; therefore, it provides for inter-

Nor does our system of practice recognize any other form of intermediary final judgment. As above stated, only one final judgment is permissible in a single action, "and that is one which in

locutory decrees. Now, if it be conceded (as it must be), that there is an essential and radical difference between judgments and decrees on the one hand, and orders on the other, it is apparent that the above reasoning fails.

"The argument against the conclusion reached by the court is briefly this: the code provides for judgments and for orders, and except in partition cases, for nothing else; an *interlocutory* decree cannot be a judgment within the meaning of the code, because it defines a judgment to be 'the final determination of the rights of the parties'; and it cannot be an order because of the essential difference between judgments and orders above referred to; therefore, there is no provision for interlocutory decrees. This conclusion is strengthened when the other features of our system of practice are considered, and is in harmony with previous decisions.

"1. The code expressly provides for an interlocutory decree in suits for partition (which are equity cases, *Goodale v. Fifteenth District Court*, 56 Cal. 26). Why should such a provision have been inserted if it were intended that there should be interlocutory decrees in all equity cases? Is it not a proper case for the application of the maxim *expressio unius*, etc.?

"2. An interlocutory decree is a judgment upon a portion of the issues made by the pleadings. In order to come within the class judgments it must be a disposition of some, at least, of such issues. And in order to be interlocutory it must be upon a portion only of the case; if it disposed of the whole case it would be final. Such being the case, it is manifest that if we are to have interlocutory decrees we must have interlocutory or partial findings. A judgment under our system must rest upon findings; and if it can be made before all the issues are determined, it is absolutely necessary that findings upon the issues which are determined should be made. Where the judge goes out of office after mak-

ing such interlocutory judgment and findings, they pass to his successor, who is to take the case up where his predecessor left off and dispose of the remainder of it. This is the only course open under the rule laid down in *Thompson v. White*; for if the second judge is to try the whole case over again he may take a different view of the evidence, and may make findings which differ from those of his predecessor and which call for a contrary judgment; and this would render it necessary to treat the first judge's findings and judgments as invalid, which would be in no wise different, in a legal sense, from setting them aside, as was done by the court below in *Thompson v. White*. Under the rule in that case, therefore, the second judge must take the interlocutory judgment and findings of his predecessor, and treat them as conclusive as far as they go, and must confine himself to disposing of the remainder of the case. And it results that there may be several trials of a case before it is finally disposed of, and several sets of findings by different judges. In other words, that a judge can try a little bit of a case and pass it to his successor, who can try a little bit more and pass it to his successor, and so on. This used to be the case under the old chancery practice, and was one of the causes of the interminable delays of that system. One reason of the greater simplicity and effectiveness of our system is that, as a general rule, there is but one trial, one set of findings, and one judgment, which is 'the final determination of the rights of the parties.'

"3. It is thoroughly well settled that the provisions of the Code of Civil Procedure apply alike to cases at law and in equity. No difference, in point of the mere procedure, is made between the two classes of cases. This is expressly recognized in *Thompson v. White*. Now, if we are to have interlocutory judgments in cases in equity, why not in actions at law?

"4. The decision in *Thompson v. White* is not in harmony with the au-



effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in

thorities. In New York, from which the definition of a judgment was taken, it was held that interlocutory decrees were done away with. *Belmont v. Ponvert*, 3 Robt. (N. Y.) 694. The same conclusion is reached by Mr. Freeman in his treatise on Judgments, in which, after discussing the subject, he says: "There can be now no such thing as an interlocutory judgment in any case." Freeman on Judgments, sec. 14. And in the case of *Freeman v. Campbell*, 55 Cal. 197, it was held that where, after making findings and judgment, a judge went out of office, it would be impracticable to remand the case for a finding upon an omitted issue, but that the whole case must be tried anew. In *Thompson v. White* it is said that the proper method of review was on motion for new trial. In previous cases it was held that there can be no motion for new trial until all the issues are disposed of. *Hinds v. Gage*, 56 Cal. 488; *Bates v. Gage*, 49 Cal. 126."

Upon a second review of *Thompson v. White*, 76 Cal. 381, 18 Pac. 399, the supreme court took occasion to limit or qualify its former conclusions, our learned author, who was then a supreme court commissioner, being intrusted with the duty of preparing the opinion of the court. He said:

"As a matter of course, whatever was decided upon the former appeal has become the law of the case, and must govern on this appeal. The question is, whether it was there decided that the final decree cannot be inconsistent with the interlocutory one. And we do not think that it was. The court below had proceeded upon the theory that there could not be, under our system, such a thing as an interlocutory decree except in partition cases,—in other words, that the court had no power to make such a decree. All that was necessary for the appellate court to decide was, that the trial court had such power, and that the proceedings should not be set aside as for want of power. And this is what we think it did decide, its language being, 'there was no warrant

for its vacation upon the theory that it was beyond the power of the court to make.'

"It was not necessary for the court to say that the trial court could not on the final hearing modify the interlocutory decree as the law and the evidence might seem to require. And it did not say it. It was not even necessary for it to say what kind of interlocutory decree it referred to. The opinion is not entirely clear in this regard, but we think it sufficiently shows that the court referred to the interlocutory decree of the old equity practice. It could not have referred to the interlocutory decree established by our statutes in partition cases, because that kind of decree is itself appealable, and is not reviewable on appeal from the final decree; whereas the opinion says of the interlocutory decree, that it 'is also reviewable on appeal from the final judgment.' (63 Cal. 509.) And unless the court intended to evolve something entirely new (which cannot be supposed), it must have had reference to the interlocutory decree of the old equity practice. Its language is consistent with this idea. For it is said that the intention of the codifiers was not 'to abolish the power of a court of equity to pronounce what in equity was called an interlocutory decree or decretal order.' And what is said with reference to new trials evidently refers to the findings of fact upon which the interlocutory decree rested, which findings had been set aside by the court below along with the decree resting upon them.

"If this be the true interpretation of the opinion, it does not matter whether the final decree is inconsistent with the interlocutory one, or not. For under the old equity practice the interlocutory decree could be modified on the final hearing, as the law and the evidence should require."

The question again arose, very soon afterward, in *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88, and Mr. Hayne again wrote the opinion of the court. The question came up on motion to dismiss the appeal from the judgment and

controversy.”<sup>33</sup> A so-called decree, therefore, based upon findings of fact and conclusions of law with respect to issues raised by a cross-complaint, which does not dispose of all the issues pending in the cause, and purports to dispose of one only of the defenses to the action, is irregular.<sup>34</sup>

A consequence of the rule that only one final judgment in an action will be allowed is, that where, for any reason, a judgment is vacated, and a second judgment in lieu thereof entered, the last judgment entered is the final judgment, and all notices, bills of exceptions, statements, etc., whose service dates from entry of judgment must be served within the statutory period from the entry of the second judgment. And if, after appeal, the *remittitur* of the

from the order denying the motion for a new trial. The opinion is as follows:

“1. We think that the motion to dismiss the appeal from the decree should be granted. If the suit is to be regarded as a partition suit, it is obvious that the appeal was not taken within the sixty days allowed by law. (Code Civ. Proc., subd. 3, sec. 939.) If, however, as contended for the appellant, so much of the decree as established the equitable rights of the plaintiff was not properly a part of the partition suit, and for that reason is to be considered as a decree in an ordinary action, it would follow that the decree was not appealable at all. It is well settled that interlocutory matters are not appealable except in the cases provided by statute. (See cases collected in Hayne on New Trial and Appeal, sec. 188.) There is nothing inconsistent with this in the case of *Thompson v. White*, 63 Cal. 505; second appeal, 76 Cal. 381, 18 Pac. 399. On the contrary, on the first appeal the court, after stating that the decision was reviewable on motion for new trial, said: ‘That decision is also reviewable on appeal from final judgment when one shall be entered.’ And this was the view on the second appeal. It is to be regretted that this is the law. There are many actions, notably actions for an accounting, in which almost the whole controversy may be as to

whether an interlocutory decree should be made; and the parties should not be compelled to wait until a final decree is rendered, and then drag the whole case up to the appellate court, in order to present a question which could with much less expense be presented at once. The due administration of justice requires that where an interlocutory decree is proper, it should be placed upon the same footing as interlocutory decrees in partition. But it is for the legislature to make the change.”

Whatever inconsistencies are to be found in the expressions of the court upon this point, they are to be referred to the apparent departure from principle noted by our author in the first opinion in *Thompson v. White*; and the result is to fix more firmly perhaps than could have been otherwise accomplished the doctrine that, except in the cases prescribed by the code, interlocutory judgments, orders, or decrees, however defined, are no longer appealable; and hence are no longer to be regarded as in any sense final; and this, whether in law or equity.

See, also, *Fox v. Hale & Norcross Co.*, 112 Cal. 568, 44 Pac. 1022; *Hawthurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142, 51 Pac. 846.

<sup>33</sup> See *Stockton etc. Works v. Insurance Co.*, 98 Cal. 557, 33 Pac. 633.

<sup>34</sup> See *Stockton etc. Works v. Insurance Co.*, 98 Cal. 557, 33 Pac. 633.

appellate court provides for entry of judgment, such judgment is the final judgment in the action.<sup>25</sup>

§ 185. **Appeal from a Part of a Judgment.**—As has been shown, the statute provides for an appeal from a final judgment.<sup>1</sup> There is no express provision for an appeal from a part of a judgment. But section 940 of the California code provides that “an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or *some specific part thereof*, and serving, etc.” And the old Practice Act contains a provision substantially similar.<sup>2</sup> That such provision authorizes an appeal from a part of a judgment has been stated by the court<sup>3</sup> (although it has not been directly decided), and there are numerous cases in which appeals from parts of judgments have been entertained.<sup>4</sup> In view of these cases it may be said that under our system a party may appeal from a part of a final judgment as well as from the whole judgment; provided, the judgment, from a portion of which an appeal is sought

<sup>25</sup> See *Klanber v. San Diego etc. Co.*, 98 Cal. 105, 32 Pac. 876, and also *Stockton etc. Works v. Insurance Co.*, 98 Cal. 557, 33 Pac. 633; *Colton etc. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878.

<sup>1</sup> See sections 182-184.

<sup>2</sup> See section 337, Laws of 1851, p. 105.

See, also, section 4808, Revised Codes of Idaho; section 7100, Revised Codes of Montana (section 1724, Code of Civil Procedure); section 3426, Cutting's Compiled Laws of Nevada (section 331, Civil Practice); section 7205, Revised Codes of North Dakota; section 550, Lord's Oregon Laws; section 349 (subdivision 1) Code of Civil Procedure of South Dakota; section 3305, Compiled Laws of Utah; section 1719, Rem. & Bal. Code of Washington (section 6503, Bal. Code).

<sup>3</sup> *England v. Lewis*, 25 Cal. 337.

<sup>4</sup> *Riggs v. Waldo*, 2 Cal. 485, 486, 56 Am. Dec. 356; *Dewey v. Latson*, 6 Cal. 609; *Benedict v. Bunnell*, 7 Cal. 245; *Gunter v. Laffan*, 7 Cal. 588; *Belden v. Henriques*, 8 Cal. 87, 88; *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Beebe v. Brooks*, 12 Cal. 308, 309; *Patrick v. Montader*, 13

Cal. 434; *Wand v. Wand*, 14 Cal. 512; *Clark v. Duval*, 15 Cal. 85; *Barber v. Barber*, 16 Cal. 378; *Magee v. Welsh*, 18 Cal. 155; *Ricketson v. Richardson*, 19 Cal. 330; *Donahue v. Cromartie*, 21 Cal. 80, 82; *Estate of Isaacs*, 30 Cal. 105; *Carpentier v. Gardiner*, 29 Cal. 160; *Fair v. Stevenot*, 29 Cal. 486, 11 Morr. Min. Rep. 11; *Poett v. Stearns*, 31 Cal. 78; *Porter v. Ather-ton*, 32 Cal. 416; *Tewksbury v. Mag-raft*, 33 Cal. 237; *Bludworth v. Lake* (No. 2), 33 Cal. 265; *Rohr v. McCaig*, 33 Cal. 309; *Hardenbergh v. Bacon*, 33 Cal. 356, 1 Morr. Min. Rep. 352; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107, 11 Morr. Min. Rep. 432; *Stewart v. Levy*, 36 Cal. 159; *Dougherty v. Miller*, 36 Cal. 83; *Himmel-man v. Spanagel*, 39 Cal. 389; *Patter-son v. Sharp*, 41 Cal. 133; *Pujol v. McKinlay*, 42 Cal. 559, 570; *Estate of Mullins*, 47 Cal. 450; *Bull v. Shaw*, 48 Cal. 455; *Wilcoxson v. Miller*, 49 Cal. 193; *Brenham v. Davidson*, 51 Cal. 352; *Kinsey v. Green*, 51 Cal. 379; *Nisbet v. Nash*, 52 Cal. 540, 11 Morr. Min. Rep. 531; *Salter v. Baker*, 54 Cal. 140; *Lowell v. Lowell*, 55 Cal. 316.

to be prosecuted, is severable.<sup>4a</sup> And when an appeal is taken from a part of a judgment, the appellate court will not review the part

<sup>4a</sup> If the judgment is an entirety, the statute does not authorize a review thereof by the appellate court by piecemeal. *Farmers' etc. Bank v. Key*, 33 Or. 443, 54 Pac. 206. An appellant cannot prosecute an appeal from an unfavorable part of a judgment and leave undisturbed and in force that portion favorable to him, where the decree is of such a character, at least, as that it cannot be severed, and one portion allowed to stand and another portion to be nullified. *New Zealand etc. Co. v. Smith*, 41 Or. 466, 69 Pac. 268.

The rule is by no means free from exception. In *Bush v. Mitchell*, 28 Or. 92, 41 Pac. 155, the court, in discussing the point involved here, said:

" . . . . The rule is universal that a party will not, without the consent of his adversary, be permitted to split up his demands and maintain separate actions on the several parts. . . . So, too, it is equally well settled that a party will not be permitted to maintain separate appeals from parts of a judgment or decree. . . . 'There is a class of cases . . . which apparently form an exception to the general rule that an appeal will not lie from parts of a case; but the cases forming this class will be found on investigation to be apparent, rather than actual, exceptions. The class to which we refer is composed of cases wherein an issue, distinct, entire, and complete, is formed between some of the parties, and upon which issue a final judgment is given affecting only the interests and rights of the parties to that issue.' In prescribing the form of a notice of appeal, the statute provides that: 'Such notice shall state that the appellant appeals from the judgment or decree of the circuit court, or some specified part thereof, and in case the judgment be one rendered in an action at law, shall specify the grounds of error with reasonable certainty upon which the appellant intends to rely upon the appeal.' Hill's Code, section 537, subdivision 1. It also provides that: 'Upon an appeal, the appellate court

may affirm, reverse, or modify the judgment or decree appealed from, in the respect mentioned in the notice, and not otherwise, as to any or all of the parties joining in the appeal, and may include in such decision any or all of the parties not joining in the appeal, except a codefendant of the appellant against whom a several judgment or decree might have been given in the courts below; and may, if necessary and proper, order a new trial.' Id., sec. 544. The section of the statute last quoted, when interpreted by the apparent exception to the general rule applicable to appeals (Elliott's App. Proc., section 99), would seem to refer to some of the parties between whom a distinct issue is formed, and who would be permitted to appeal from such of the judgment or decree given in the whole case as may determine such particular issue,—for example, the parties to a foreclosure proceeding who seek to establish among themselves a priority of lien. From the example given it can readily be seen that, under the statute, separate appeals may be maintained from distinct parts of a decree in equity, but it may well be doubted if such appeals lie from judgments in actions at law. Thayer, J., in construing these sections of the statute, says: 'These two provisions, taken together, seem to restrict the review to the part of the decree specified in the notice, although the latter portion of section 533 of the code (Hill's Code, section 543) provides that, upon an appeal from a decree given in any court, the suit shall be tried anew upon the transcript and evidence accompanying it. This would seem to imply that the whole case would be before the appellate court for trial *de novo*, though it might be sufficient answer to repel the inference that an appeal from a part of a decree is not "an appeal from a decree," within the meaning of the above provision, that said provision was only intended to apply to an appeal from an entire decree. Still, I think a more satisfactory construction can be given to the provision, and make it har-

not appealed from.<sup>4b</sup> So an appeal may be taken from a portion of an order.<sup>5</sup> Thus an appeal may be taken from an order on motion for a new trial as to a portion of the issues involved, when separable, leaving the order as to the remaining findings to stand.<sup>6</sup>

monize with the view I have indicated, by construing the several provisions together, and giving effect to all of them. Under such construction, the conclusion would necessarily follow that the trial of the suit anew would be confined to a trial of the case affecting a part of the decree specified in the notice of appeal.' Shook v. Colohan, 12 Or. 239, 6 Pac. 503. The case of Inverarity v. Stowell, 10 Or. 261, was a controversy between a mortgagee and subsequent lien claimants, and it was there held that the decree, as to the lien claimants being severable, the plaintiff could appeal from that part of it. 'The party appealing,' says Wade, C. J., in Barkley v. Logan, 2 Mont. 296, in construing a similar statute, 'must bring the whole decree before the appellate court (otherwise it has no jurisdiction to hear the case), and may specify in his notice of appeal the portion of the decree he wishes to reverse. He cannot sever the decree, and leave that portion of it favorable to himself in force in the district court, and appeal from that portion adverse to him.' So, too, in Construction Co. v. O'Neill, 24 Or. 54, 32 Pac. 764, it was held that the appellant could not have a decree in the lower court for a given amount and here for an additional sum. An appeal from a part of a decree must necessarily bring to the appellate court the whole decree, and while the part appealed from may be affirmed, modified, or reversed, the portion not reviewed will be affirmed. The whole cause being tried here *de novo*, a complete decree must be rendered in this court. In actions at law this court can review judgments only as to questions of law appearing upon the record; and, when error is discovered, the cause must be remanded to the court below for further proceedings. The reversal of a judgment necessarily opens it; and, if opened for

one, it must be for all purposes. Otherwise litigation would be interminable, and actions tried and appeals taken by piecemeal,—a result which would be contrary to the policy of the law. . . . "

As indicated by the excerpt therefrom above quoted, the language of the court in Barkley v. Logan, 2 Mont. 296, was equally as strong in opposition to the rule outlined in the text. The code provisions in the two states of Montana and Oregon are not materially different from those of other states, and the above argument applies with only slightly diminished force to the construction of the codes elsewhere. It is believed, however, that the rule outlined in the text is the true one.

In the more recent case of McDonald v. White, 46 Wash. 334, 89 Pac. 891, in support of the rule as stated in the text, the court said:

" . . . A party may appeal from the whole or any part of a judgment adverse to him if he considers the same erroneous, assuming that it is not so connected with the judgment as a whole as to make an appeal from the judgment as an entirety necessary to a proper determination of the issue presented. . . . "

In Healy v. Seward, 5 Wash. 319, 31 Pac. 874, it was said that where a judgment is partly in favor of appellant and partly adverse to him, he should appeal from the adverse part only, and not from the whole judgment.

<sup>4b</sup> Pacific etc. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758. But see opinion quoted in note 4a, *supra*, from Bush v. Mitchell.

<sup>5</sup> Dimick v. Deringer, 32 Cal. 488; Estate of McCauley, 50 Cal. 544.

<sup>6</sup> San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83;

### § 186. What may be Reviewed on Appeal from the Judgment.

Under the old Practice Act the only questions that could be reviewed on appeal from the judgment were questions in relation to the pleadings,<sup>1</sup> questions as to whether the judgment was supported by the findings or verdict,<sup>2</sup> questions as to the correctness of intermediate orders necessarily affecting the judgment and not themselves appealable,<sup>3</sup> and questions as to errors in law occurring at the trial and excepted to.<sup>4</sup> Of the grounds of a motion for new trial the one last referred to, viz., errors in law occurring at the trial, was the only one that could be presented on appeal from the judgment. Questions as to irregularities of the court, jury, or adverse party, or as to misconduct of the jury, questions as to accident or surprise, or newly discovered evidence, and questions as to excessive damages,<sup>5</sup> or the insufficiency of the evidence to justify the verdict or decision,<sup>6</sup> could be presented only on motion for new trial.

The Code of Civil Procedure made one change in the previous practice, viz., that questions as to the insufficiency of the evidence to justify the verdict or decision may be presented on appeal from the judgment, provided the appeal be taken within sixty days from

Duff v. Duff, 101 Cal. 1, 35 Pac. 437; Fallbrook etc. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793; Mountain Tunnel Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Robinson v. Muir, 151 Cal. 118, 90 Pac. 521; Emerson v. Yosemite etc. Co., 149 Cal. 50, 85 Pac. 122; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159.

<sup>1</sup> Errors apparent in the judgment-roll might be reviewed on appeal from the judgment. Thompson v. Patterson, 54 Cal. 542; Wetherbee v. Carroll, 33 Cal. 549; Putnam v. Lamphier, 36 Cal. 151; Jones v. City of Petaluma, 36 Cal. 230; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237. The same rule has been held to govern under the code, and in some cases it has been further held that such errors could be reviewed nowhere else. See *In re Westerfield*, 96 Cal. 113, 30 Pac. 1104; Thompson v. Los Angeles, 125 Cal. 270, 57 Pac. 1015. Pleadings constitute a part of the roll (see section 230, *post*), and errors arising from rulings upon demurrers

(see *Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381), and upon the sufficiency of the complaint (see *Frey v. Vignier*, 145 Cal. 251, 78 Pac. 733), can be reviewed solely on appeal from the judgment.

If errors are not apparent on the judgment-roll, they must be made to appear by a bill of exceptions. See section 262, *post*. See cases cited in note 8, below, as to the practice under the code.

<sup>2</sup> *Shepherd v. McNeil*, 38 Cal. 72; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Solomon v. Reese*, 34 Cal. 28; *Thompson v. Hancock*, 51 Cal. 110; and see note 1, above; and see cases cited in note 8, below, as to the practice under the code.

<sup>3</sup> See section 195, *post*.

<sup>4</sup> See note 10 to section 100, *ante*.

<sup>5</sup> See notes 4 to section 94, *ante*.

<sup>6</sup> See cases cited in notes 7, 8, and 9, to section 96, *ante*.

the rendition of the judgment.<sup>7</sup> In other respects the practice is the same as formerly.<sup>8</sup>

<sup>7</sup> See note 10 to section 96, *ante*.

<sup>8</sup> The following cases illustrate the practice under the code: *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16; *In re Doyle*, 73 Cal. 564, 15 Pac. 125; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *Evans v. Paige*, 102 Cal. 132, 36 Pac. 406; *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Pierce v. Willis*, 103 Cal. 91, 36 Pac. 1080; *In re Redfield*, 116 Cal. 637, 48 Pac. 794; *Hall v. Susskind*, 120 Cal. 559, 53 Pac. 46; *Patch v. Miller*, 125 Cal. 240, 57 Pac.

986; *Rauer v. Fay*, 128 Cal. 523, 61 Pac. 90; *Moore v. Douglas*, 132 Cal. 399, 64 Pac. 705; *Morse v. Wilson*, 138 Cal. 558, 71 Pac. 801; *Swift v. Occidental etc. Co.*, 141 Cal. 161, 74 Pac. 700; *Sharp v. Bowie*, 142 Cal. 462, 76 Pac. 62; *Bell v. Southern Pacific Co.*, 144 Cal. 560, 77 Pac. 1124; *Jenson v. Will & Finck*, 150 Cal. 398, 89 Pac. 113.

See, also, cases cited in section 1, *ante*, as to what may be reviewed on motion for new trial, and on appeal from a new trial order.

## CHAPTER XXIX.

## WHAT MAY BE APPEALED FROM—INTERLOCUTORY ORDERS.

- § 187. What is an order.
- § 188. Interlocutory orders are not appealable unless expressly made so by statute.
- § 189. Appeals from county and district courts—Arrangement of the subject.
- § 190. Orders on motion for new trial.
- § 191. Injunctions.
- § 192. Attachments.
- § 193. Change of the place of trial.
- § 194. Partition cases.
- § 195. Interlocutory orders, not appealable themselves, but involving the merits and necessarily affecting the judgment, may be reviewed on appeal from the judgment.
- § 196. Special orders made after final judgment.
- § 197. Orders in relation to costs.
- § 198. Orders in relation to contempt.
- § 199. The appeal must be taken from the order complained of, if appealable, and not from a subsequent order refusing to set it aside.

§ 187. **What is an Order.**—The provision of the code is as follows: "Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order."<sup>1</sup> It is essential, under this definition, that the order should be "made or entered in writing." "A verbal promise of the judge to cause an order to be entered, or a . . . verbal request for an order, verbally granted," without being evidenced by any writing, is inoperative.<sup>2</sup>

<sup>1</sup> Section 1003, California Code of Civil Procedure; Laws of 1851, p. 132, sec. 515; see *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290.

See, also, section 371, *Mills' Annotated Code of Colorado*; section 4880, *Revised Codes of Idaho*; section 7139, *Revised Codes of Montana* (section 1820, *Code of Civil Procedure*); section 2685, subdivision 97, *Compiled Laws of New Mexico*; section 7320, *Revised Codes of North Dakota*; section 6064, *Compiled Laws of Oklahoma*; section 534, *Lord's Oregon Laws*; section 548, *Code of Civil Procedure of South Dakota*; section 3323, *Compiled Laws of Utah*; section 405,

*Rem. & Bal. Code of Washington* (section 5080, *Bal. Code*); section 4606, *Compiled Statutes of Wyoming*.

"All rulings made in the course of the proceedings leading up to the judgment are orders." *Coyle v. Seattle etc. Co.*, 31 Wash. 181, 71 Pac. 733. And see *Dahlstrom v. Portland etc. Co.*, 12 Idaho, 87, 85 Pac. 916.

<sup>2</sup> *Campbell v. Jones*, 41 Cal. 515.

In *State v. Bowser*, 21 Mont. 133, 53 Pac. 179, it was contended that an order granting leave to file an information was invalid because not in writing; but the court held that the validity of an order of the court could not be made to rest upon the



If the order be made in open court, it must be entered in the minute-book kept by the clerk,<sup>3</sup> but need not be signed by the judge; if made out of court, it must be signed by the judge, and should be filed. Whether an order made out of court and signed by the judge is operative without being filed is not entirely clear. The section above quoted is silent as to the filing, nor has any section been found which expressly requires the filing. In *Swift v. Canovan*,<sup>4</sup> where the defendant obtained an order from the judge extending the time to answer, but did not file it, and a judgment by default was taken against him, it was set aside on motion, and the supreme court affirmed the order upon the default, saying: "The more correct practice certainly is to file or serve the order extending the time to answer. But we are not aware of any provision of law requiring it to be filed or served."<sup>5</sup> In the more recent decision of *Devlin v. Rydberg*,<sup>6a</sup> however, it was held that a mere declaration, although in writing and signed by a judge of a superior court, that it is "ordered, adjudged, and decreed that said injunction is no longer in force," not filed with the clerk, and not intended to be entered in the minutes, is not a "direction" within the meaning of section 1003, above referred to, is not an order, and is not appealable.<sup>6b</sup>

Not only is it doubtful whether a written expression, signed but not filed, can be regarded as an "order" of the court, from which

performance by the clerk of his ministerial duty to enter it—at least, as to an order of this description. The language of the court is as follows:

" . . . The point is not made that there was no leave of court at all obtained before filing the information, but that no order was made in writing, and none was entered; that is to say, that an oral order granting leave to a county attorney to file an information is not valid, and especially is it invalid if not entered in the clerk's minutes. The answer to this argument is that by the statute it is not necessary that the order of court granting leave to file an information be an order in writing, other than by an entry in the minutes of the court kept by the clerk. The judge of the court speaks orally for the court, and orders that leave be granted. The judicial act is thus performed, and thereafter the minis-

terial duty of the clerk is to enter the order of the court. . . . "

If an order is not entered, any party injured by failure to enter may insist, as a matter of right, on its entry *nunc pro tunc*. *Douglas Co. Road v. Douglas Co.*, 5 Or. 406.

<sup>3</sup> As to entry of orders, see *Hastings v. Hastings*, 31 Cal. 95. An entry in the rough minutes would probably be sufficient. Look at *People v. Smith*, 59 Cal. 601.

<sup>4</sup> 47 Cal. 86.

<sup>5</sup> See section 1003, quoted in text, and *Bond v. Pacheco*, 30 Cal. 530; *Sullivan v. Triunfo G. & S. M. Co.*, 33 Cal. 385.

<sup>6a</sup> 132 Cal. 324, 64 Pac. 396.

<sup>6b</sup> Unless either filed or entered in the minutes the clerk could not certify an order in a transcript on appeal. Orders by the court or judge should be filed. "The proper place for orders made by a court or the judge thereof is among the files of the

an appeal can be taken, but there is some question as to whether such a writing can be said to be an order, although signed and filed, unless the same be also entered in the minutes. In *Weisser v. Southern Pacific Co.*,<sup>50</sup> where there was a controversy as to the ground upon which a motion for a new trial was really granted, and it was contended that the true ground was stated in a letter signed by the trial judge, the supreme court held that even if the letter could be accepted as a written order of court, signed and filed, it could not be held to limit the effect of the order set out in the minutes of the court granting the motion upon general terms.

The code (section 1704, Code of Civil Procedure), expressly requires probate orders to be entered in the minutes, and the supreme court, in *Tracy v. Coffey*,<sup>51</sup> thus referred to the practice of writing and filing orders:

"There is no statute expressly authorizing the making of a memorial of the terms of an order of the superior court by the method of writing it on a separate piece of paper, and having the judge attach his signature thereto. It has become customary to do so in many instances, and the courts have often recognized such a memorial as competent evidence of the terms of the order. But the code (Code Civ. Proc., sec. 1704) expressly requires probate orders to be entered in the minute-book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of the order which, under our decisions, sets the time running for an appeal. . . . The fact that another memorial exists consisting of a document filed with papers in the case, and that there are some slight discrepancies . . . between the filed order and the entry in the minute-book, would not affect the validity of the minute entry nor extend the time for appeal until another entry was made."

As stated in the decision last quoted, it is customary to regard an order written out and signed, when filed, as an order from which

court in the particular case. Indeed, the practice of securing orders and then retaining or withholding them from the files is one that cannot be commended, and should not be encouraged." *Sandstrom v. Smith*, 11 Idaho, 779, 84 Pac. 1060.

<sup>50</sup> 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636. If there is an order in the minutes it is, under the California decisions, the prevailing record of the action of the court, and its terms cannot be varied by any other

written record thereof, even though signed and filed, and purporting to be the order of the court in the premises. Aside from this, however, in the absence of a minute entry, an order signed and filed would seem to be sufficient basis for an appeal. See *Newman v. Overland Co.*, 132 Cal. 73, 64 Pac. 110; *Ben Lomond Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332.

<sup>51</sup> 153 Cal. 356, 95 Pac. 150.

an appeal may be taken, although no entry thereof is made in the minutes, unless, as in the case of probate orders, special provision has been made for such entry. Thus it has been held that an appeal may be taken from an order made at chambers. And it is not necessary that the order should have been made upon notice. An *ex parte* order may be appealed from without any application to set it aside having first been made.<sup>66</sup>

It is now well settled that a void judgment or order is appealable.<sup>67</sup> In a case where it was argued by the respondent that if the order appealed from was void as contended by appellant, the appeal should be dismissed, the court (although it held that the order was voidable only) said in answer to the argument: "There is, however, something having the form of an order, purporting to have been made subsequent to the judgment in the course of a judicial proceeding, having the sanction of the district judge, assuming to act in his official capacity. It is such an order as the ministerial officers of the court would in all probability act upon. Its validity is even maintained by counsel in this court. Counsel have referred us to no authority to sustain the position that the action of the court in making it cannot be reviewed on appeal. We think the appellants entitled to have the order vacated."<sup>68</sup>

<sup>66</sup> Sullivan v. Triunfo G. & S. M. Co., 33 Cal. 385.

<sup>67</sup> Livermore v. Campbell, 52 Cal. 75; James v. Center, 53 Cal. 31; Huerstal v. Muir, 62 Cal. 479; De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90; 60 Pac. 45. And see Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278; White v. Superior Court, 110 Cal. 54, 42 Pac. 471.

The appealability of an order does not rest upon what may be its operative effect, and therefore the question as to whether it is void or not cannot govern its appealability, which may be said to rest upon what it purports to determine. Thus in Estate of Bullock, 75 Cal. 419, 17 Pac. 540, where the order appealed from purported to determine and settle the final account of the administrator of an estate, although no account had been filed, it was held that the order was appealable, the court saying:

"We express no opinion as to the validity of the orders contained in the portion of the decree appealed

from. Void orders may be appealable. If the orders appealed from can be treated simply as orders commanding the dismissal of the action against the executor, . . . and directing the settlement of an account not yet filed, they were premature, but not appealable. . . . But they were neither mere recitals nor orders independent of the settlement of the account which was ordered in the same decree. When the court undertook to direct the dismissal of the action brought by the administrator upon a claim alleged to be due the estate and to find thereupon that there was no property in the hand of the administrator, it undertook both to state and settle his account to that extent. It determined his rights in that regard, and settled, or attempted to settle, his account as effectually as if the order had been made after he had filed an account. Whether an order is appealable is to be determined by what it purports to determine, not by what may be its actual operative effect."

<sup>68</sup> Bond v. Pacheco, 30 Cal. 530.

Such a judgment or order might, through the exercise of ministerial authority, be made oppressive, and it is eminently proper that a potential grievance, arising out of a proceeding *coram non judice*, should be remedied by the tribunal which exists for the correction of judicial error.<sup>7a</sup>

An appeal may also be taken from a judgment entered in the lower court under the direction of the appellate court. In response to a contention that such a judgment is really a judgment of the appellate court, and that therefore no appeal would lie, the supreme court, in *Randall v. Duff*,<sup>7b</sup> said:

"For some purposes the judgment may be deemed on a par with the judgment which might have been entered here. But great injustice might be done if it were held that such a judgment cannot be appealed from. Serious doubts may arise as to whether the judgment entered was the judgment ordered. And such a judgment is as plainly within the language allowing appeals as any other. I think there can be no doubt of the right to appeal."

In his concurring opinion, McFarland, J., said:

"I concur in the judgment and in the opinion of Mr. Justice Temple. Of course when the lower court enters the judgment directed by this court there is an end of the litigation; but when there is a question whether or not the lower court has entered the judgment directed, then an appeal lies. If the appeal be frivolous, and not taken *bona fide*, the remedy is the imposition of heavy damages."

The appellate court is not limited, however, in its review of matters presented on an appeal from a judgment entered under its direction to the bare question as to whether such judgment was or was not entered in accordance with such direction. Such a judgment, for purposes of appeal, is not to be distinguished from a judgment ordered by the trial court upon its original determination. A judgment entered in obedience to the direction of the higher court has no greater sanctity upon an appeal than if it had been entered after trial anew under a similar direction. If errors have supervened in either case prior to entry, which have conducted thereto, the appellate court may examine them. If new issues are presented, as, for example, in the case of alleged errors in the ad-

<sup>7a</sup> See *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732;

and *Stearns Ranchos Co. v. McDowell*, 134 Cal. 562, 66 Pac. 724.

<sup>7b</sup> 107 Cal. 33, 40 Pac. 20.

mission of evidence, the party aggrieved may present the same on the second appeal as readily as upon the first.<sup>7c</sup>

An appeal may be taken from a part of an order.<sup>8</sup>

**§ 188. Interlocutory Orders are not Appealable Unless Expressly Made so by Statute.**<sup>1</sup>—This has been frequently decided. It is the policy of the law to discourage litigation piecemeal. No good purpose is to be subserved by allowing appeals from every order made pending suit or action, by which some one or other, or even all, the parties are aggrieved. When the final judgment is rendered an appeal may then be taken, and this appeal will amply protect all who are aggrieved, whether by an interlocutory order, or by the final judgment itself. The rule is therefore well settled that interlocutory orders are not appealable, unless expressly so made by statute.<sup>1a</sup> An early case in which this rule was enunciated is that of *Juan v. Ingoldsby*,<sup>2</sup> where it was held that no appeal could be taken from an order granting a change of venue; and *Heydenfeldt, J.*, delivering the opinion, said: "The Practice Act provides an appeal from interlocutory orders refusing to change the place of trial; no appeal is allowed from orders where the change is granted. Appeals from interlocutory orders are the creations of statute, and cannot be extended by implication." So in *Martin v. Travers*,<sup>3</sup> it was held that an appeal could not be taken from an order refusing to dissolve an injunction, and *Burnett, J.*, delivering the opinion,

<sup>7c</sup> See *Klauber v. San Diego etc. Co.*, 98 Cal. 105, 32 Pac. 876; also *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 Pac. 69; and see *Heinlen v. Beans*, 73 Cal. 240, 14 Pac. 855.

<sup>8</sup> See section 185, *ante*.

<sup>1</sup> As to the extent to which the right of appeal depends upon legislative provision, see section 181, *ante*. The legislature of New Mexico (Laws of 1901, c. 82) sought to abrogate the effect of this rule by passing an act authorizing appeals to the supreme court from all interlocutory orders affecting substantial rights, but the act was held to be in conflict with the organic act of the territory in *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933; and it is the established rule in that jurisdiction as elsewhere that interlocutory orders and decrees cannot be made the subject of independent appeal otherwise than by

specific statutory authority. *De Harrison v. Perea*, 11 N. M. 505, 70 Pac. 558.

<sup>1a</sup> See *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670, and other cases cited in section 184, *ante*. Subdivision 3 of section 939, California Code of Civil Procedure, and subdivisions 2 and 3 of section 963 of the same code, name the orders, interlocutory and final, expressly made appealable.

See, also, *Illinois T. & S. Bank v. Alvord*, 99 Cal. 407, 33 Pac. 1132; and *Free Gold Mining Co. v. Spiers*, 135 Cal. 130, 67 Pac. 61; and *S. C.*, 136 Cal. 484, 69 Pac. 143.

<sup>2</sup> 6 Cal. 439. As to present law on subject of change of venue, see section 193, *post*.

<sup>3</sup> 7 Cal. 253. As to present condition of the law on the subject of appeals from orders in reference to injunctions, see section 191, *post*.

said: "The three hundred and forty-seventh section of the Practice Act specifies the cases in which appeals are allowed from the orders and judgments of the district courts and the superior court of San Francisco. No appeal is allowed from an order refusing to dissolve an injunction, nor from an order changing the place of trial. The appeal should be taken from the order granting the injunction; appeal dismissed." So in *De Barry v. Lambert*,<sup>4</sup> it was held that no appeal could be taken from an order denying a motion to set aside a statement, or from an order allowing an amendment to a statement; and Field, J., delivering the opinion, said: "The orders were interlocutory, and no appeal lies from such orders except in the cases provided by statute." So in *Baker v. Baker*,<sup>5</sup> it was held that no appeal could be taken from one which, though not so in form, was in effect an order directing further testimony to be taken in a divorce case; and Field, J., delivering the opinion, said: "It is interlocutory in character, and not, therefore, the subject of appeal. Such orders are appealable only in the special cases provided by statute." So in *Hopper v. Kalkman*,<sup>6</sup> it was held that no appeal could be taken from an order refusing to transfer a cause to a federal court; and Field, C. J., delivering the opinion, said: "The appeal must be dismissed, as from the order no appeal lies. The statute enumerates the orders from which an appeal will lie before final judgment; and this is not embraced among them." So in *Wenborn v. Boston*,<sup>7</sup> it was held that no appeal could be taken from an order denying a motion for leave to intervene; and Crocker, J., delivering the opinion, said: "Section 336 of the Practice Act specifies the cases in which an appeal may be taken, and an order of this kind is not included among them. Nor can it properly be said to be included in the term 'final judgment,' used in that section. The remedy of the appellants is by an appeal from the final judgment when rendered." So in *Moulton v. Ellmaker*,<sup>8</sup> it was held

<sup>4</sup> 10 Cal. 503. See, also, *Leffingwell v. Griffing*, 29 Cal. 192; *Ketchum v. Crippen*, 31 Cal. 365; *Quivey v. Gambert*, 32 Cal. 304; *Calderwood v. Peyser*, 42 Cal. 110; *Clark v. Crane*, 57 Cal. 629; and see section 196, *post*.

<sup>5</sup> 10 Cal. 527; and look at *Johnson v. Dopkins*, 6 Cal. 83; *Peck v. Courtis*, 31 Cal. 207; *Harris v. S. F. S. R. Co.*, 41 Cal. 393.

<sup>6</sup> 17 Cal. 517; affirmed in *Brooks v. Calderwood*, 19 Cal. 124.

<sup>7</sup> 23 Cal. 321; but see *Coburn v. Smart*, 53 Cal. 742; and look at *Stich v. Goldner*, 38 Cal. 608. The decision in *Wenborn v. Boston* was overruled in *Dollenmayer v. Pryor*, 150 Cal. 1, 87 Pac. 616, but it is nevertheless an illustration of the principle here involved, and for that reason is cited. See section 184, *ante*.

<sup>8</sup> 30 Cal. 527; and see, also, *Moraga v. Emeric*, 4 Cal. 308; *Sutter v. San Francisco*, 36 Cal. 112; *Daniels v.*

that an appeal could not be taken from an order sustaining a demurrer; and Currey, C. J., delivering the opinion, said: "By reference to the three hundred and forty-seventh section of the Practice Act, then in force, it will be seen that an order sustaining or overruling a demurrer was not one of those from which an appeal could be taken to and reviewed by this court before final judgment in the cause." So in *Harazthy v. Horton*,<sup>9</sup> it was held that an appeal could not be taken from an order denying a motion for a continuance, the court saying: "The appeal directly from the order refusing the continuance cannot be considered, for the reason that such an order is not in itself a distinct subject of appeal. (Code Civ. Proc., sec. 939.)" So in *Beach v. Hodgdon*,<sup>10</sup> it was held that an appeal would not lie from an order striking out a pleading. So in *Duff v. Duff*,<sup>11</sup> it was held that an interlocutory order establishing a trust and directing an accounting was not appealable. Nor would an order on a motion to set aside a verdict be reviewable on a separate appeal. So in *Watson v. Sutro*,<sup>12</sup> it was held that an interlocutory decree adjudging the plaintiff the owner of a portion of the real estate in controversy, and directing a conveyance thereof, was held not to be separately appealable. So in *Rochat v. Gee*,<sup>13</sup> it was held that an order approving an account of a receiver of a dissolved partnership, which showed on its face that it was not final, and that future accounts were to be filed, the receiver continuing in possession, was not an appealable order. But it was also suggested that the receiver might appeal from an order disallowing his final account. So in *Grey v. Brennan*,<sup>14</sup> an interlocutory order for an accounting in an action for the concealment and fraudulent disposition of trust funds, was held not appealable, as not being a final decree, and not being included in the list of interlocutory decrees expressly made appealable by statute. So before the statute of 1864, interlocutory decrees in

*Lansdale*, 38 Cal. 567; *Hibberd v. Smith*, 39 Cal. 145; *Agard v. Valencia*, 39 Cal. 292; *Ashley v. Olmstead*, 54 Cal. 616. The rule was otherwise under the act of 1851, and until the amendment of 1854. See *Burgoyne v. Perry*, 3 Cal. 50.

<sup>9</sup> 46 Cal. 545.

<sup>10</sup> 66 Cal. 187, 5 Pac. 77.

<sup>11</sup> 71 Cal. 513, 12 Pac. 570. See, also, *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115, where a similar order

in a suit to compel a conveyance of real property was held not appealable, for the same reason.

<sup>12</sup> 77 Cal. 609, 20 Pac. 88.

<sup>13</sup> 91 Cal. 355, 27 Pac. 670. See, also, *Illinois T. & S. Bank v. Alvord*, 99 Cal. 407, 33 Pac. 1132, where the same ruling was made, the receivership being of a corporation instead of a partnership.

<sup>14</sup> 147 Cal. 355, 81 Pac. 1014.

partition were not appealable,<sup>10</sup> and the decisions fully establish the principle stated at the beginning of this section, viz., that such interlocutory orders are not appealable unless expressly made so by statute. The same principle applies to special orders made after final judgment,<sup>11</sup> and to appeals from probate proceedings.<sup>11a</sup> The extent to which the right of appeal depends upon legislative provision has been already considered.<sup>12</sup> For other instances of nonappealable orders, see note below.<sup>13</sup>

What is said above must be taken with the limitation, however, that not all orders, interlocutory in form, are really so. As noted heretofore, there is a well-recognized class of orders made pending suit, ancillary and collateral in character, which are in reality final judgments, and must be treated as such, and not as orders or interlocutory judgments or decrees, which cannot be reviewed on a separate appeal unless expressly so made by statute. Of this class are

<sup>10</sup> See cases quoted in the latter part of section 184, *ante*, and see section 194, *post*.

<sup>11</sup> As to which see section 196, *post*.

<sup>11a</sup> As to which see section 200, *post*.

<sup>12</sup> See section 181, *ante*.

<sup>13</sup> *Rhodes v. Craig*, 21 Cal. 419; *Gates v. Walker*, 35 Cal. 289. And see *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58, where it was held that an order allowing judgment on the pleadings was not appealable; *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66 Pac. 326, where it was held that an order refusing to dismiss an action for want of prosecution was held not appealable; *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352, where it was held that an order refusing to set aside a stipulation was not appealable, but was reviewable on appeal from the judgment; and see *Romine v. Cralle*, 80 Cal. 626, 22 Pac. 296, where it was held that an order denying a motion to call up a motion for a new trial after the same has been denied is not an appealable order.

In other states the following intermediate orders were held nonappealable: An order overruling a demurrer to a bill in chancery: *Armor v. Lyon*, 1 Colo. 7. An order sustaining the demurrer to the declaration: *Andrews v. Loveland*, 1 Colo.

8. An order vacating an award of her statutory allowance: *Lipe v. Fox*, 21 Colo. 140, 40 Pac. 353. An order overruling a motion to set aside a dismissal: *Green v. Hughes*, 9 Colo. App. 61, 47 Pac. 401. An order overruling a demurrer to a petition to vacate a decree: *Thomas v. Thomas*, 10 Colo. App. 170, 50 Pac. 211. Order for judgment: *Hodgins v. Harris*, 4 Idaho, 517, 43 Pac. 72. An order in a foreclosure suit under a trust deed: *Bucher v. Thompson*, 7 N. M. 599, 38 Pac. 250. An order permitting parties to intervene, and an order refusing to strike out an answer as a sham: *Jones v. New York Life Ins. Co.*, 11 Utah, 401, 40 Pac. 702. An order denying a motion for judgment by default: *Schlotsfeldt v. Bull*, 13 Wash. 242, 43 Pac. 33. An order striking plaintiff's complaint from the files: *Havens v. Stewart*, 7 Idaho, 298, 62 Pac. 682. An order for the substitution of a cost bond alleged to have been lost: *Easton v. Broadwell*, 8 Okl. 442, 58 Pac. 506. An order for an accounting and for payment over: *Musser v. Edmunds*, 23 Utah, 425, 64 Pac. 1105. An order denying a motion to discharge a receiver; an order adopting a report of a referee; or an order overruling a demurrer: *Jones v. Quayle*, 3 Idaho (Hasb.) 640, 32 Pac. 1134.



restraining orders which have the effect of preliminary injunctions,<sup>14</sup> orders fixing the compensation of a receiver and directing its payment out of a definite fund, and others of a similar character.<sup>15</sup> Such orders are final judgments, and if the amount involved is within the appellate jurisdiction an appeal may be prosecuted therefrom by any person claiming an interest in the fund, or who may be otherwise aggrieved by such order, and he is not required to await the final disposition of the cause before prosecuting his remedy by appeal.

**§ 189. Difference Between Provisions in Relation to Appeals from the County and District Courts—Arrangement of the Subject.** The purpose of the present, the preceding, and the succeeding chapters is to give the provisions of the statutes that have existed and that exist in relation to appeals from judgments and orders. In carrying out this purpose the only practicable course has seemed to be to treat separately the different determinations which may be the subject of appeal without regard to the nature of the action or proceeding in which such determinations may be made. Thus, for example, the provisions in relation to appeals from orders on motion for new trial are given under the head "orders on motion for new trial," but no mention is made of the actions in which such orders may be made. This follows the section in relation to appeals from the district courts. That section enumerated certain judgments and orders which were appealable, but (with the exception of partition cases) no mention was made of the actions in which such orders could be made. The consequence of this was that the enumerated orders, when made in the district courts, could be appealed from, without regard to the nature of the action in which they were made. But the section in relation to appeals from the county courts enumerated certain orders which were appealable *in certain specified actions and proceedings*. The specifications of such actions and proceedings purported to include all of which the county court had original jurisdiction. And it has not been thought worth while to repeat the distinction in connection with each order.

<sup>14</sup> See *Neumann v. Moretti*, 146 Cal. 31, 79 Pac. 512.

<sup>15</sup> See *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604; *Grant v. Los Angeles etc. Co.*, 116 Cal. 71, 47 Pac. 872; *Los Angeles v. Los Angeles*

*Water Co.*, 134 Cal. 121, 66 Pac. 198; *Anglo-Californian Bank v. Superior Court*, 153 Cal. 753, 96 Pac. 803; and also *Estate of Welch*, 106 Cal. 427, 39 Pac. 805.

A regard for clearness has seemed to require that orders in relation to costs and contempts should be treated in separate sections, and a separate chapter has been devoted to probate proceedings, proceedings in insolvency, and to actions of forcible entry and detainer.

**§ 190. Orders on Motion for New Trial.**—The provisions in relation to the different courts will be considered separately.

1. *Provisions in Relation to the County Court.*—The California Practice Act of 1851 made no provision for any appeal from the county court to the supreme court. It provided an appeal from the county court to the district court,<sup>1</sup> but this was held to be unconstitutional.<sup>2</sup> The act of 1853 “concerning the courts of justice of this state and judicial officers,” provided that,<sup>3</sup>—

“The supreme court shall have jurisdiction to review upon appeal,—

“*Second.* An order granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding.”

But this provision seems to have been construed as providing merely “what this court can review upon appeal, when the cause is regularly before it, and not for bringing up the cause”; and consequently that prior to 1854 no appeal at all could be taken from the county to the supreme court.<sup>4</sup> In 1854 section 359 of the Practice Act was amended so as to provide that an appeal could be taken from the county court to the supreme court “in all cases where the amount in dispute exceeds two hundred dollars, or where the legality of any tax, toll, or impost, or municipal fine is in question”;<sup>5</sup> but there does not seem to have been any provision expressly designating any order or judgment in the county court as appealable until 1866. In that year section 359 was amended so as to provide that an appeal could be taken, among other things, from “an order granting or refusing a new trial,” in the cases in which the county court had jurisdiction.<sup>6</sup> The provision in this regard was reproduced in section 966 of the Code of Civil Procedure.

<sup>1</sup> See Laws of 1851, pp. 108, 109.

<sup>2</sup> *Caulfield v. Hudson*, 3 Cal. 389.

<sup>3</sup> Laws of 1853, p. 288; and look at Laws of 1854, p. 228; and Laws of 1863, p. 333.

<sup>4</sup> *Middleton v. Gould*, 5 Cal. 190, 191.

<sup>5</sup> Laws of 1854, p. 65, sec. 359.

<sup>6</sup> Laws of 1865-66, pp. 846, 847.

2. *Provisions in Relation to the District Courts.*—The statute has always provided an appeal from orders granting or refusing a new trial in the district courts.<sup>7</sup>

3. *Provisions in Relation to the Superior Court.*—Under the Constitution of 1879 the superior courts take the place of the county and district courts, and the code, as amended in 1880, provides that an appeal may be taken from the superior courts to the supreme court from "an order granting or refusing a new trial."<sup>8</sup> As no particular action or proceeding is specified, this provision must be construed to mean an order granting or refusing a new trial in any action or proceeding in which there can be a motion for new trial under the code.<sup>9</sup>

<sup>7</sup> Section 347; Laws of 1851, p. 106; Laws of 1854, p. 64; Laws of 1863, p. 756; Laws of 1865-66, p. 707; section 963, California Code of Civil Procedure.

<sup>8</sup> Section 963, California Code of Civil Procedure.

Section 1214, Revised Statutes of Arizona, subdivision 1, authorizes an appeal from an order refusing a motion for new trial, but there is no express reference to an order granting the motion, although an appeal is authorized, in the same subdivision and connection, from an order granting a motion in arrest of judgment. Section 1716, Rem. & Bal. Code of Washington (section 6500, Bal. Code), authorizes an appeal from an order granting the motion, but not from the converse order.

Section 4807, Revised Codes of Idaho, section 7098, Revised Codes of Montana, section 3425, Cutting's Compiled Laws of Nevada, section 2891, Compiled Laws of New Mexico, section 7225, Revised Codes of North Dakota, section 6067, Compiled Laws of Oklahoma, and section 462, Code of Civil Procedure of South Dakota (subdivision 3), authorize appeals from new trial orders in practically the same phraseology as that used in the California code.

Section 393, Mills' Annotated Code of Colorado, provides that no motion for a new trial is necessary to enable the supreme court to review the judgments and orders of inferior courts, where the matters alleged as errors

have once been passed upon by such court against exceptions made at the time.

Similar provisions are to be found elsewhere, as in North Dakota. Section 7226, Revised Codes of that state, provides that the supreme court may review any intermediate order or determination of the trial court upon an appeal from the judgment, whether the same is excepted to or not.

<sup>9</sup> As to the proceedings in which a motion for new trial is proper, see section 5.

The right of appeal from new trial orders is recognized in most jurisdictions, either by express provision of statute or by judicial rulings; but in Oregon and in Utah it is denied, except that in Oregon, by express provision of section 548, Lord's Oregon Laws, an appeal is permitted from an order granting the motion.

In Oregon, under the provisions of section 6, article 7, of the Constitution, it is essential that an order or judgment should have all the characteristics of finality before it can be made the subject of an appeal (see note 30b, section 183, *ante*); and section 548 provides that "an order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree, . . . shall be deemed a judgment or decree." It was held in

§ 191. **Injunctions.**—For convenience, the provisions in relation to the different courts will be considered separately.

1. *Provisions in Relation to the County Courts.*—As stated in the preceding section, no appeal was provided from the county courts to the supreme court until 1854, and the provision of that year did not designate any particular order as appealable. In 1866 section 359 was amended so as to provide for an appeal from the

Kearney v. Snodgrass, 12 Or. 311, 7 Pac. 309, that an order granting a new trial does not "affect a substantial right," and it was said in Fisk v. Henarie, 14 Or. 29, 13 Pac. 193, that such an order was not a sufficient determination of the action to be appealable. For these reasons, and for others growing out of the fact that orders of this description are in the discretion of the trial court, and can be reviewed only on the ground of abuse, the supreme court has refused to entertain appeals from new trial orders. Section 548, *supra*, however, was amended after the decision of the cases cited, so as to bring orders granting the motion within appellate purview, but orders denying the motion must still be reviewed, if at all, on appeals from the judgment. See State v. Becker, 12 Or. 318, 7 Pac. 329; Tucker v. Mills, 13 Or. 28, 7 Pac. 53; First National Bank v. McCullough, 50 Or. 508, 126 Am. St. Rep. 758, 93 Pac. 366, 17 L. R. A., N. S., 1105; Powell v. Dayton etc. Co., 14 Or. 22, 12 Pac. 83; Mitchell v. Downing, 23 Or. 448, 32 Pac. 394.

Section 9, article 8, Constitution of Utah, permits appeals from all final judgments of the district courts, and the Utah supreme court has held that new trial orders are not final judgments within the meaning of the Constitution. Eastman v. Gurrey, 14 Utah, 169, 46 Pac. 823; White v. Pease, 15 Utah, 170, 49 Pac. 416; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479; Bear Valley Co. v. Hanley, 15 Utah, 506, 50 Pac. 611; Bacon v. Thornton, 16 Utah, 138, 51 Pac. 153; Felt v. Cook, 31 Utah, 299, 87 Pac. 1092.

And the rule as to the nonappealability of the judgment during the pendency of a new trial motion prevails. Stoll v. Daly etc. Co., 19 Utah,

271, 57 Pac. 295; Everett v. Jones, 32 Utah, 489, 91 Pac. 360.

It is to be noted, however, that at one time new trial orders were made appealable by statute. See Laws of Utah, 1884, p. 303, sec. 828; and see Kelly v. Kershaw, 5 Utah, 300, 14 Pac. 808.

The final character of an order on motion for new trial was raised in Schultz v. Keeler, 2 Idaho, 305 (333), 13 Pac. 481, where it was contended that such an order was not appealable because not final. The court said:

" . . . In support of this contention against jurisdiction, counsel refers to McCormick v. Walla Walla Co., 1 Wash. Ter. 512. An examination of that case will show that it is not directly in point in the case at bar. In that case a new trial had been granted in the trial court, and on appeal from the order the supreme court said, in substance, that there was no final decision to appeal from. But, if that decision goes to the extent that counsel here claims for it, we would still be unwilling to follow it. Ever since the organization of this territory litigants have been appealing from orders denying motions for new trials. Our reports show a great number of these cases to have been heard and determined in this court, and now for the first time the right of appeal is questioned. It will be observed that the organic act allows appeals from the final decisions. Now, if an application for a new trial is overruled, is not the order a final decision? Certainly, so far as the court is concerned, it puts an end to the suit. In our opinion it is final, within the meaning of the law, and from such an order or decision an appeal will lie. Wyatt v. Wyatt, 2 Idaho, 219 (236), 10 Pac. 288."

county courts to the supreme court, among other things, from "an order granting or dissolving, or refusing to grant or dissolve an injunction."<sup>1</sup> This language was reproduced in section 966 of the Code of Civil Procedure, as first enacted, but omitted by the amendment of 1874.

2. *Provisions in Relation to the District Courts.*—The Practice Act of 1851 did not enumerate the orders which were appealable, but provided that an appeal could be taken from the district courts to the supreme court from "an order made at a special term granting or refusing a new trial, or which affects a substantial right in an action or special proceeding."<sup>2</sup> The amendment of 1854 enumerated the appealable orders, and provided that an appeal could be taken from the district courts to the supreme court, among other things, from "an order granting or dissolving an injunction."<sup>3</sup> As will be observed, this provision did not include orders *refusing* to grant or dissolve an injunction. And accordingly it was held that no appeal could be taken from an order refusing to grant,<sup>4</sup> or from an order refusing to dissolve,<sup>5</sup> an injunction. No change in section 347 was made until 1863; but in 1859 section 336 (in relation to the *time* of taking appeals) was amended so as to provide that an appeal must be taken within sixty days "from an order granting or dissolving an injunction; and from an order refusing to grant or dissolve an injunction."<sup>6</sup> But section 336 was only in relation to the time for taking appeals,<sup>7</sup> although it was, in all probability, intended by the framer of the amendment to remedy the defect in section 347, as it stood at the time. This latter section was the one which designated the orders which were appealable. It was amended in 1863, so as to provide that an appeal could be taken from the district courts to the supreme court, among other things, from "an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction."<sup>8</sup> This

<sup>1</sup> Laws of 1865-66, p. 846, sec. 359.

<sup>2</sup> Laws of 1851, p. 106, sec. 347. And as to the provisions in relation to the *time* of taking appeals, see Laws of 1851, p. 104, sec. 336; and look at the act "concerning the courts of justice of this state and judicial officers." Laws of 1853, p. 288; Laws of 1854, p. 28; Laws of 1863, p. 333.

<sup>3</sup> Laws of 1854, p. 64, sec. 347; and look at sec. 306, p. 104.

<sup>4</sup> Richards v. McMillan, 6 Cal. 422.

<sup>5</sup> Martin v. Travers, 7 Cal. 253.

<sup>6</sup> Laws of 1859, p. 140, sec. 336. For further amendments of this section, see Laws of 1863, p. 756; Laws of 1865-66, p. 706.

<sup>7</sup> As to the time for taking appeals, see chapter 30.

<sup>8</sup> Laws of 1863, p. 756.

language was reproduced in the amendment of 1866,<sup>9</sup> and in the corresponding section of the Code of Civil Procedure.<sup>10</sup>

3. *Provisions in Relation to the Superior Courts.*—By the Constitution of 1879 the superior courts were substituted for the county and district courts. And in 1880 section 963 of the code was amended so as to provide that an appeal could be taken from the superior courts to the supreme court, among other things, from "an order . . . granting or dissolving, or refusing to grant or dissolve an injunction."<sup>10a</sup>

An application for an injunction (if before the filing of the answer) may be made either upon or without notice to the adverse party.<sup>11</sup> If it be made without notice, and be granted, the adverse party may move in the court below to have the injunction dissolved,<sup>12</sup> and may appeal from the order denying his application if it be denied;<sup>13</sup> or he may (in the case mentioned) appeal directly from the order granting the injunction, even though it was made at chambers.<sup>14</sup> But if the injunction was granted *upon notice* or (which amounts to the same thing) upon an order to show cause the only remedy of the party enjoined is to appeal from the order granting the injunction. The court below should not entertain a motion to dissolve an injunction which was granted upon notice, or upon an order to show cause. An order dissolving such an in-

<sup>9</sup> Laws of 1865-66, p. 707, sec. 347.

<sup>10</sup> Section 963, California Code of Civil Procedure.

<sup>10a</sup> Section 963, California Code of Civil Procedure, in so far as it refers to injunctions, is as follows: "2. From an order . . . granting or dissolving an injunction, or refusing to grant or dissolve an injunction, . . ." Section 4807, Revised Codes of Idaho, and section 3425, Cutting's Compiled Laws of Nevada, contains the same language.

Section 7098, Revised Codes of Montana (act approved February 28, 1899), contains the same language as the codes above quoted; but section 7099, the corresponding provision which fixes the time to take appeals, is as follows: "3. . . . From an order granting, dissolving, or modifying an injunction," etc. See, also, section 462, subdivision 3, Code of

Civil Procedure of South Dakota, and section 6067, Compiled Laws of Oklahoma.

<sup>11</sup> Sections 528, 530, California Code of Civil Procedure; old Practice Act, secs. 113, 114.

<sup>12</sup> Section 532, California Code of Civil Procedure; old Practice Act, sec. 118.

<sup>13</sup> If the party were compelled to appeal from the order made without notice, he would have no opportunity to make a showing. It is only where he conceives that the order was improper upon plaintiff's own showing that it is advisable to appeal directly from the order granting the injunction.

<sup>14</sup> *Sullivan v. Triunfo G. & S. M. Co.*, 33 Cal. 385. As to injunction granted by the county judge in a cause pending in the district court, see *Crandall v. Woods*, 6 Cal. 449.

junction will be reversed,<sup>15</sup> and an order refusing to dissolve it will be affirmed,<sup>16</sup> irrespective of the merits of the motion.

A refusal to grant an order to show cause why an injunction should not issue is not an "order refusing to grant an injunction," and is not appealable.<sup>17</sup>

An order striking out the mandatory portion of an injunction is, in effect, an order dissolving an injunction to that extent, and is therefore appealable.<sup>18</sup>

While an order refusing to dissolve a preliminary injunction is appealable, after it becomes merged into the final judgment it may be reviewed on appeal from the latter; and if it should be decided that the final judgment was correctly rendered, any error there might have been in granting or refusing to dissolve such preliminary injunction becomes immaterial.<sup>19</sup>

A restraining order issued *ex parte* before defendant's appearance is a preliminary injunction, and is therefore appealable.<sup>20</sup>

<sup>15</sup> Natoma Water Co. v. Clarkin, 14 Cal. 544; Natoma Water Co. v. Parker, 16 Cal. 83.

<sup>16</sup> Curtis v. Sutter, 15 Cal. 259.

<sup>17</sup> Grant v. Johnson, 45 Cal. 243.

<sup>18</sup> See Wolf v. Supervisors, 143 Cal. 333, 76 Pac. 1108.

<sup>19</sup> See Thema v. Sisson, 152 Cal. 167, 92 Pac. 64.

<sup>20</sup> See Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512.

The following cases from other jurisdictions are noted: In Hadley v. Ulrich, 1 Okl. 380, 33 Pac. 705, where there was an attempted appeal from an injunction which was in form and effect merely an interlocutory order of the court, the supreme court held it not appealable. In Helm v. Gilroy, 20 Or. 517, 26 Pac. 851, the court refused a preliminary injunction, and entered a final decree settling the rights of the parties under the whole controversy. It was held that an appeal would not lie from the injunction order, but the appeal was properly prosecuted from the final judgment. In Basche v. Pringle, 21 Or. 24, 26 Pac. 863, it was held that an appeal would not lie from an order overruling a motion to dissolve a preliminary injunction in a suit for partnership dissolution, such an order not being one "affecting a substantial right," or one "which, in effect, de-

termines the action," under section 535, Hill's Code. In Putnam v. Putnam, 2 Ariz. 259, 14 Pac. 356, and Bogan v. Pignataro, 3 Ariz. 383, 29 Pac. 652, it was held that orders refusing to dissolve temporary injunctions were not orders affecting substantial rights so as to render them reviewable on independent appeals. In Mahneke v. Tacoma, 1 Wash. 18, 23 Pac. 804, it was held that an order refusing a temporary injunction was not a final decision under the Revised Statutes of the United States, section 1869, in regard to appeals from territories, and hence was not appealable, independently from the final judgment. See, also, to same effect, Johnston v. Eisenbeis, 1 Wash. 259, 24 Pac. 446. In Sprague v. Locke, 1 Colo. App. 171, 28 Pac. 142, it was held that section 159 of the Colorado Civil Code permitted appeals from writs of injunction asking affirmative relief. In Wells v. Northern Pacific Co., 2 Wash. Ter. 303, 5 Pac. 215, it was held that an order granting or modifying a temporary injunction is not a final order from which an appeal might be prosecuted. In Denver v. Monash, 21 Colo. 453, 42 Pac. 662, it was said that a temporary injunction could not be reviewed otherwise than as any other interlocutory order, on the appeal from the final judg-

§ 192. **Attachments.**—The act of 1851 provided that an appeal could be taken from the district courts to the supreme court from “an order made at a special term granting or refusing a new trial, or *which affects a substantial right* in an action or proceeding.”<sup>1</sup> While this act was in force it seems to have been held that an order refusing to dissolve an attachment was appealable.<sup>2</sup> In 1854 the provision was amended so as to enumerate the appealable orders; but no mention was made of orders dissolving or refusing to dissolve attachments;<sup>3</sup> nor were such orders mentioned in the amendment of 1863.<sup>4</sup> In the case of *Taaffe v. Rosenthal*,<sup>5</sup> however, it was said that an order refusing to dissolve an attachment was appealable. But the order in that case was not disturbed, the court being of opinion that it was correct. And the case was disapproved in *Allender v. Fritts*,<sup>6</sup> where it was held that an order refusing to dissolve an attachment was not itself appealable, and could not be reviewed on appeal from the final judgment, it not being an “intermediate order involving the merits, and necessarily affecting the judgment.” Under this decision there was no way in which an order dissolving or refusing to dissolve an attachment could be reviewed. This defect was remedied by the act of 1866, which provided that an appeal could be taken from the district court to the supreme court “from an order dissolving or refusing to dissolve an attachment.”<sup>7</sup> This provision was reproduced in section 963 of

ment. In *North Point etc. Co. v. Utah* etc. Co., 14 Utah, 155, 46 Pac. 824, it was held that an order granting a temporary injunction is not a final judgment from which an appeal can be prosecuted. In *Wetzstein v. Boston* etc. Co., 25 Mont. 85, 63 Pac. 799, it was held that an appeal would not lie from a temporary injunction.

In *Blue Bird etc. Co. v. Murray*, 9 Mont. 468, 23 Pac. 1022, it was held that under the provisions of sections 421 and 444, Code of Civil Procedure, an order modifying and partially dissolving an injunction was appealable by independent process.

<sup>1</sup> Laws of 1851, p. 106, sec. 347. The county courts not having jurisdiction of money demands upon which attachments could issue (except by way of appeal), no provision was made for appeals from those courts from orders dissolving or refusing to dissolve attachments. Laws of 1854, p. 65, sec. 359; Laws of 1865–66, p. 846, sec. 359.

<sup>2</sup> *Griswold v. Sharpe*, 2 Cal. 17.

<sup>3</sup> Laws of 1854, p. 64, sec. 347; see, also, sec. 336, p. 64.

<sup>4</sup> Laws of 1863, p. 756, sec. 347; see, also, sec. 336, p. 756.

<sup>5</sup> 7 Cal. 514.

<sup>6</sup> 24 Cal. 447. In the subsequent case of *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49, the court said with reference to an order refusing to dissolve an attachment: “The order is not an appealable order (*Allender v. Fritz*, 24 Cal. 447), but all the material points made in regard to the attachment arise also on appeal from the judgment.” By this, however, was not meant that the order itself could be reviewed on appeal from the judgment, but only that the appeal from the judgment in the case happened to involve the same questions as the appeal from the order.

<sup>7</sup> Laws of 1865–66, p. 707, sec. 347; see, also, sec. 336, pp. 706, 707.

See, also, section 4807, Revised Codes of Idaho; section 7098, Revised Codes of Montana; section 3425, Cal.



the Code of Civil Procedure. After the creation of the superior courts by the Constitution of 1879, section 963 was amended so as to provide that an appeal could be taken from the superior court to the supreme court from an order "dissolving or refusing to dissolve an attachment."<sup>8</sup> And so the law stands at present.

An order discharging from an attachment property claimed as exempt is in effect an order dissolving an attachment, and is appealable under the section of the Code of Civil Procedure last above cited.<sup>9</sup>

**§ 193. Change of the Place of Trial.**—Under the old California Practice Act no appeal was provided from the county court to the supreme court from orders changing, or refusing to change, the

ting's Compiled Laws of Nevada; section 7225, Revised Codes of North Dakota; section 462, subdivision 3, Code of Civil Procedure of South Dakota; section 1716, Rem. & Bal. Code of Washington (section 6500, Bal. Code),—each authorizes appeals from orders dissolving or refusing to dissolve attachments. No express provision is found in the statutes of Arizona, New Mexico, Oregon, or Wyoming, where, if authorized at all, the authority is derived from general provisions, which, in the main, are practically the same as the earlier California practice.

In *Sheppard v. Yocum*, 11 Or. 234, 3 Pac. 824, the supreme court of that state, in the construction of a statute identical with the California statute under which the cases of *Taffe v. Rosenthal*, and *Allender v. Fritz*, *supra*, were decided, held in accordance with the first-named decision that the statute authorized an appeal from the attachment order. But in *Farmers' Bank v. Key*, 33 Or. 443, 54 Pac. 206, it was held that an intermediate order dissolving an attachment was not appealable.

The rule in New Mexico is to be gathered from the following cases: In *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933, and *Machen v. Keeler*, 11 N. M. 413, 68 Pac. 937, it was held that an order vacating an attachment is not an appealable order; and in the latter case it was held that the statutory provision (Laws of 1899, c. 75,

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secs. 8, 9), allowing such appeals was unconstitutional as being in violation of the organic act. In the earlier case of *Schofield v. American etc. Co.*, 9 N. M. 485, 54 Pac. 753, a similar principle was followed.

In *Westheimer v. Hahn*, 15 Okl. 49, 78 Pac. 378, it was held that an order dissolving an attachment was not appealable. "There being no provision for appeals from interlocutory orders such as the dissolving of an attachment, it follows that no appeal will lie." A similar conclusion was reached in the Colorado case of *Bogert v. Adams*, 5 Colo. App. 510, 39 Pac. 351. "The order dissolving the attachment was interlocutory, and no appeal lies from such an order." And see *Hagerman v. Moore*, 2 Colo. App. 83, 29 Pac. 1014.

<sup>8</sup> See, also, the provision in relation to the time of taking appeals, Code of Civil Procedure, section 939, and chapter 30, hereof. And see *Flagg v. Puterbaugh*, 101 Cal. 583, 36 Pac. 95.

See, also, *Augir v. Foresman*, 23 Wash. 595, 63 Pac. 201; *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902; *Red River etc. Bank v. Freeman*, 1 N. D. 196, 46 N. W. 36; *Maxwell v. Griffith*, 20 Wash. 106, 54 Pac. 938; *Jensen v. Hughes*, 12 Wash. 661, 42 Pac. 127; *Spokane etc. Co. v. Fritz*, 26 Wash. 433, 67 Pac. 252.

<sup>9</sup> *Risdon Iron Works v. Citizens' Co.*, 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529.

place of trial.<sup>1</sup> The Code of Civil Procedure as first enacted provided an appeal from the county court "from an order changing, or refusing to change, the place of trial."<sup>2</sup> But this provision was omitted from the amendment of 1874, and no further change was made during the existence of the county courts.

The statute of 1851 in relation to appeals from the district courts provided that an appeal could be taken from those courts to the supreme court from "an order made at a special term granting or refusing a new trial, or which affects a substantial right in an action or special proceeding."<sup>3</sup> In 1854 the section was amended so as to enumerate the appealable orders, and it provided that an appeal could be taken (among other things) from "an order refusing to change the place of trial of an action or proceeding, after a motion is made therefor, in the cases provided by law, or on the ground that a judge is disqualified from hearing or trying the same."<sup>4</sup> It will be observed of this provision that it does not include orders *granting* a change of the place of trial; and accordingly, in *Juan v. Ingoldsby*,<sup>5</sup> it was held that no appeal could be taken from such orders. The amendment of 1863<sup>6</sup> omitted the provision last quoted; and from that time and until the adoption of the Code of Civil Procedure there was no provision permitting an appeal from orders granting or refusing a change of the place of trial.<sup>7</sup> The code as first enacted provided that an appeal could be taken from the district courts to the supreme court from "an order changing, or refusing to change, the place of trial."<sup>8</sup> The Constitution of 1879 abolished district and county courts, and created in their place the superior courts; and in 1880 section 963 was amended so as to provide that an appeal may be taken from the superior courts to the

<sup>1</sup> See section 182; Laws of 1854, p. 65, sec. 359; Laws of 1865-66, pp. 846, 847.

<sup>2</sup> Section 966, California Code of Civil Procedure; see in this connection section 189.

<sup>3</sup> Laws of 1851, p. 106, sec. 347; and see sec. 336, p. 104; and see Laws of 1853, p. 288; Laws of 1854, p. 28; Laws of 1863, p. 333.

<sup>4</sup> Laws of 1854, pp. 64, 65, sec. 347; see, also, sec. 336, p. 64; and same section in Laws of 1859, p. 140.

<sup>5</sup> 6 Cal. 439. As to appeals in criminal cases, see *People v. Stillman*, 7 Cal. 117.

<sup>6</sup> Laws of 1863, p. 756, secs. 336, 347.

<sup>7</sup> See Laws of 1865-66, p. 707, sec. 347, and sec. 336, pp. 706, 707. Nor could an order changing the place of trial be reviewed on *mandamus*, even though erroneous. *People v. Sexton*, 24 Cal. 78. Nor was an order denying a motion to transfer to a federal court appealable. *Hopper v. Kalkman*, 17 Cal. 517.

<sup>8</sup> Section 963; see, also, section 939 of the California Code of Civil Procedure in relation to the time for taking appeals.

supreme court from an order "changing, or refusing to change, the place of trial."<sup>\*</sup> And so the law stands at present.

**§ 194. Partition Cases.**—Under the old Constitution partition cases were to be brought in the district courts, and consequently the provisions in relation to appeals from the district courts applied to such cases. And prior to the year 1864 the appealable orders in partition cases were the same in other cases in the district courts. But in that year an act was passed which provided (in addition to the appeals allowed in ordinary actions) an appeal "from the judgment or decree of the court in cases of partition, which determines the rights of the several parties and directs partition to be made."<sup>1</sup>

<sup>\*</sup> See section 963, subdivision 2, California Code of Civil Procedure; and, as to time to take appeals, section 939, same code; and see, also, as to place of trial in civil actions, section 392 et seq., same code; and as to change of place of trial in civil actions, section 397 et seq., same code; and as to removal of action in criminal procedure, see section 1033 et seq., California Penal Code.

Motion to change place of trial is addressed to discretion of court when the cause is convenience of witnesses. See *Sloan v. Smith*, 3 Cal. 410; *People v. Fisher*, 6 Cal. 154; *Watson v. Whitney*, 23 Cal. 375; *Hanchett v. Finch*, 47 Cal. 192; *Avila v. Meherin*, 68 Cal. 478, 9 Pac. 428; *Clanton v. Ruffner*, 78 Cal. 268, 20 Pac. 676; *Stockton v. Houser*, 103 Cal. 377, 37 Pac. 179.

Also *Black v. Bent*, 20 Colo. 342, 38 Pac. 387; *Harris v. Ramsey*, 16 Mont. 302, 40 Pac. 589; *Richardson v. Augustine*, 5 Okl. 667, 49 Pac. 930; *State v. Court*, 9 Wash. 673, 38 Pac. 155.

As to discretion of court in general, see *People v. Elliott*, 80 Cal. 296, 22 Pac. 207; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581 (and cases cited in the *Elliott* case).

As to appeals from orders of this description, see *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211.

A refusal to pass upon a motion for a change of venue, or an unreasonable delay in doing so, may be remedied by writ of mandate. See *Livermore v. Brundage*, 64 Cal. 299,

30 Pac. 848; *Krumdieck v. Crump*, 98 Cal. 117, 32 Pac. 800; *San Joaquin v. Superior Court*, 98 Cal. 602, 33 Pac. 482; and see, also, *Paige v. Carroll*, 61 Cal. 211; *Upton v. Upton*, 94 Cal. 26, 29 Pac. 411.

See, also, section 4807, Revised Codes of Idaho.

Provisions in the codes of other states corresponding to that in the California code authorizing independent appeals from orders changing or refusing to change the place of trial are rare. The decisions are not in harmony in those states where the jurisdiction of the appellate courts depends upon general provisions. Thus in *State v. Shaw*, 21 Nev. 222, 29 Pac. 321, it was held, in the absence of an express authorization, that such an order was not appealable. Also in *Peters v. Jones*, 26 Nev. 259, 66 Pac. 745, 67 Pac. 466, to same effect. On the other hand, a contrary view, upon a similar general authorization was adopted in *White v. Railway Co.*, 5 Dak. 508, 41 N. W. 730. The Nevada view was adopted in *Bogle v. Puget Sound etc. Co.*, 3 Wash. 138, 28 Pac. 376, where it was held to be a mere interlocutory order having no connection with or effect upon the final determination of the controversy. In *Re Davis' Estate*, 11 Mont. 1, 27 Pac. 342, an appeal from the order was entertained, but it seems that the entire proceedings of the trial court were incorporated in the transcript.

<sup>1</sup> Laws of 1863-64, p. 223. This statute was not retroactive. See *Gates v. Salmon*, 28 Cal. 320; *Peck v. Courtis*, 31 Cal. 207, 209.

The judgment referred to in this act is that which is commonly known as the interlocutory decree. Prior to the act of 1864 the interlocutory decree was not the subject of appeal,<sup>2</sup> but was reviewable on appeal from the final judgment as an intermediate order affecting the merits.<sup>3</sup> After the act went into operation the interlocutory decree, being itself appealable, was not longer open to review on appeal from the final judgment.<sup>4</sup>

The provision of the act of 1864 was incorporated into section 347 of the General Practice Act by the amendment of 1866,<sup>5</sup> which provided that an appeal could be taken from the district courts to the supreme court (among other things) "from such interlocutory judgment in actions for partition as determines the rights and interests of the parties, and directs partition to be made." And section 336 as amended in 1866<sup>6</sup> provided that the appeal must be taken within sixty days. Section 347 as amended in 1866 stood until the adoption of the Code of Civil Procedure, and its provisions as to partition cases were reproduced in section 963 of the code as first enacted. By the Constitution of 1879 the district courts were abolished and the superior courts created in their stead; and in 1880 section 963 was amended so as to provide that an appeal could be taken from the superior courts to the supreme court (among other things) "from such interlocutory judgments in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made."

Up to this time no appeal had been allowed from orders in relation to the report of referees to make partition in accordance with the rights as determined by the interlocutory decrees;<sup>7</sup> and section 963, as amended in 1880, did not give such appeal. But section 939, in relation to the *time* for taking appeals, as amended in 1880, provided that an appeal could be taken (among other things) from "an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for partition of real property, in the cases mentioned in section 763 of this code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court or filed with the clerk." As

<sup>2</sup> *Gates v. Salmon*, 28 Cal. 320; *Peck v. Vandenberg*, 30 Cal. 11; *Peck v. Courtis*, 31 Cal. 207, 209; *Hastings v. Cunningham*, 35 Cal. 549.

<sup>3</sup> *Peck v. Vandenberg*, 30 Cal. 11.

<sup>4</sup> *Hihn v. Peck*, 30 Cal. 280; *Regan v. McMahon*, 43 Cal. 625; *Lorenz v.*

*Jacobs*, 53 Cal. 24; *Barry v. Barry*, 56 Cal. 10; and see section 195, note 2.

<sup>5</sup> *Laws of 1865-66*, p. 707.

<sup>6</sup> See section 205, *post*.

<sup>7</sup> *Peck v. Courtis*, 31 Cal. 207.

stated above, no corresponding provision was added to section 963 in relation to the orders which are appealable; but there can be no doubt that the provision inserted in section 939 had the effect of making the orders mentioned the subject of appeals.<sup>8</sup> In partition cases, therefore, the interlocutory decree, and orders in relation to report of the referees, are appealable as well as the orders in the ordinary cases.<sup>9</sup>

**§ 195. Interlocutory Orders Which are not Appealable, but Which Involve the Merits or Necessarily Affect the Judgment, may be Reviewed on Appeal from the Judgment.**—The provision of the old Practice Act which stood from the time of its adoption in 1851 until the Code of Civil Procedure was as follows:<sup>1</sup>

“Sec. 344. Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.”

As first enacted, the corresponding section of the code was as follows:

“Sec. 956. Upon an appeal from a judgment the court may review the verdict or decision, if excepted to, or any intermediate order which involves the merits or necessarily affects the judgment.”

So far as concerns the subject under consideration, section 956, just quoted, was the same as section 344 of the old Practice Act. And it was well settled that section 344 did not apply to orders which were themselves appealable, and that such orders could not be reviewed on appeal from the judgment.<sup>2</sup> This principle was incorporated into section 965 by the amendment of 1876. As then amended that section read as follows:

“Sec. 956. Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate order or decision excepted to,<sup>3</sup> which involves the merits or necessarily affects the

<sup>8</sup> See section 184, note 17a, *ante*.

<sup>9</sup> See, also, section 4807, Revised Codes of Idaho; section 7098, Revised Codes of Montana; section 3425, Cutting's Compiled Laws of Nevada.

<sup>1</sup> Laws of 1851, p. 105. This section applied to both county and district courts; and look at Laws of 1853, p. 288; Laws of 1854, p. 28; and Laws of 1863, p. 333.

<sup>2</sup> *Hihn v. Peck*, 30 Cal. 280; *McCourtney v. Fortune*, 42 Cal. 387;

*Regan v. McMahon*, 43 Cal. 625; and look at *Lorenz v. Jacobs*, 53 Cal. 24; *Barry v. Barry*, 56 Cal. 10, decided after amendment of 1876.

<sup>3</sup> As to what is exception, see sections 646 and 648, California Code of Civil Procedure. Certain orders are deemed to be excepted to. Section 647, California Code of Civil Procedure. When the order is not deemed to be excepted to, the exception to it must be taken at the time the order

judgment, *except a decision or order from which an appeal might have been taken.*"

This section has not since been changed. It is not every intermediate or interlocutory nonappealable order which may be reviewed on appeal from the judgment, but only such as "involve the merits and necessarily affect the judgment." Thus in *Allender v. Fritts*,<sup>4</sup> it was held that an order refusing to dissolve an attachment was neither appealable nor reviewable on appeal from the final judgment; and Sawyer, J., delivering the opinion, said:

"The attachment is merely a proceeding ancillary to the action, by which a party is enabled to acquire a lien for the security of his demand by a levy made before instead of after the entry of a judgment. This ancillary proceeding may be taken at the time of the commencement of the action, or at any time afterward. Neither the action nor the judgment, under our law, in any manner depends upon the attachment, although the attachment depends upon the action. The judgment in the case is precisely the same, whether the attachment is dissolved or not. In those states where the attachment is used as a process acquiring jurisdiction, the consequence of dissolving or refusing to dissolve an attachment might be different. But here the judgment is not in any respect affected by the attachment. We could neither reverse nor modify the final judgment in any particular in consequence of any error in the attachment proceedings. The provision, 'upon an appeal from a

is made. Section 646, California Code of Civil Procedure. No particular form of exception is required. Section 648, California Code of Civil Procedure. But the exception must be stated *in the bill of exceptions* with sufficient matter to explain it. As to what is exception, see section 258, *post*.

See, also, section 1213, Revised Statutes of Arizona; sections 78 and 398, Mills' Annotated Code of Colorado; section 4824, Revised Codes of Idaho; section 7226, Revised Codes of North Dakota; section 6067, Compiled Laws of Oklahoma; section 558, Lord's Oregon Laws; section 3304, Compiled Laws of Utah; section 1716, subdivision 7, Rem. & Bal. Code of Washington (section 6500, Bal. Code).

In most of the codes except California are to be found also provisions, the phraseology of which is applicable

to both judgments and orders, interlocutory or intermediate and final, in point of time. The Oregon provision, section 548, Lord's Oregon Laws, is as follows: " . . . . An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein. . . . " See, also, section 1214, subdivision 2, Revised Statutes of Arizona; section 7225, subdivision 1, Revised Codes of North Dakota; section 462, subdivision 1, Code of Civil Procedure of South Dakota; section 1716, subdivision 6, Rem. & Bal. Code of Washington (section 6500, Bal. Code); section 5107, Compiled Statutes of Wyoming.

<sup>4</sup> 24 Cal. 447. After this decision orders dissolving or refusing to dissolve attachments were added to the list of appealable orders. See section 192, *ante*.

judgment the court may review any order involving the merits and necessarily affecting the judgment,' implies that it shall not review intermediate orders not affecting the judgment. We think the question cannot be reviewed in this form of proceeding. It is a case for which the Practice Act has made no provision."

Upon the reasoning of this case it would probably be held that no order in relation to the provisional remedies is reviewable on appeal from the final judgment.\* In *Williams v. Conroy*,<sup>6</sup> which was an action to settle the accounts of a trustee, it was held that an order requiring the trustee to pay a sum of money into court, and that upon such payment he be discharged from all further liability as trustee, and reserving the distribution of the money between the persons entitled was not a final judgment and was not appealable. Whether such an order is reviewable on appeal from the final judgment seems questionable.

The following orders were held to be nonappealable and were *said* to be reviewable on appeal from the final judgment, viz.: An order bringing in a new party defendant,<sup>7</sup> an order sustaining exceptions to the report of a referee to take an account,<sup>8</sup> an order sending a divorce case back to the commissioner for further testimony,<sup>9</sup> an order denying a motion for leave to intervene,<sup>10</sup> an order sustaining or overruling a demurrer,<sup>11</sup> an order striking out a part of a pleading,<sup>11a</sup> an order striking out a complaint,<sup>11b</sup> an order

\* As to orders in relation to injunctions and attachments, see sections 191, 192, *ante*.

<sup>6</sup> 52 Cal. 414. So far as can be gathered from the report, the order was in substance a simple requirement to pay money into court. Upon the reasoning of *Allender v. Fritz*, quoted in the text, such an order would not seem to be appealable. See in this connection the case of *Adams v. Woods*, 21 Cal. 165.

<sup>7</sup> *Beck v. San Francisco*, 4 Cal. 375.

<sup>8</sup> *Johnson v. Dopkins*, 6 Cal. 83, 84. See, in this connection, *Hihn v. Peck*, 30 Cal. 280, 287; *Harris v. S. F. S. R. Co.*, 41 Cal. 393. But the above does not apply to the report of a referee to report a judgment, or to pass upon the issues of fact raised by the pleadings.

<sup>9</sup> *Baker v. Baker*, 10 Cal. 527.

<sup>10</sup> *Wenborn v. Boston*, 23 Cal. 321; but see *Coburn v. Smart*, 53 Cal. 742;

and look at *Stich v. Goldner*, 38 Cal. 608. See note 16b, section 184, *ante*; note 7, section 188, *ante*.

<sup>11</sup> *Agard v. Valencia*, 39 Cal. 292; and see *Moraga v. Emeric*, 4 Cal. 308; *Moulton v. Ellmaker*, 30 Cal. 527; *Sutter v. San Francisco*, 36 Cal. 112; *Daniels v. Lansdale*, 38 Cal. 567; *Hibberd v. Smith*, 39 Cal. 145; *Ashley v. Olmstead*, 54 Cal. 616; *Heilbron v. Irrigation Co.*, 76 Cal. 8, 17 Pac. 932; *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868. Also, *Oregon v. Portland etc. Co.*, 52 Or. 502, 95 Pac. 722, 98 Pac. 160; *Miller v. Hunt*, 6 Idaho, 523, 57 Pac. 315.

<sup>11a</sup> *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394; *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868.

<sup>11b</sup> *Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292.

striking out an amended complaint,<sup>110</sup> an order striking out a demurrer,<sup>111</sup> an order allowing judgment on the pleadings,<sup>112</sup> an order setting aside a default in a case where no judgment has been rendered,<sup>113</sup> an order refusing a continuance,<sup>114</sup> an order setting aside an order settling the account of an assignee of an insolvent debtor stated by a referee in an action to set aside and vacate an alleged fraudulent assignment,<sup>115</sup> an order denying a motion to set aside an indictment,<sup>116</sup> an order directing that a complaint be made more definite,<sup>117</sup> an order denying a motion in arrest of judgment,<sup>118</sup> an order refusing leave to withdraw a plea of guilty,<sup>119</sup> an order on an attachment,<sup>120</sup> and others.<sup>121</sup>

An order denying a motion for judgment on the pleadings was said in *McAbee v. Randall*<sup>12</sup> to be reviewable only on appeal from the judgment. An order substituting a party plaintiff was held to be nonappealable in *Welch v. Allen*,<sup>13</sup> and is probably reviewable on appeal from the judgment.<sup>14</sup> An order denying a motion for a nonsuit is not appealable, but is reviewable on appeal from the judgment,<sup>15</sup> and the same may be said of an order granting such a motion, but with somewhat less of certainty.<sup>15a</sup> In *Melde v. Ray-*

<sup>110</sup> *Cleland v. Walbridge*, 78 Cal. 358, 20 Pac. 730.

<sup>111</sup> *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

<sup>112</sup> *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; but see note 12 below.

<sup>113</sup> See *Savage v. Smith*, 154 Cal. 325, 97 Pac. 821; and see note 20a, section 184, *ante*. Also *Rauer's etc. Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214; *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739; *Thornburg v. Gutridge*, 46 Or. 286, 80 Pac. 100; *Burbank v. Rivers*, 20 Nev. 81, 16 Pac. 430; *State v. Langan*, 29 Nev. 459, 91 Pac. 737; *Van Riper v. Botsford*, 29 Nev. 465, 91 Pac. 738.

<sup>114</sup> *People v. Buck*, 151 Cal. 667, 91 Pac. 529; *People v. Besold*, 154 Cal. 363, 97 Pac. 871. Also *Pacific etc. Co. v. Inman*, 50 Or. 22, 90 Pac. 1099.

<sup>115</sup> *Etchebarne v. Roeding*, 89 Cal. 517, 26 Pac. 1079.

<sup>116</sup> *People v. Simmons*, 119 Cal. 1, 50 Pac. 844; and see sections 1237 and 1259, California Penal Code.

<sup>117</sup> *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761.

<sup>118</sup> See note 21a, section 184, *ante*.

<sup>119</sup> *People v. Dabner*, 153 Cal. 398, 95 Pac. 880.

<sup>120</sup> *Van Voorhies v. Taylor*, 24 Or. 247, 33 Pac. 380.

<sup>121</sup> An order quashing an information. *Mahoney v. Elliott*, 8 Idaho, 356, 69 Pac. 108. Denying a motion to dismiss an appeal from a lower court. *Winscott v. Shelton*, 5 Colo. App. 357, 38 Pac. 595. And see *Hagerman v. Moore*, 2 Colo. App. 83, 29 Pac. 1014.

In jurisdictions where independent appeals cannot be prosecuted from new trial orders, such orders are reviewable on the main appeal. *White v. Pease*, 15 Utah, 170, 49 Pac. 416; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479.

<sup>12</sup> 41 Cal. 136; and see note 11e, *supra*.

<sup>13</sup> 54 Cal. 211; and see *Grant v. Los Angeles etc. Co.*, 116 Cal. 71, 47 Pac. 872.

<sup>14</sup> For instance, see *Dubbers v. Coux*, 51 Cal. 153.

<sup>15</sup> *Christie v. Christie*, 53 Cal. 26. See, also, sections 112 and 186, *ante*.

<sup>15a</sup> See note, 21, section 184, *ante*.



nolds,<sup>15b</sup> it was held that an order striking from the files amended affidavits in support of a motion for a new trial, after the motion had been made, and while it was pending, was not appealable, but might be reviewed on appeal from the new trial order, if properly incorporated in a statement or bill of exceptions. As to orders in relation to costs, see section 197, *post*.

A special order made after final judgment is not reviewable on appeal from the judgment, in the first place because it is not "intermediate," and in the second place because it is itself appealable.<sup>16</sup>

Intermediate orders reviewable on appeal from the judgment require to be presented by bill of exceptions unless the facts appear in the judgment-roll.<sup>17</sup>

**§ 196. Special Orders Made After Final Judgment.**—Orders made after final judgment are not "intermediate" or interlocutory, but are considered in this chapter for convenience.

As already stated,<sup>1</sup> the statute did not enumerate any appealable orders in the county courts before 1866. The amendment of that year<sup>2</sup> provided that an appeal could be taken from the county courts to the supreme court (among other things) from "any special order made after final judgment in the cases in this section before enumerated." This provision was reproduced in the corresponding section of the Code of Civil Procedure, as first enacted, and as amended in 1874.<sup>3</sup>

The statute in relation to appeals from the district courts did not, as enacted in 1851,<sup>4</sup> enumerate the appealable orders, but provided that an appeal could be taken from the district courts to the supreme court from "an order made at a special term granting or refusing a new trial, or which affects a substantial right in an action or special proceeding." The amendment of 1854 enumerated the appealable orders in the district courts, and provided that an appeal

<sup>15b</sup> 120 Cal. 234, 52 Pac. 491.

<sup>16</sup> *McCourtney v. Fortune*, 42 Cal. 387; see, also, section 196, *post*.

<sup>17</sup> See sections 261 and 262, *post*. But see *Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292, where it was held that orders of this description were distinct from the *decisions* referred to in section 648 and section 939, Code of Civil Procedure, and that no specifications of the insufficiency of the evidence are required, and that an appeal from the judgment need not be taken

within sixty days after rendition to secure a review of the evidence in connection with an order striking out the complaint as not being sufficient.

<sup>1</sup> See section 191, *ante*.

<sup>2</sup> Laws of 1865-66, pp. 846, 847, sec. 359.

<sup>3</sup> Section 966, California Code of Civil Procedure; see in this connection section 189, *ante*.

<sup>4</sup> Laws of 1851, p. 106, sec. 347; see, also, sec. 336, p. 104.

could be taken from those courts to the supreme court (among other things) "from any special order made after final judgment."<sup>8</sup> This provision was reproduced in the subsequent amendments of the old Practice Act,<sup>9</sup> and in the corresponding section of the Code of Civil Procedure,<sup>7</sup> as first enacted.

By the Constitution of 1879, the county and district courts were abolished, and the superior courts created, and the amendment to the code made in 1880 provided that an appeal could be taken from the superior courts to the supreme court (among other things) "from any special order made after final judgment."<sup>8</sup>

Some of the earlier cases asserted a distinction with reference to orders made after final judgment, between such as followed the judgment "in the same line of proceeding," or "in logical sequence," and such as did not, and maintained that the former only were appealable.<sup>9</sup> Thus in *Ketchum v. Crippen*<sup>10</sup> it was held that an order refusing to strike out a statement, although in point of time it was after the judgment, was in a different line of proceeding, and was therefore not within the meaning of the statute

<sup>8</sup> Laws of 1854, pp. 64, 65, sec. 347; see, also, sec. 336; Laws of 1859, p. 140.

<sup>9</sup> Laws of 1863, p. 756, sec. 347; Laws of 1865-66, p. 707, sec. 347; see, also, sec. 336 (p. 756 of Laws of 1863, and p. 706 of Laws of 1865-66).

<sup>7</sup> Section 963, Code of Civil Procedure; see, also, sec. 939, same code.

<sup>8</sup> Section 963, Code of Civil Procedure; see, also, sec. 939, same code.

Section 1214, Revised Statutes of Arizona, is as follows:

"3. A final order affecting a substantial right made in special proceedings or upon a summary application in any action after judgment." Section 4807, Revised Codes of Idaho, section 7098, Revised Codes of Montana, and section 3425, Cutting's Compiled Laws of Nevada, contain the same language as that of the California section quoted in the text. Section 7225, Revised Codes of North Dakota, and section 462, Code of Civil Procedure of South Dakota are the same as the Arizona section above quoted. See, also, section 6067, Compiled Laws of Oklahoma. Section 548, Lord's Oregon Laws, contains the following: ". . . or a final order affecting a substantial right, and made

in a proceeding after judgment or decree." Section 1716, Rem. & Bal. Code of Washington (section 6500, Bal. Code), subdivision 7, is as follows: ". . . From any final order made after judgment which affects a substantial right." Section 5122, Compiled Statutes of Wyoming, is substantially the same as the Arizona section above quoted. See, also, section 398, Mills' Annotated Code of Colorado.

The Washington practice (see same section) also authorizes the review of orders after judgment on the appeal therefrom. See *Maxwell v. Griffith*, 20 Wash. 106, 54 Pac. 938; *State v. Court*, 19 Wash. 118, 52 Pac. 1009, where this right of review was recognized.

<sup>9</sup> See *Ketchum v. Crippen*, 31 Cal. 365; *Pendegast v. Knox*, 32 Cal. 73; *Quivey v. Gambert*, 32 Cal. 304; *Dimick v. Derringer*, 32 Cal. 488; see, also, *Leffingwell v. Griffing*, 29 Cal. 192, and *Genella v. Relyea*, 32 Cal. 159.

<sup>10</sup> 31 Cal. 365. In *De Barry v. Lambert*, 10 Cal. 503, the order refusing to strike out the statement was made *before* judgment, and on that ground was held to be nonappealable.

above quoted. So in *Quivey v. Gambert*<sup>11</sup> it was held that an order striking out a statement was not appealable for the same reason. This distinction was definitely repudiated in *Calderwood v. Peyser*.<sup>12</sup> In that case it was held that an order striking out a statement was appealable, and Wallace, J., delivering the opinion of the majority of the court, said:

"The first question to be considered concerns the appellate jurisdiction of this court, for the respondent claims that it does not extend to the review of an order striking from the files of the court below a statement placed there in support of a motion for a new trial, and there is no doubt that such was the view announced in *Quivey v. Gambert*, 32 Cal. 304, upon the authority of several adjudged cases in this court there enumerated. The general doctrine of those cases is that 'any special order made after final judgment' (Practice Act, sec. 336, subd. 3), to become the subject of an appeal here, must have followed the judgment, not in mere point of time of its entry, but that the order to be reviewed must, in some way, have depended upon the judgment itself, or have followed it in logical sequence (*Pendegast v. Knox*, 32 Cal. 73); that it must have 'followed the judgment in the same line of proceeding' (31 Cal. 365), etc. I am unable to discover any reason upon which these distinctions can be supported. If there in reality be any, these cases have not pointed it out, but have stopped with simply announcing the supposed distinctions themselves. . . .

" . . . By an examination of section three hundred and forty-seven, *supra*, it will be seen that certain enumerated orders made in a case, and which respectively concern a new trial, an injunction, an attachment, or proceedings in partition, constitute of themselves distinct subjects of appeal, whether entered *before* or *after* the rendition of final judgment. So if an order, though not included within this enumeration, be made *before* the rendition of final judgment, it is reviewed here through the instrumentality of an appeal taken from the *judgment itself*, and section three hundred and forty-seven declares that any special order made after final judgment shall also, *of itself*, be the subject of appeal. The necessity

<sup>11</sup> 32 Cal. 304.

<sup>12</sup> 42 Cal. 110. An order refusing to settle a statement or bill of exceptions is perhaps not an appealable order. See section 146. The remedy is by writ of mandate. But the reasons given in the later cases in support of the practice certainly do not

apply in the case of an order on a motion to strike out a statement after it has been settled. See *Clark v. Crane*, 57 Cal. 629; *Empire Co. v. Bonanza Co.*, 67 Cal. 406, 7 Pac. 810; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588.

for this latter provision is apparent when it is considered that an appeal from the judgment would only bring up the record of the proceedings resulting in the rendition of the judgment, and that such an appeal may have been taken and even disposed of here, by affirmance or reversal, *before* the order complained of was made in the court below; so that while an appeal from the judgment might in some instances be safely relied upon for the review of an order entered before its rendition, it would afford no reliable remedy against such an order only entered *subsequently* to its rendition. Accordingly, the statute allows an appeal to be taken directly from any special order made after final judgment as the only safe and convenient method for its review. The statute declares such an order, made subsequently in point of time to the rendition of the judgment, to be the subject of a distinct appeal, and we are not at liberty to add that it must also be an order made in the direct line of the procedure. From an order refusing to dissolve an attachment, for instance, an appeal is given by *designation*, 'from any special order made after final judgment,' a like appeal is as clearly given by *definition*, and I do not see why we might not upon some idea of the particular line of procedure pursued below refuse to entertain an appeal in the one case with as much propriety as in the other. For other reasons, too, I think that the rule laid down by the cases cited upon this point ought not to be maintained; the rule itself is so vague and indefinite that its application to cases coming here on appeal would, in many instances, be productive of the utmost confusion, and the most profitless preliminary discussion. What is the required line of procedure? In what way must the order depend upon the judgment? Or, when may it be said to follow the judgment in the same line of proceeding? Can there be said to be any uniform line of proceeding at all, or one that is capable of such delineation as would make it safe or reliable as a boundary line between orders within and orders without the appellate jurisdiction of this court? Nor does the rule in question, by its practical operation upon the substantial rights of parties, commend itself to my judgment. For under that operation a special order, if made after the rendition of judgment, and made in a case, too, within our appellate jurisdiction, though it might be clearly erroneous, and perhaps of the most oppressive and ruinous character, is nevertheless effectually withdrawn from revision in this court, because, forsooth, it was not entered in a particular line

of procedure. Its other errors are not to be inquired into here, because it has the merit of having been irregularly entered in the court below."

The doctrine of this decision, afterward approved in *Clark v. Crane*,<sup>13</sup> has not been overruled in any later decision, and is believed to be the correct principle. It results, therefore, that any order which is subsequent in point of time to the judgment is a "special order made after final judgment," and is appealable.<sup>13a</sup> As has been already shown,<sup>14</sup> "the judgment," under the code (whatever may have been the rule under the old Practice Act<sup>15</sup>), is the judgment *entered*,<sup>16</sup> and not the findings or the order for judgment. So that the rule is that *any* order subsequent in point of time to the entry of judgment is appealable.

A single exception to this rule is perhaps contained in the class of cases hereinafter described,<sup>13a</sup> where the order is one setting aside or refusing to set aside an order or judgment in itself appealable.<sup>13b</sup> The earlier cases are not altogether clear or consistent. Thus it was sometimes held that an order setting aside a judgment is an appealable order,<sup>1</sup> as having been made after judgment.<sup>17</sup> So it was also held that an order refusing to set aside a judgment was appealable, for the same reason.<sup>18</sup> But in all of these instances it is

<sup>13</sup> 57 Cal. 629. See note 12, *supra*.

<sup>13a</sup> The following cases sustain the principle here stated: *Dahlstrom v. Portland etc. Co.*, 12 Idaho, 87, 85 Pac. 916; *Washington etc. Co. v. Kinnear*, 24 Wash. 405, 64 Pac. 522; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004; *In re Sullivan's Estate*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297; *State v. Court*, 32 Mont. 20, 79 Pac. 410; *Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201; *Weinrich v. Porteous*, 12 Nev. 102; *Coe v. Cleghorn*, 10 Idaho, 162, 77 Pac. 331.

This provision does not apply to probate decrees. *In re Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722; *In re Kelly's Estate*, 31 Mont. 356, 78 Pac. 579, 79 Pac. 244. But only to such final judgments as were recognized as such under the common law.

<sup>14</sup> See section 183, *ante*.

<sup>15</sup> See in this regard note 6 to section 183. The case of *Levy v. Getleson*, 27 Cal. 685, seems to proceed upon the theory that under the old Practice Act the order, in order to be appealable, must be subsequent to the

entry of judgment. While the case of *McCourtney v. Fortune*, 42 Cal. 387, seems to proceed upon the contrary theory. Look at section 197.

<sup>16</sup> Look at *MacNevin v. MacNevin*, 63 Cal. 186; and see section 183, *ante*.

<sup>13a</sup> See section 199, *post*.

<sup>13b</sup> See particularly *Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770.

<sup>17</sup> See *Bond v. Pacheco*, 30 Cal. 530. This was a default case. See section 199, *post*, subdivision 7; *Livermore v. Campbell*, 52 Cal. 75; *James v. Center*, 53 Cal. 31; *Kaufman v. Superior Court*, 108 Cal. 446, 41 Pac. 476. In all of these cases, the order appealed from, which was one setting aside a judgment of dismissal, made on the motion of the party aggrieved thereby, was within the exception outlined in section 199, *post*, subdivision 6. If an appeal had been refused, the appellant would have been deprived of his day in court.

<sup>18</sup> *Sacramento Co. v. C. P. R. R. Co.*, 61 Cal. 250. In this case an appeal was recognized by the supreme

apparent that the court merely recognized the well-settled exceptions to the general rule.

The following are instances of special orders made after final judgment, held to be appealable under the provision of section 963, above cited: An order setting aside the report of a referee directing the payment of a certain sum as counsel fees for services rendered the receiver;<sup>19</sup> an order retaxing or refusing to retax costs;<sup>20</sup> an order directing a receiver to pay over money to the plaintiff;<sup>21</sup> an order substituting copies of papers on file in place of originals lost;<sup>22</sup> an order striking out a statement;<sup>23</sup> an order in proceedings supplementary to execution;<sup>24</sup> an order refusing to quash an execution;<sup>25</sup> an order directing that money paid into court in satisfaction of a judgment be retained by the clerk until the claims of a third party to the same may be determined;<sup>25a</sup> an order granting a writ of assistance;<sup>25b</sup> an order directing the sale of the property of the defendant in a suit for divorce to satisfy a judgment for alimony;<sup>25c</sup> an order refusing to set aside a default;<sup>25d</sup> an order of condemnation, if final;<sup>25e</sup> an order denying relief under section 473, Code of Civil Procedure;<sup>25f</sup> an order in a criminal case "for the entry of

court from an order refusing to set aside a compromise judgment. The appeal was taken by the attorney general on behalf of the county of Sacramento, and was based upon the contention that the district attorney of the county was without authority, of his own motion, and without the consent or acquiescence of the attorney general, who had appeared in the case in the lower court, to make a compromise with the defendant. It is clear that a judgment entered in accordance with such a compromise was, conceding the above contention, not different from a judgment entered *ex parte*, and the case, therefore, presents an instance of the exception noted in section 199, *post*, subdivision 4.

<sup>19</sup> *Adams v. Woods*, 8 Cal. 306.

<sup>20</sup> As to orders in relation to costs, see section 197, *post*.

<sup>21</sup> Look at *Whitney v. Buckman*, 26 Cal. 447, 10 Morr. Min. Rep. 428.

<sup>22</sup> Look at *Buckman v. Whitney*, 28 Cal. 555.

<sup>23</sup> *Calderwood v. Peyser*, 42 Cal. 110; *Clark v. Crane*, 57 Cal. 629; *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588; *S. C.*, 100 Cal. 576, 35 Pac. 158; *Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770; and see note 12, *supra*.

<sup>24</sup> Look at *Briggs v. McCulloch*, 36 Cal. 542; *McCullough v. Clark*, 41 Cal. 298.

<sup>25</sup> *Gilman v. Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290.

<sup>25a</sup> *Slavonic etc. Assn. v. Superior Court*, 65 Cal. 500, 4 Pac. 500.

<sup>25b</sup> See *Davis v. Donner*, 82 Cal. 35, 22 Pac. 879; *Gordan v. Graham*, 153 Cal. 297, 95 Pac. 145; but see *Rovegno v. Hunt*, 83 Cal. 445, 23 Pac. 524. In partition suits the interlocutory decree directing a sale of the premises in controversy is a final judgment with respect to the subsequent orders in aid of its execution. *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847; *Gordan v. Graham*, *supra*.

<sup>25c</sup> *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471.

<sup>25d</sup> *Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686.

<sup>25e</sup> *Cal. S. R. R. Co. v. S. P. R. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Los Angeles v. Pomeroy*, 132 Cal. 340, 64 Pac. 477.

<sup>25f</sup> An order granting relief under this section from a failure to propose or present a statement in time, or to give a notice of intention in time, is

judgment *nunc pro tunc*, as of a prior date;<sup>250</sup> an order entering judgment upon an appeal bond under the provisions of section 942, Code of Civil Procedure;<sup>251</sup> an order fixing a day for the execution of a sentence of death;<sup>252</sup> and orders confirming or refusing to confirm sales under partition decrees.<sup>253</sup> And it make no difference

not appealable, because it is reviewable on appeal from the new trial order. See section 146, *ante*. But such an order may be a special order after judgment, and appealable in other cases. See note 12, *supra*. In cases where the order is one denying relief it is always appealable. It cannot, in such a case, be reviewed on appeal from the new trial order. See section 146, *ante*.

<sup>250</sup> Such an order is one that materially affects the rights of the defendant. *Ward v. Dunn*, 136 Cal. 19, 68 Pac. 105.

<sup>251</sup> It is not a special proceeding such as described in section 23 of the same code. The sureties, in the execution of the bond, make themselves, for the purpose of this proceeding, parties to the original action, and the entry of the judgment makes them aggrieved parties. *Hawley v. Gray Brothers*, 127 Cal. 560, 60 Pac. 437.

<sup>252</sup> *People v. Sprague*, 54 Cal. 92; *People v. McNulty*, 95 Cal. 594, 30 Pac. 963; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; *People v. Durrant*, 119 Cal. 201, 51 Pac. 185; but see *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670. In this last case *People v. Ebanks* is expressly overruled, with the statement that the cases cited in support of that decision were not in point. It is presumed, though the decisions themselves are not very clear, that the first three cases were appeals from orders made pursuant to the provisions of section 1227 of the Penal Code, and that an original order, or warrant, drawn up under the authority of section 1217 of the same code, is not an appealable order. In the *Flannelly* case the court held that the order was not appealable, for the reason that it was not a judicial order. "It is not made by the court but by the judge."

As if for the purpose of removing the opportunity thus given for further delay in capital cases in consequence

of the above decisions, the legislature of 1905 adopted an amendment to section 1227, Penal Code, providing as follows: "From an order directing and fixing the time for the execution of a judgment, as herein provided, there is no appeal." Stats. 1905, p. 700.

This amendment has not received construction by the supreme court, but its constitutionality is seriously doubted. The provision of section 4 of article 6 of the constitution as to appeals in criminal cases "where judgment of death has been rendered" has but a single limitation, viz., "on questions of law alone." If a question as to the right of the defendant to be present in court should be raised in the trial court and decided against the defendant, as in the two cases first above cited, a question of law would be raised, and the right of the defendant to a decision of the supreme court upon the point could not be reasonably denied. For this reason, also, there is a grave question as to the correctness of the decision in the *Flannelly* case. The court might say, as was said there, that the order was not a judicial one, and that the code makes no provision for the presence of the defendant and that the constitution has not given him the right to be present, but if a question of law is raised, and the trial court passes upon that question after the judgment has been rendered, it is difficult to find a reason for the denial of the constitutional right of a review of the ruling in question by the court having constitutional cognizance thereof. As if in recognition of this difficulty, the supreme court in *People v. Fallon*, 154 Cal. 743, 99 Pac. 202, declined to pass upon the question, going directly to the merits.

<sup>253</sup> See *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847; *Gordan v. Graham*, 153

that the order was made by a different judge than the one who decided the cause.<sup>26</sup>

But in order to be appealable, the transcript must show that the order was made after judgment;<sup>27</sup> and the order itself must appear to have been made in the cause in which the judgment is entered. Thus a proceeding to have a homestead appraised at the instance of a judgment creditor is not a proceeding in the case in which the judgment was entered, and an order therein would not, for that reason, be a special order after final judgment, and appealable under the code provision under consideration.<sup>28</sup> So an order deny-

Cal. 297, 95 Pac. 145. See note 25b, *supra*.

In other states the following orders have been held to be special orders after final judgment, and appealable: An order overruling a motion to set aside a judgment of dismissal. *Oliver v. Kootenai Co.*, 13 Idaho, 281, 90 Pac. 107. An order in supplementary proceedings directing a judgment debtor to apply property to the satisfaction of the judgment. *Ryland v. Arkansas etc. Co.*, 19 Okl. 435, 92 Pac. 160. An order in supplementary proceedings approving final report of receiver, and discharging him from further service. *Johnson v. Joslyn*, 47 Wash. 531, 92 Pac. 413. An order amending a judgment already entered. *State v. Court*, 32 Mont. 20, 79 Pac. 410; but the contrary was held in *Cullen v. Harris*, 27 Utah, 4, 73 Pac. 1048. An order striking from the record so much of the judgment as was awarded against a surety. *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004. An order granting additional time to prepare a statement on motion for new trial and a bill of exceptions. *Beach v. Spokane etc. Co.*, 21 Mont. 7, 52 Pac. 560. An order striking out the statement on motion for new trial. *Beach v. Spokane etc. Co.*, 25 Mont. 367, 65 Pac. 106. An order vacating a judgment without authority to do so. *Deering v. Creighton*, 26 Or. 556, 38 Pac. 710. An order, in effect, directing the officer to disregard the rights of an attaching creditor in making a levy under execution. *Sheppard v. Guisler*, 10 Wash. 41, 38 Pac. 759.

See *Shumake v. Shumake*, 17 Idaho, 649, 107 Pac. 42, where the question

of an appeal from an order vacating a judgment was exhaustively treated.

The following were held to be non-appealable: An order vacating a decree entered by default, and allowing the defendant to answer, is not a decision made after final judgment from which an appeal will lie. *Thomas v. Thomas*, 10 Colo. App. 170, 50 Pac. 211. And see *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878. An order on a motion to quash an execution is not such an order after final judgment as to be appealable by independent proceeding. *Good v. Martin*, 2 Colo. 292. An order authorizing the payment of a fund in condemnation proceedings to the person entitled to it is not a special order after final judgment, and not appealable. *Chicago etc. Co. v. White*, 36 Mont. 437, 93 Pac. 350. An order overruling a motion to dismiss an appeal from a justice's court is not such an order. *Raymond v. Raymond*, 32 Mont. 170, 79 Pac. 1056. An order after an unsuccessful appeal, vacating a judgment on the ground of fraud, is not appealable otherwise than on the appeal from the final judgment. *Post v. Spokane etc. Co.*, 35 Wash. 114, 76 Pac. 510. An order refusing to set aside a final decree is not such an order, and not appealable. *National etc. Assn. v. Simpson*, 21 Wash. 16, 56 Pac. 844.

<sup>26</sup> *Wells, Fargo & Co. v. Anthony*, 35 Cal. 696.

<sup>27</sup> Look at *Welch v. Allen*, 54 Cal. 211. Also *Kinman v. Scheuer*, 30 Mont. 73, 75 Pac. 690.

<sup>28</sup> *Brown v. Starr*, 75 Cal. 163, 16 Pac. 760. Such a proceeding, under sections 1245 and 1253 of the Civil



ing a motion to amend the minutes of the court is not such an order.<sup>29</sup>

In the earlier cases the opinion seemed to prevail that the appealability of special orders made after final judgment, in which were involved questions as to the payment of money, or the value of property, depended, as in the case of the judgments themselves, upon the amount involved, corresponding to the *ad damnum* clause of the original action. This was the view adopted with respect to orders relating to costs. Thus in *Ouallahan v. Morrissey*,<sup>30</sup> which was such an order, the supreme court held that inasmuch as the amount was less than that conferring appellate jurisdiction, the appeal could not be entertained. So in *Langan v. Langan*,<sup>31</sup> which was an appeal from an order taxing costs and attorney's fees, the appeal was dismissed for a similar reason. This ruling was followed in other cases,<sup>32</sup> and was the settled practice until the decision in *Harron v. Harron*,<sup>33</sup> where the court took occasion to adopt the more logical as well as the better constitutional view of discarding the test of the amount, and holding that appellate jurisdiction in this class of cases was expressly conferred by section 963 of the Code of Civil Procedure, and did not depend upon the amount in controversy any more than did that in equity cases.<sup>34</sup>

Orders made after entry of judgment cannot be reviewed on appeal from the latter in any event.<sup>35</sup>

**§ 197. Orders in Relation to Costs.**—Orders taxing or refusing to tax costs, or striking out or refusing to strike out cost

Code, is special in its character, and orders growing out of it are not special orders made after final judgment, but are interlocutory orders, reviewable on appeal from the final judgment of the court rendered after receipt of the report of the appraisers.

<sup>29</sup> *Griess v. Investment Co.*, 93 Cal. 411, 28 Pac. 1041. Such an order in no manner affects the judgment or bears any relation to it, either by way of enforcing it or staying its operation. Nor does it concern any other order or motion in the case. It is merely a determination of the court that its minutes do not require correction, and its action in this respect is not subject to review.

<sup>30</sup> 73 Cal. 279, 14 Pac. 864.

<sup>31</sup> 83 Cal. 618, 23 Pac. 1084; *S. C.*, 86 Cal. 132, 24 Pac. 852.

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<sup>32</sup> *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42.

<sup>33</sup> 123 Cal. 508, 56 Pac. 334.

<sup>34</sup> *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360; *Sierra etc. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038. In the last-cited case it was held that the amount in controversy no more controlled in the case of orders made before than those made after final judgment, if otherwise appealable.

<sup>35</sup> *Jenness v. Bowen*, 77 Cal. 310, 19 Pac. 522.

bills, have never been enumerated among the orders designated as appealable, but are reviewable either on appeal from the judgment as "intermediate orders which involve the merits and necessarily affect the judgment," or as "special orders made after final judgment." Both of these grounds have been already considered.<sup>1</sup> But there has been so much confusion in regard to the proper way in which these orders are to be reviewed that it is convenient to treat the subject separately.

In the case of *Levy v. Getleson*<sup>2</sup> an order overruling a motion to retax costs was made after the rendition, but before the entry of judgment. It was held not to be a "special order made after final judgment," and Shafter, J., delivering the opinion, said: "*The proper course would have been to appeal from the judgment, raising the question of the correctness of the taxation by a statement annexed to the judgment-roll.*" In the case of *Stevenson v. Smith*,<sup>3</sup> the only appeal appears to have been from the order denying plaintiff's motion for new trial. The court held that the error in refusing to allow costs to the plaintiff could not be corrected on appeal from the order denying a new trial. And Sawyer, J., delivering the opinion, said: "*The proper mode of reviewing and correcting this error is on appeal from the judgment, but no such appeal has been taken in this case.*" In the subsequent case of *Jones v. Frost*,<sup>4</sup> after the judgment had been entered, and after an appeal from the judgment had been perfected, the court seems to have made an order adding a certain sum to the judgment for costs. It was held that this order could not be reviewed on the appeal from the judgment previously taken, and Shafter, J., delivering the opinion, said: "The order complained of was made ten days after the court had lost jurisdiction of the case by the perfecting of the appeal, and *the proper and only remedy for the defendants was by appeal from the order.*" The next case is *Lasky v. Davis*.<sup>5</sup> There the notice of the motion to retax costs was given, and the order striking out several items of the cost bill was made after the entry of the judgment. The appeal was from the order. The supreme court ordered it dismissed, and Sanderson, J., delivering the opinion, said:

"An order made on a motion to retax costs is not appealable. It is not an order made after final judgment within the meaning

<sup>1</sup> See sections 195 and 196, *ante*.

<sup>2</sup> 27 Cal. 685.

<sup>3</sup> 28 Cal. 102, 87 Am. Dec. 107.

<sup>4</sup> 28 Cal. 245.

<sup>5</sup> 33 Cal. 677.

of section 343 of the Practice Act, even though it be made after the entry of judgment, for in legal effect the order, if the motion is granted, amounts to a modification or amendment of the judgment; or, in other words, becomes a part of it. If the motion is denied the error is none the less in the judgment, and can be reviewed only on appeal from the judgment. Costs are included in and constitute a part of the judgment (section 511), and hence, though ascertained and adjudged by the court after the entry of the judgment by the clerk may have been made, yet the law considers such action of the court as having preceded the final judgment. (*Votan v. Reese*, 20 Cal. 89; *Levy v. Getleson*, 27 Cal. 685; *Stevenson v. Smith*, 28 Cal. 105, 87 Am. Dec. 107.)”

The doctrine of *Lasky v. Davis* was repudiated in *Dooley v. Norton*.<sup>6</sup> In the latter case after the judgment was entered,<sup>7</sup> a motion was made to retax costs, and was dismissed. On appeal the order dismissing the motion was reversed, and *Sprague, J.*, delivering the opinion, after reviewing the cases, said:

“The order made on the motion to retax the costs in an action is a proper subject for review in some mode in this court. If made before the judgment is rendered, it may be reached by an appeal from the judgment; but if made more than twenty days after the entry of judgment, how is the question to be presented for review? It is very clear upon the authorities in this court that it can be presented only by means of a statement on appeal. The statement cannot be annexed to the judgment, because more than twenty days have elapsed since the entry of the judgment. (Section 338.) If it is not annexed to the order it has no place in the record, and cannot be brought before the appellate court. The motion to retax costs is in effect a motion to modify the judgment, and however the order may be considered, when it is made before the entry of the judgment, it seems clear to me that when it is made after the entry of the judgment it is an order after final judgment as fully in every sense as an order modifying the judgment in any other respect. If this be not the true construction, the party complaining of the order would in many instances be without redress.”

<sup>6</sup> 41 Cal. 439.

<sup>7</sup> The report is not very clear as to this; but it is stated in the opinion that the court below dismissed the motion on the ground that it had no jurisdiction, because “the judgment

had been entered at a former term of the court” (page 441). From this it is inferred that the notice was given, and the order made after the entry of the judgment.

This case is inconsistent with the rule laid down in *Lasky v. Davis*, and must be taken to have overruled that case. But in the subsequent case of *Flubacher v. Kelly*<sup>a</sup> it appears to have been overlooked. In *Flubacher v. Kelly*, after the verdict, but before the entry of judgment, a motion was made to retax the costs. The supreme court dismissed the appeal from the order denying the motion, and Niles, J., delivering the opinion, said: "The motion to strike out the cost bill, if granted, would have effected a modification of the judgment, and the order refusing the motion can be reviewed only upon an appeal from the judgment. (*Lasky v. Davis*, 33 Cal. 677.)" In *Empire Co. v. Bonanza Co.*,<sup>aa</sup> however, the decision in *Flubacher v. Kelly* was distinguished, the court saying:

"The case of *Flubacher v. Kelly* (49 Cal. 116), though referring to *Lasky v. Davis* with seeming approval, was really a case in which the motion to strike out a cost bill was made before the entry of judgment, and under all the cases could only be reviewed by an appeal therefrom."

Continuing, the court said further:

"A motion to tax a cost bill is a special motion, that is, it is not a proceeding as of course in the cause, and an order thereon is a special order, and if made subsequent to the rendition and entry of final judgment can only be reviewed in this court by a direct appeal therefrom. This rule is in harmony with the letter and spirit of the Code of Civil Procedure. In appeals from final judgments the statement or bill of exceptions may be framed so as to include a review of all orders prior to the entry of judgment, but as to orders made subsequent to entry of judgment, and which may, and usually will, require a special statement, and that, too, frequently, after the time for a statement on appeal has expired, the inconvenience in practice of treating them as included in the appeal from final judgment will be found a serious objection, to say nothing of trenching upon the true intent of the code."

In the case of *Kelly v. McKibbin*<sup>b</sup> the report does not state whether the order was subsequent to the entry of the judgment.

<sup>a</sup> 49 Cal. 116.

<sup>aa</sup> 67 Cal. 406, 7 Pac. 810.

<sup>b</sup> 54 Cal. 192.

The word "retax" was made use of formerly in all cases referred to in the text where the party was not satisfied with the costs as originally taxed by the clerk, and is retained for that

reason. Many practitioners continue to make use of the old phraseology. The code makes provision for "taxing" costs, however, and not for "retaxing," and the former word is therefore, strictly speaking, more appropriate.

The appeal was from the judgment, but the court held that it could not review the order, and said: "As we have only the judgment-roll before us, we cannot review the order denying the motion to retax costs. The memorandum of costs constitutes no part of the judgment-roll." And it is evident that the ground is irrespective of whether the order preceded the entry of judgment or not.

The rule as expressed in *Empire Co. v. Bonanza Co.*, above cited, has been followed with approval in a number of cases,<sup>9a</sup> and in other cases the court has reviewed and reversed,<sup>10</sup> and reviewed and affirmed<sup>11</sup> orders in relation to costs, no question as to their appealability being raised. In *Crane v. Forth*,<sup>11a</sup> where the appellant contended that the trial court erred in refusing him a judgment for costs, the court said:

"This point has no foundation in the record. It merely appears that there is no judgment for costs. It does not appear that the plaintiff filed or served any cost bill, and it cannot be presumed that he did. (*Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783.) Nor does it appear that he in any manner moved the court, either before or after final judgment, to allow him costs. But if the court erred in denying him costs *before* final judgment, the error should have been shown by bill of exceptions, or statement on motion for new trial. (*Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080.) Had the court made an erroneous order *after* final judgment, relating to costs, the only remedy would be by appeal from such order. (*Empire Co. v. Bonanza Co.*, 67 Cal. 406, 7 Pac. 810.)"

From the authorities above quoted and cited it may be fairly deduced that:

1. In no event can orders in relation to costs be reviewed on motion for new trial. This was the decision in *Stevenson v. Smith*,<sup>12</sup> and there is no decision or *dictum* to the contrary.
2. If the order was made before the entry<sup>13</sup> of judgment, it is not a special order made after final judgment, and consequently

<sup>9a</sup> See *Yorba v. Dobner*, 90 Cal. 337, 27 Pac. 185; *Crane v. Forth*, 95 Cal. 92, 88 Pac. 193; *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87.

<sup>10</sup> *Jacobi v. Bauer*, 55 Cal. 554; *O'Neil v. Donahue*, 57 Cal. 226; *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795.

<sup>11</sup> *Alderman v. Kirkpatrick*, 57 Cal. 353; *Bank of Woodland v. Hiatt*, 58

Cal. 234; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409.

<sup>11a</sup> 95 Cal. 88, 30 Pac. 193.

<sup>12</sup> 28 Cal. 102, 87 Am. Dec. 107.

<sup>13</sup> Under the code the judgment is the thing "entered" by the clerk. See sections 183, 196, *ante*; and see note 15 to section 196.

is not appealable. This was the decision in *Levy v. Getleson*,<sup>14</sup> and there is no decision or *dictum* to the contrary. But in such case the order is reviewable on appeal from the judgment as an "intermediate which involves the merits and necessarily affects the judgment."<sup>15</sup> There is no *decision*<sup>16</sup> upon this point, unless the decision in *Crane v. Forth*, *supra*, is to be so understood, but there are several *dicta* to that effect. And it is evident that if such order be not reviewable in this way, it is not reviewable at all; for it is not enumerated among the appealable orders, and being *before* judgment, it cannot be a special order made after final judgment.

3. If the order be subsequent, in point of time, to the entry of judgment, it cannot be reviewed on appeal from the judgment.<sup>16a</sup> This is contrary to the *dicta* in *Lasky v. Davis* and *Flubacher v. Kelly*; but as above stated, *Lasky v. Davis* was disapproved in *Dooly v. Norton*, which case seems to have been overlooked in *Flubacher v. Kelly*. It would seem to be clear that only "intermediate" orders are reviewable on appeal from the judgment.<sup>17</sup> Orders made subsequent to the entry of judgment are appealable as special orders made after final judgment. This was the decision in *Dooly v. Norton*, and it is in consonance with the general rule laid down in *Calderwood v. Peyser*,<sup>18</sup> and with the practice followed in the most recent cases.<sup>19</sup>

4. Whether the appeal be taken from the order or from the judgment, it must be supported by a bill of exceptions (under the

<sup>14</sup> 27 Cal. 685.

<sup>15</sup> As to which, see section 195, *ante*.

<sup>16</sup> See *Levy v. Getleson*, 27 Cal. 685; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Lasky v. Davis*, 33 Cal. 677; *Flubacher v. Kelly*, 49 Cal. 116. In these cases (except the second) it was *decided* that the orders were not appealable. What was said as to the proper method of review was unnecessary to the decisions. In *Stevenson v. Smith* the *decision* was that an order in relation to costs could not be reviewed on motion for new trial. In the subsequent case of *Crane v. Forth*, above cited, however, it is distinctly decided that such an order may be properly reviewed on appeal from the judgment, when made prior thereto.

<sup>16a</sup> Look at *Jones v. Frost*, 28 Cal. 245; and *Dooly v. Norton*, 41 Cal. 439; *Empire Co. v. Bonanza Co.*, 67

Cal. 406, 7 Pac. 810; *Schallert-Ganahl Co. v. Neal*, 94 Cal. 192, 29 Pac. 622; and cases cited in note 9a, *supra*; and see as to orders in general, *Jenness v. Bowen*, 77 Cal. 310, 10 Pac. 532.

<sup>17</sup> See section 196, *ante*.

<sup>18</sup> See section 196, *ante*.

<sup>19</sup> See cases cited in notes 8a to 11a, inclusive, *supra*. See *Granite Mtn. Co. v. Weinstein*, 7 Mont. 346, 17 Pac. 108, and cases there cited.

Also *Spencer v. Mungus*, 28 Mont. 357, 72 Pac. 663, where it was held that costs formed a part of the judgment, and questions relating thereto were reviewable as such. In *Murray v. Northern Pacific Co.*, 26 Mont. 268, 67 Pac. 625, and *King v. Allen*, 29 Mont. 5, 73 Pac. 1107, it was held that no independent appeal would lie from an order taxing costs; and in *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963, 30 Mont. 144, 75 Pac. 969, it was held that while this was true,

old Practice Act statement) on appeal; for the memorandum of costs is no part of the judgment-roll.<sup>20</sup>

As heretofore noted, the earlier decisions upheld the doctrine that an order in relation to costs could not be reviewed unless the case itself should be within the appellate jurisdiction of the court,<sup>21</sup> and this view was followed until the decision in *Harron v. Harron*,<sup>22</sup> where the earlier decisions were repudiated, particularly that in *Langan v. Langan*,<sup>23</sup> and it was specifically held that the jurisdiction of the appellate courts in divorce proceedings, whether the appeal was from the judgment or an order, before or after entry or final judgment, rested upon its equitable character, and was conferred directly by the Constitution. Incidentally the case of *Fairbanks v. Lampkin*<sup>24</sup> was also overruled, and the appellate jurisdiction of special orders was referred to the provisions of section 963 of the Code of Civil Procedure, and held to be wholly independent of the amount in controversy. This decision was afterward

such an order might be reviewed on the appeal from the final judgment. In *Musigbrod v. Hartford*, 30 Mont. 273, 76 Pac. 563, it was held that such an order was not reviewable otherwise than on the appeal from the final judgment. See, also, *Isman v. Altenbrand*, 42 Mont. 188, 111 Pac. 849; *Rader v. Nottingham*, 2 Mont. 157; *Orr v. Haskell*, 2 Mont. 350; *Bank v. Neill*, 13 Mont. 377, 34 Pac. 180; *Montana etc. Co. v. Boston etc. Co.*, 27 Mont. 288, 70 Pac. 1114, 22 *Morr. Min. Rep.* 471. This rule does not, however, seem to apply to costs which do not in fact constitute a part of or enter into the original judgment. See *Ryan v. Maxey*, 15 Mont. 100, 38 Pac. 228.

The supreme court of Washington, in *Stevens v. Jones*, 40 Wash. 484, 82 Pac. 754, held that it would not entertain an appeal after the main controversy had ceased for the purpose of determining a mere matter of costs; and in *Lamona v. Bank*, 35 Wash. 113, 76 Pac. 534, it was held that an appeal involving no other question would be dismissed. Any question relating to the taxing of costs is reviewable on appeal from the final judgment, and in that way alone. *State v. Millis*, 19 Mont. 444, 48 Pac. 773. But this rule applies

only to the parties themselves, and not to the sureties on the cost bond. *Trumbull v. Jefferson Co.*, 37 Wash. 604, 79 Pac. 1105.

In Colorado no appeal is entertained from an order of this kind. *Van Buskirk v. Balch*, 19 Colo. App. 292, 74 Pac. 792.

<sup>20</sup> See *Kelly v. McKibben*, 54 Cal. 192; and look at opinions in *Dooly v. Norton*, 41 Cal. 439; *Levy v. Getleson*, 27 Cal. 685; *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193.

See, also, to the same effect, *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021; *Ames v. Bank*, 48 Wash. 328, 93 Pac. 530.

<sup>21</sup> See *Oullahan v. Morrissey*, 73 Cal. 297, 14 Pac. 864; *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Foley v. Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87; and see *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084; *S. C.*, 86 Cal. 132, 24 Pac. 832; *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457; also *Sellick v. DeCarlow*, 95 Cal. 644, 30 Pac. 795; and see the previous section (196).

<sup>22</sup> 123 Cal. 508, 56 Pac. 334.

<sup>23</sup> 83 Cal. 618, 23 Pac. 1084; *S. C.*, 86 Cal. 132, 24 Pac. 832.

<sup>24</sup> 99 Cal. 429, 34 Pac. 101.

approved in later decisions, and states the settled doctrine in both respects.<sup>25</sup>

Section 964 of the Code of Civil Procedure excepts from the list of appealable orders covered by section 963, including special orders made after final judgment, those cases which came originally from justices' courts, or other inferior courts, except cases of forcible entry and detainer, cases involving the title or possession of real property, or the legality of any tax, impost, assessment, etc., so that unless included in this exception, cases appealed from justice's, police, or other inferior courts to the superior courts, are excluded from the provisions of section 963 relative to appeals from special orders made after final judgment.<sup>26</sup>

The rules above outlined have been applied to orders allowing attorneys' fees under section 1195, Code of Civil Procedure, when made after final judgment.<sup>27</sup> Such fees are not costs, but may be so considered for the purpose of appeals, as bearing some resemblance thereto, inasmuch as such fees are incident to the judgment.<sup>28</sup>

Errors in rulings with respect to costs, unless they appear in the judgment-roll, require, as in the case of other appealable orders, to be presented by a bill of exceptions, and unless so presented cannot be considered.<sup>29</sup>

**§ 198. Orders in Relation to Contempts.**—Orders in relation to contempts are not enumerated among the orders designated as appealable; but it is evident that in some cases such orders may

<sup>25</sup> *Southern California Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; and see cases cited in note 34, section 196, *ante*.

<sup>26</sup> See *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457, where the supreme court declined to entertain an appeal from an order striking out a cost bill, made after final judgment, on the ground that the case arose in the justice court. And see *Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626.

<sup>27</sup> See *Schallert-Ganahl Co. v. Neal*, 94 Cal. 192, 29 Pac. 622.

<sup>28</sup> See *Rapp v. S. V. Gold Co.*, 74 Cal. 532, 16 Pac. 325; *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15; *Schallert-Ganahl Co. v. Neal*, 94 Cal. 192, 29 Pac. 622.

<sup>29</sup> *People v. Marin Co.*, 103 Cal. 223, 37 Pac. 203, 26 L. B. A. 659;

*Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021; and see *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193.

In *Isman v. Altenbrand*, 42 Mont. 188, 111 Pac. 849, the question was incorporated in "a so-called statement of the case, embodying the entire proceedings from the taking of the depositions to the time of the settlement of the statement, including the proceedings to tax the costs." The court said: "Proper practice dictates that . . . a bill of exceptions should have been preserved. . . . While this method of procedure (the statement) involves some confusion, we think it sufficiently accurate to satisfy the general rules of practice, and shall therefore consider the error assigned."



be "made after final judgment." And in one case an order imposing a fine of three hundred dollars was held to be a final judgment.<sup>1</sup> If a contempt order can be considered to be in effect a final judgment, or a "special order made after final judgment," it is appealable, unless there is some provision of statute to the contrary. Such provision, however, seems to exist. Section 1222 of the code is as follows: "The judgment and orders of the court or judge, made in cases of contempt, are *final and conclusive*." The previous statutes contained the same provision.<sup>2</sup> The language of this provision is

<sup>1</sup> People v. O'Neil, 47 Cal. 109. In order to be a final judgment the contempt order would have to be considered an independent proceeding. Compare Adams v. Woods, 18 Cal. 30.

<sup>2</sup> Laws of 1851, p. 128, sec. 493.

Similar provisions are to be found in section 5168, Revised Codes of Idaho, and section 7322, Revised Codes of Montana (section 2183, Code of Civil Procedure). The latter goes further, and provides, "and there is no appeal," but review by *certiorari* is authorized. Section 684, Lord's Oregon Laws, expressly provides that "either party to a judgment in a proceeding for a contempt may appeal therefrom, in like manner and with like effect as from a judgment in an action, but such appeal shall not have the effect to stay the proceedings in any other action, suit, or proceeding, or upon any judgment, decree, or order therein, concerning which or wherein such contempt was committed."

Section 7578, Revised Codes of North Dakota, provides as follows: "Appeals may be taken to the supreme court from any final order adjudging the accused guilty of contempt and upon such appeal the supreme court may review all the proceedings had and affidavits and other proof introduced by or against the accused." Provision is also made for the preparation of a bill of exceptions as in other civil actions.

Section 1062, Rem. & Bal. Code of Washington (section 5811, Bal. Code), is identical with the Oregon section above quoted.

No express provision corresponding with the California section quoted in the text is to be found in the Nevada

practice. In this respect alone does it differ from the California chapter upon contempts. The entire California chapter, except this section, is incorporated in the Nevada Practice Act. The supreme court has repeatedly held, however, that where the proceeding is purely criminal it has no appellate jurisdiction therein. See Phillips v. Welch, 11 Nev. 187, and cases cited. And the subject has been treated, apparently, as though the section providing that a judgment of conviction in a proceeding for contempt is final and conclusive had not been omitted from the Practice Act. See Phillips v. Welch, 12 Nev. 158.

Section 334, Mills' Annotated Code of Colorado, provides that "The judgment and orders of a court or judge, made in cases of contempt committed in the immediate view and presence of the court or judge in chambers, shall be final and conclusive." But continuing, "The judgment and orders of a court made upon a verdict of guilty found by a jury shall, at the request of the person so adjudged guilty and sentenced to imprisonment or to pay a fine, be reviewed by the supreme court of the state, either by appeal or writ of error, unless such proceeding shall be instituted originally against such person in said supreme court."

Section 2227, Compiled Laws of Oklahoma, defines direct contempts as disorderly and insolent behavior during a session of the court, and provides that the court shall have jurisdiction to punish such contempt *summarily*.

Section 3360, Compiled Laws of Utah, contains a similar provision.

open to the construction that orders "made in cases of contempt" cannot be reviewed in any mode. But it was held at an early day that it is by no means the case that every act which a court declares to be contempt is in reality such.<sup>3</sup> And it seems to be the received doctrine that if the act be not such as the law declares to be contempt, an order adjudging it to be such is beyond the jurisdiction of the court and void. Upon this theory persons imprisoned for contempt are frequently released on *habeas corpus*.<sup>4</sup> If there be no imprisonment the order may be annulled on *certiorari*.<sup>5</sup> If the order be not made the judge may be prohibited from making it.<sup>6</sup> The earlier cases were to the effect that contempt orders in excess of the jurisdiction of the court could be reviewed on appeal as well as on *certiorari*. Thus in *Ware v. Robinson*,<sup>7</sup> a motion to dismiss an appeal from an order adjudging certain persons guilty of contempt for refusing to answer questions put to them upon a garnishment was denied, the court saying that the question had been sufficiently considered in *Ex parte Rowe*.<sup>8</sup> All that was decided in that case, however, was that an order adjudging a contempt could be reviewed on *habeas corpus*. In a subsequent case an appeal from a contempt order seems to have been entertained without question;<sup>9</sup> and in *People v. O'Neil*,<sup>10</sup> the supreme court, upon appeal, reversed an order imposing a fine of three hundred dollars for contempt, and Crockett, J., delivering the opinion, said:

"We think the judgment appealed from is appealable. It is for money, and sufficient in amount to give jurisdiction to this court. Some of the facts essential to a correct understanding of the case do not appear of record, and therefore would not be brought up on *certiorari*, but are properly presented by a statement on appeal. We think an appeal in a case of this character, when facts *dehors* the record may be examined, is the appropriate remedy. We are also of opinion that the judgment, though purporting to be for a contempt, is appealable, and is subject to review on the facts presented by this record. We are not called upon in this case to decide whether a judgment for contempt rendered by a

<sup>3</sup> See *People v. Turner*, 1 Cal. 152.

<sup>4</sup> *Ex parte Cohen*, 6 Cal. 318; *Ex parte Rowe*, 7 Cal. 175, 181; *Ex parte Tinkum*, 54 Cal. 201.

<sup>5</sup> See *People v. Turner*, 1 Cal. 152; *Adams v. Haskell*, 6 Cal. 316, 65 Am. Dec. 517; *Fletcher v. Daingerfield*, 20 Cal. 427; and look at *Huerstal v. Muir*, 62 Cal. 479.

<sup>6</sup> See *People v. County Judge*, 27 Cal. 151; *Williams v. Dwinelle*, 51 Cal. 442.

<sup>7</sup> 9 Cal. 107.

<sup>8</sup> See 7 Cal. 175, 181.

<sup>9</sup> *Mahoney v. Van Winkle*, 33 Cal. 448. See in this connection the opinion in *People v. Dwinelle*, 29 Cal. 632.

<sup>10</sup> 47 Cal. 109.

court having jurisdiction to render it may in any case be reviewed for mere error. But it is clear that the question of jurisdiction is always open for review. In *Adams v. Haskell & Wood*, 6 Cal. 316, a party who had been committed for a contempt was discharged from custody, and the judgment set aside on the ground that the court below had no jurisdiction to enter it. In *Ex parte Cohen*, 6 Cal. 318, a person committed for contempt was discharged from arrest on the same ground. To the same effect is *Ex parte Rowe*, 7 Cal. 181, 185. In *Batchelder v. Moore*, 42 Cal. 412, this court reviewed on *certiorari*, and set aside a judgment for contempt on the ground that the court exceeded its jurisdiction in entering the judgment. It is clear, therefore, that in such cases the question of jurisdiction is subject to review in the appellate court."

But the doctrine of these cases was confined to such orders as were in excess of the jurisdiction of the court. Thus in *Larrabee v. Selby*,<sup>11</sup> an appeal from an order adjudging a party to be guilty of contempt in re-entering land from which he had been removed under a judgment was dismissed, the court saying: "In some cases in this court appeals have been entertained from such orders where questions of jurisdiction were involved; but there is no question of that kind in this case, and although it is manifest that such orders may, in their effects, be as important as a judgment for the recovery of the possession of the land, yet the court must, in obedience to the provisions of section 1222, hold that an appeal in this case will not lie."

Even as thus limited, however, the doctrine has been repudiated. In *Huerstal v. Muir*,<sup>12</sup> an appeal from an order adjudging a party guilty of contempt in re-entering land from which he had been removed under a judgment was dismissed, and *McKinstry, J.*, delivering the opinion of the court in bank, said:

"In *People v. O'Neil*, 47 Cal. 109, it was held: 'An appeal may be taken from a judgment for contempt when the fine is for three hundred dollars, and the court below has exceeded its jurisdiction, and there are facts *dehors* the record which can only be brought up on a statement on appeal.' We are not inclined to extend the authority of that decision so as that it shall include any case differing in its circumstances or not limited by the conditions therein considered as material. In the case now before us no fine of three hundred dollars was imposed by the court below; neither does it appear

<sup>11</sup> 52 Cal. 506.

<sup>12</sup> 62 Cal. 479.

that there are facts *dehors* the record which could only be brought up by statement or bill of exceptions. It may be remarked, also, that the affidavits and papers found in the transcript are in no way identified as having been used at the trial of the alleged contempt. The question, then, is whether on a record which shows that an order adjudging a party guilty of contempt by a court which had no power to make an operative order in the manner in which this order was made can be reviewed on appeal. Persons committed for contempt by the district court have been discharged on *habeas corpus*, on the ground that in the particular circumstances the court had no jurisdiction to adjudge the contempts. (Ex parte Cohen, 6 Cal. 318; Ex parte Cohen, 6 Cal. 38; Ex parte Rowe, 7 Cal. 181.) But these cases do not strengthen the argument in favor of hearing *appeals* from contempt judgments and orders. Section 1222 of the Code of Civil Procedure provides: 'The judgments and orders of the court or judge made in cases of contempt are final and conclusive.' This section is not intended to declare the absurdity that such judgments when rendered without jurisdiction may not be annulled by a proper proceeding. To give effect to its language, judgments and orders in cases of contempt must be held to be 'final and conclusive,' in the sense that they are not appealable. In *People v. Wright*, 27 Cal. 151, a *writ of prohibition* issued to arrest the proceedings of a county judge who was about to try and punish a recalcitrant party for disobedience of an order of the district court. In *Batchelder v. Moore*, 42 Cal. 412, a contempt order of the county court was annulled by *certiorari*, and it must be remembered that *certiorari* can be resorted to only where there is *no appeal*. It appears, therefore, that if a judicial officer is about to exceed his jurisdiction by trying for a contempt without legal power to do so, the party threatened may stay the proceeding by prohibition; if he actually adjudges one guilty of contempt, without jurisdiction, his judgment may be annulled by *certiorari*, and if the judgment imposes an imprisonment, the prisoner may be discharged on *habeas corpus*. The remedy in each case is ample by resort to a common-law or a statutory writ. We find no authority for the position that an order adjudging one guilty of contempt may be appealed from simply on the ground that the record shows want of jurisdiction to render the judgment. It is admitted on all sides that if the lower court has jurisdiction, such an order is not appealable. The appellate jurisdiction of this court cannot depend upon the presence or absence of jurisdiction in the court below. We have jurisdiction to hear ap-

peals in all cases of contempt judgments, when the question presented by the record is simply as to the jurisdiction of the lower court, or in none; since in all such cases, when we pass upon the jurisdiction of the court below, we pass upon the merits of the appeal."

The foregoing opinion does not expressly overrule *People v. O'Neil*, above quoted. On the contrary, the mention of that decision seems to imply that upon precisely similar facts it would be followed. The necessity for an appeal in some cases is apparent. For, as remarked in *People v. O'Neil*, where the facts showing the want of jurisdiction do not appear in the record, they would not be brought upon *certiorari*; and the same is true of *habeas corpus* and prohibition. It is desirable, therefore, for the sake of justice to have an appeal, and the doctrine of *People v. O'Neil* ought to have been maintained if it could have been done without violating any provision of the statute. The only provision in the way is that of section 1222 above cited, which provides that "the judgments and orders of the court or judge made in cases of contempt are final and conclusive." The language of this provision, if taken literally, would exclude the review of contempt orders or judgments in *any* mode. But, as above shown, it is well settled that such orders and judgments, when in excess of the jurisdiction of the court, may be reviewed on *habeas corpus* or *certiorari*. The provision, therefore, cannot be taken literally. Now, it cannot be said that the language of the provision makes any distinction between the different kinds of *remedies*. It cannot be said that the language refers to appeals as distinguished from writs of *certiorari*, etc. If any such distinction exists, it must result from the nature of the proceedings; it must be ingrafted on the language by some controlling reason. But it is not easy to see that there is any reason requiring such a distinction to be made. And every argument that can be adduced to show that an excess of jurisdiction in a contempt proceeding can be corrected on *certiorari* or *habeas corpus* will apply with equal force to show that it can be corrected on appeal. The provision of the statute referred to must of course have some meaning. But it is submitted with deference that the true construction is that contempt orders and judgments cannot be disturbed *for mere error*; that is to say, that where the act is of a class which the law declares to be contempt, the supreme court cannot inquire further into the correctness of the order, but that where the act is not of such a class, or in other words, where there has been an excess of jurisdic-

tion, the order may be set aside either upon appeal or upon writ of *certiorari*, or (if there be an imprisonment) upon *habeas corpus*. This is the result of the case of *People v. O'Neil*. But the practitioner must bear in mind that although the case of *Huerstal v. Muir* seems to contain a reservation in favor of *People v. O'Neil*, if a precisely similar case should arise, yet that the construction given in *Huerstal v. Muir* to section 1222 is inconsistent with the appealability of any contempt judgment or order. And it is by no means certain or probable that the construction above contended for will finally prevail. And even if it does prevail, the order or judgment must be brought within one of the classes of appealable orders or judgments; that is to say, it must either be a special order *after* final judgment, or it must be of an amount sufficient to give the court jurisdiction as from a final judgment, as was the case in *People v. O'Neil*.

However this may be, the doctrine of *People v. O'Neil* was long ago explicitly overruled. In *Tyler v. Connolly*,<sup>12a</sup> *Thornton, J.*, for the supreme court, said:

"In *People v. O'Neil*, we think the court mistook the law in holding that the judgment in that case (which was for contempt) was appealable. No authority is referred to in the opinion to sustain such a rule, nor is any law, constitutional or statutory, granting a right of appeal referred to or cited. We think a sounder conclusion on the subject was reached by the learned Justice Crockett, who wrote the opinion in the case above cited (*Huerstal v. Muir*), and another justice, Rhodes, in *Aram v. Schallenger*, 42 Cal. 275. What is said in *Ex parte Hollis* as to an appeal is mere *dictum*. We are of opinion that *O'Neil's* case does not properly declare the law on the point under discussion, and should be overruled."

Inasmuch as the learned justice criticised the *O'Neil* decision for want of sufficient support, it is interesting to note upon what his own argument rests. In this connection he said:

"The appellate jurisdiction of this court is conferred on it and is defined by the Constitution. It has such jurisdiction 'in all cases . . . in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars; . . . and also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone.' It is argued that because the judgment against *Tyler* exceeds three hun-

<sup>12a</sup> 65 Cal. 28, 2 Pac. 414.

dred dollars, that the appeal is given by the Constitution. But the Constitution does not give an appeal in all cases where the judgment exceeds three hundred dollars; it gives it only when the demand, exclusive of interest, exceeds that sum. There was no demand for any sum in the proceeding against Tyler. The demand made appears in the pleadings—either in the complaint or answer. (*Dashiell v. Slingerland*, 60 Cal. 653.) We know of no demand for a sum of money in a proceeding for a contempt. The law does not require or authorize such a demand to be made, and it would be entirely unnecessary and without avail. The contention cannot on the ground stated, in our opinion, be maintained.

"It has been held by this court that a proceeding for contempt is a criminal case. (*Ex parte Crittenden*, 62 Cal. 534.) But as it is not prosecuted by indictment or information, its character as a criminal case furnishes no ground for an appeal. The Constitution expressly limits appeals to criminal cases presented in the mode above stated. We find no warrant in the Constitution for an appeal in the proceeding for contempt.

"Conceding that the legislature may confer appellate jurisdiction on this court in cases not provided for in the Constitution, we have been referred to no statute giving the right to appeal from a judgment in a contempt case. On the contrary, in our judgment, such right is withheld by section 1222 of the Code of Civil Procedure. That section is as follows: 'The judgment and orders of the court or judge made in cases of contempt are final and conclusive.' In *Appeal of S. O. Houghton*, 42 Cal. 35, these words, 'final and conclusive,' in a statute in regard to a judgment of the county court, were held to deny an appeal from such judgment. It may be added here that it was conceded on the argument that an appeal was not given by statute."

The conclusion of the court in this case was subsequently upheld in a number of cases, and is unquestionably the settled doctrine.<sup>12b</sup>

<sup>12b</sup> *Sanchez v. Newman*, 70 Cal. 210, 11 Pac. 645; *In re Vance*, 88 Cal. 262, 26 Pac. 101; *Ex parte Clancy*, 90 Cal. 553, 27 Pac. 411; *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211; *People v. Kuhlman*, 118 Cal. 140, 50 Pac. 382; *Estate of Wittmeier*, 118 Cal. 255, 50 Pac. 393 (see dissenting opinion of Beatty, C. J.); and see *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Frazer v. Lynch*, 88 Cal. 621, 26 Pac. 344;

*Natoma W. & M. Co. v. Hancock* (Cal.), 36 Pac. 100; *Cosby v. Superior Court*, 110 Cal. 45, 42 Pac. 460; *Mott v. Clarke* (Cal.), 56 Pac. 545; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

Contempts in insolvency cases were expressly made appealable under the provisions of section 64 of the Insolvent Act of 1880 (*Laws of 1880*, p. 98); but the supreme court in *Ex parte Clancy*, 90 Cal. 553, 27 Pac.

It has been said that the process provided in the code<sup>120</sup> in the matter of contempt of court is designed for the protection of the court itself, and lies within the sound discretion of the presiding judge.<sup>121</sup> No appeal lies therefrom, but as heretofore suggested, it may be annulled by *certiorari*,<sup>122</sup> reviewed by *habeas corpus*,<sup>123</sup> and arrested by prohibition.<sup>124</sup> The trial court may determine conclusively for itself the question of jurisdiction, which was formerly made a basis for appeal, by reciting the existence of the facts neces-

411, held such provision to be in conflict with section 1222 of the Code of Civil Procedure, and that it was therefore obnoxious to the provisions of section 11 of article 1 of the Constitution, which requires all laws of a general nature to have a uniform operation. See, also, *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438.

In *Levan v. Richards*, 4 Idaho, 667, 43 Pac. 574, in the construction of a code provision identical with that of California, the supreme court held that when the district court keeps within its jurisdiction and there is no abuse of discretion, there is neither appeal nor *certiorari*. No other court has gone quite to this extent, however, and that of Montana, in *State v. Court*, 27 Mont. 128, 69 Pac. 988, seemed to question the constitutionality of any statute which seeks to deprive the supreme court of its constitutional jurisdiction to review the judgments and orders of the lower courts. See *State v. Loud*, 24 Mont. 428, 62 Pac. 497.

The Nevada rule has been already stated. See *Phillips v. Welch*, 11 Nev. 187, and S. C., 12 Nev. 158, cited in note 2, *supra*. In this case (11 Nev. 187-193), the California decision of *People v. O'Neil*, 47 Cal. 109, was severely criticised, and it was held that where the proceeding was criminal, as it was there, no appeal would lie; and in the same case reported in *Phillips v. Welch*, 12 Nev. 158, the court went further, and held that in such a case the judgment would be reviewed on *certiorari*, and, as in the case of other judgments in criminal cases, would merely determine whether the court had exercised its jurisdiction regularly, and if so,

would go no further. See, also, *Ex parte Sweeney*, 18 Nev. 74, 1 Pac. 379.

"The sole and unreviewable right of a common-law superior court of record to determine and punish a contempt does not prevail in this state, for under this section either party to a contempt proceeding may appeal from the final order therein." *State v. Gray*, 42 Or. 261, 70 Pac. 904, 71 Pac. 978. See *State v. Downing*, 40 Or. 309, 58 Pac. 863, 66 Pac. 917.

Any order which adjudges defendant guilty is, under the provisions of section 7573, Revised Codes of North Dakota, appealable. *State v. Massey*, 10 N. D. 154, 86 N. W. 225. As to such appeals in general, see *Township v. Aasen*, 10 N. D. 264, 86 N. W. 742.

The Washington practice is illustrated in the following decisions: *State v. Geiger*, 20 Wash. 181, 54 Pac. 1129; *State v. Jones*, 20 Wash. 576, 56 Pac. 369; *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895; *State v. Court*, 28 Wash. 590, 68 Pac. 1051; *State v. Peterson*, 29 Wash. 571, 70 Pac. 71; *State v. Allen*, 14 Wash. 103, 44 Pac. 121.

<sup>120</sup> Section 1209 et seq., California Code of Civil Procedure.

<sup>121</sup> See *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

<sup>122</sup> *Huerstal v. Muir*, 62 Cal. 479; *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344.

<sup>123</sup> *Huerstal v. Muir*, 62 Cal. 479; *Ex parte Zeelandelaar*, 71 Cal. 238, 12 Pac. 259; *In re Rogers*, 129 Cal. 468, 62 Pac. 47; *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344.

<sup>124</sup> *Huerstal v. Muir*, 62 Cal. 479.



sary to confer the same,<sup>12b</sup> and if the record is silent, such jurisdiction will be presumed.<sup>13</sup>

An appeal from an order *refusing* to commit a party for contempt was entertained in *Galland v. Galland*;<sup>14</sup> the court, however, affirmed the order.

The above doctrine has been so far extended as to include orders of the trial court adjudging guilty of contempt parties convicted of violating restraining orders, and it has been held that the supreme court was without jurisdiction to correct errors of law or fact committed by the trial court in granting such a restraining order when the proposition comes before it in the shape of an appeal from a judgment of contempt for violating such an order.<sup>15</sup>

**§ 199. The Appeal must be Taken from the Order Complained of if Appealable, and not from a Subsequent Order Refusing to Set It Aside.**—There must be some termination to litigation, and some point at which a determination of a court ceases to be liable to be set aside. And hence, as a general principle, where a matter has been heard and decided, the court cannot reopen it for further

<sup>12b</sup> See *Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275; *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; *76 L. & W. Co. v. Superior Court*, 93 Cal. 139, 28 Pac. 813; *F. & M. Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480; *Ex parte Clark*, 110 Cal. 405, 42 Pac. 905.

<sup>13</sup> *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; and see *Roe v. Superior Court*, 60 Cal. 93; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480.

<sup>14</sup> 44 Cal. 475, 13 Am. Rep. 167. See *Levan v. Richards*, 4 Idaho, 667, 43 Pac. 574.

<sup>15</sup> See *Natoma W. & M. Co. v. Hancock (Cal.)*, 36 Pac. 100.

The California rule, in so far, at least, as it covers contempts of the latter description has not been followed uniformly. See *Porter v. State*, 16 Wyo. 131, 92 Pac. 285; *Laramie etc. Bank v. Steinhoff*, 7 Wyo. 464, 53 Pac. 299, and cases cited; but see *State v. Davis*, 2 N. D. 461, 51 N. W. 942; also *In re Whitmore*, 9 Utah, 441, 35 Pac. 524; *Snow v. Snow*, 13 Utah, 15, 43 Pac. 620.

New Trial—65

The Colorado practice is outlined in the following decisions. Prior to the adoption of the code in 1877 there was no relief from a fine imposed for contempt. *Butler v. People*, 2 Colo. 295. This rule that contempt judgments were final and conclusive is simply a declaration of a rule of the common law. *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *Thomas v. People*, 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569. On review the appellate court will go no further than to ascertain that the facts themselves constitute a contempt and that the court below had jurisdiction to impose the penalty: *Reeves v. People*, 2 Colo. App. 196, 29 Pac. 1033; *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430; *Mullin v. People*, 15 Colo. 437, 22 Am. St. Rep. 414, 24 Pac. 880, 9 L. R. A. 566; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961. And it has been held that the review should be by writ of error and not by appeal. *Teller v. People*, 7 Colo. 451, 4 Pac. 48; *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430; *McClain v. People*, 9 Colo. 190, 11 Pac. 85; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961.

consideration. Accordingly, it is a general rule (subject to the exceptions and qualifications hereafter stated) that the party aggrieved by a judgment or order must take his appeal from such judgment or order itself if it be appealable, and not from a subsequent order refusing to set it aside. This rule was clearly stated (although it is thought to have been wrongly applied) in *Henly v. Hastings*.<sup>1</sup> In that case Heydenfeldt, J., delivering the opinion, said: "In February, 1853, the district court on an *ex parte* motion, ordered to be stricken out a marginal entry of satisfaction of a judgment, which had been rendered two years before. This was a wrongful exercise of authority, and is a proper subject for the reviewing power of this court. But the defendants do not appeal from that order. They make a motion to set aside that order, and then appeal from the refusal to grant their motion. This is certainly not revisable; it is the mere negative action of the court declining to disturb its first decision. It is that decision which is the proper subject of complaint, and the refusal to alter it, any number of times, would not make it less so. There must be observed in appeals to this court the order and regularity which belong to well-established principles founded in sound reason. The appeal is dismissed." So where the court below made an order setting aside a judgment, and admitting new parties, and the party aggrieved moved to dismiss the suit as to the new parties, and appealed from the order denying such motion, the appeal was dismissed, the supreme court, saying: "If, as has been held, an appeal lies from an interlocutory order, it should have been taken upon the order setting aside the judgment."<sup>2</sup> So where an injunction was granted upon an order to show cause, a subsequent order dissolving it was reversed on appeal, the court saying: "The order granting it might have been appealed from, and in our opinion this was the only remedy open to the defendants."<sup>3</sup> So where the court below upon motion set aside an order denying a motion for new trial, the order setting aside the previous order was reversed, and Niles, J., delivering the opinion, said: "The motion to vacate the order was equivalent in its effect upon the parties to a renewed motion for a new trial. It demanded another hearing of a question once determined, and resulted in the granting of a new trial which had been once refused.

<sup>1</sup> 3 Cal. 341. As to this case see second exception herein.

<sup>2</sup> *Stearns v. Marvin*, 3 Cal. 376.

<sup>3</sup> *Natoma Water Co. v. Parker*, 16 Cal. 83; *Natoma Water Co. v. Clarkin*, 14 Cal. 544. See, also, *Curtis v. Sutter*, 15 Cal. 259.

If this practice should be allowed, several consequences, not contemplated by the statute, would ensue. The limited time within which a motion for a new trial may be made would be practically enlarged, for there can be no good reason why the motion to set aside the order should be made within a limited number of days. The proceedings after judgment would be interminable, for the last order could be vacated upon motion of the losing party, and so *ad infinitum*. There must be some point where litigation in the lower court terminates, and the losing party is turned over to the appellate court for redress."<sup>4</sup>

So in the later case of *De La Montanya v. De La Montanya*,<sup>5</sup> Temple, J., for the supreme court, said:

"No doubt it has been held, and I think correctly, that when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable, not because the last order is not within the terms of section 963 of the code allowing appeals, for it may be; but because it would be virtually allowing two appeals from the same ruling, and would in some cases have the effect of extending the time for appealing contrary to the intent of the statute."

Similar language was made use of by the same learned justice in *Pignaz v. Burnett*,<sup>6</sup> where it was said, referring to *Henly v. Hastings*, and other cases cited in this section:

"The only possible reason for refusing to entertain appeals in those cases was that the party aggrieved had already had an opportunity to appeal from the same ruling, and cannot extend his time for taking an appeal by making the court repeat its ruling."

It is manifest, therefore, that not every attempt to vacate an appealable order or judgment by motion in the court where it was originally made, comes within the rule thus outlined. In the *De La Montanya* case, above cited, continuing, the court said:

"But I see no reason why this appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and

<sup>4</sup> *Coombs v. Hibberd*, 43 Cal. 452; *People v. Center*, 61 Cal. 191; *Nichols v. Dunphy*, 10 Pac. C. L. J. 193; *Odd Fellows' Bank v. Deuprey*, 66 Cal. 168, 4 Pac. 1173; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. 135; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 306, 416; *Carpenter v. Su-*

*perior Court*, 75 Cal. 596, 16 Pac. 778; *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *Butte etc. Co. v. Frank*, 24 Mont. 506, 62 Pac. 922.

<sup>5</sup> 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345, 32 L. R. A. 82.

<sup>6</sup> 119 Cal. 157, 51 Pac. 48.

no other method is suggested in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment-roll would not present all the facts upon which the motion is based—even if one may have a bill of exceptions when he has not been in court, and has taken no exceptions. Besides, it is a case in which it is eminently proper, if not necessary, that relief should first be asked from the trial court. Its action could not be asked in any other mode. The defendant was not in court, and had no opportunity to be heard.”

So in the *Pignaz v. Burnett* case, above cited, it was further said :

“But the reasons could not apply where no appeal could be taken from the first order, or when such an appeal would be vain for lack of a record showing the rights of the aggrieved party.”

So in *Kent v. Williams*,<sup>6a</sup> the court said :

“An order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable, unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order.”

In all of these cases, as well as in those hereinafter cited,<sup>6b</sup> at least three well-defined prerequisites control the application of the rule under consideration. The second order must be, in effect, a mere repetition of the first; the aggrieved party must be the same in both, and the record on the appeal from the second order must present no new matter, or any matter that might have been presented upon the appeal from the original order, if such an appeal had been prosecuted. These three prerequisites are self-explanatory, but they will receive more extended consideration in the subdivisions below.

An appropriate statement of the rule would therefore seem to be as follows :

An order refusing to vacate a prior order or judgment, from which an appeal might have been prosecuted, is not appealable, unless the motion to vacate is based upon matter affecting the substantial rights of the moving party, which could not have been presented upon an appeal from the original order or judgment; or, unless the right to make such motion, and to prosecute an appeal therefrom, is directly conferred by statute.<sup>6c</sup>

<sup>6a</sup> 146 Cal. 3, 79 Pac. 527.

<sup>6b</sup> See subdivisions 1, 2 and 3, herein.

<sup>6c</sup> See, in addition to the cases cited elsewhere in this section, the follow-

ing: *Estate of Burns*, 54 Cal. 223; *Reed v. Allison*, 54 Cal. 489; *Higgins v. Mahoney*, 50 Cal. 444; *Holmes v. McCleary*, 63 Cal. 497; *Cal. S. R. R. Co. v. S. P. R. E. Co.*, 65 Cal. 295, 4

The exceptions suggested in this definition and in the prerequisites above defined may be properly considered in the following separate subdivisions:

1. *Where a Motion to Vacate is Authorized by Statute.*—Whenever the code authorizes the aggrieved party to move in the court below to have the judgment or order set aside, and to appeal from the order upon such motion, as a matter of course he may adopt that procedure. Thus the code makes express provision for orders setting aside a verdict or decision and the judgment based thereon, and for a new trial of the action. So, for irregularity or inadvertence, and under certain conditions, orders and judgments may be set aside under the provisions of section 473 of the Code of Civil Procedure.<sup>64</sup> The rules governing new trial procedure are to be found in Part I of this treatise; and the procedure under section 473 is treated upon general lines in chapter 57. Suffice it to say here that where an appealable order was improvidently or inad-

Pac. 13; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Tripp v. Santa Rosa Co., 69 Cal. 631, 11 Pac. 219; Eureka etc. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. 175; Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938; Davis v. Donner, 82 Cal. 35, 22 Pac. 879; Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093; Kubli v. Hawckett, 89 Cal. 638, 27 Pac. 57; In re Get Young, 90 Cal. 77, 27 Pac. 158; Lee Chuck v. Quan Wo Chong Co., 91 Cal. 593, 28 Pac. 45; Harper v. Hildreth, 99 Cal. 265 (269), 33 Pac. 1103; Sutton v. Symons, 100 Cal. 576, 35 Pac. 158; Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Deering v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801; Estate of Gregory, 122 Cal. 483, 55 Pac. 144; Doyle v. Insurance Co., 125 Cal. 15, 57 Pac. 667; Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758; Birch v. Cooper, 136 Cal. 636, 69 Pac. 420; Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

Also, Schmidt v. Dreyer, 21 Colo. 100, 39 Pac. 1086, where a writ of error taken to review an order for the correction of a final judgment, instead of the final judgment itself, was dismissed. State v. Griffin, 4 Idaho, 459, 40 Pac. 60, where it was held

that no appeal lies from an order refusing to vacate an appealable order. National etc. Assn. v. Simpson, 21 Wash. 16, 56 Pac. 844, where it was held that an order refusing to set aside the final decree was not appealable. Morrel etc. Co. v. Princess etc. Co., 16 Colo. App. 54, 63 Pac. 807, where it was held that no appeal could be taken from an order denying a motion to vacate a judgment, since the denial of the motion merely left the way clear for an appeal from the judgment. Hibbard etc. Co. v. De Lanty, 20 Wash. 539, 56 Pac. 34, where it was held that an order refusing to set aside an order refusing to vacate a judgment was not appealable.

Also, Travelers' Co. v. Weber, 2 N. D. 239, 50 N. W. 703; Sound etc. Co. v. Fairhaven, 45 Wash. 262, 88 Pac. 198.

<sup>64</sup> See, also, sections 5153-5162, Bal. Code of Washington (sections 464-473, Rem. & Bal. Code), which provide for the vacating of judgments and orders, under certain conditions. And see Chezum v. Claypool, 22 Wash. 498, 79 Am. St. Rep. 955, 61 Pac. 157; McCord v. McCord, 24 Wash. 529, 64 Pac. 748; Wilson v. Seattle etc. Co., 26 Wash. 297, 66 Pac. 384; In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093.

vertently made, the aggrieved party may move the court below to set it aside, and may appeal from the order denying his motion. Thus, where a motion for a new trial was granted without any submission of the motion, and before the record upon the motion was completed, it was held to be proper practice for the aggrieved party to move upon affidavits to have the order granting the new trial set aside, and the order denying such motion was reversed.<sup>7</sup> The fact that the order was made irregularly takes it out of the general rule.<sup>8</sup>

2. *Where the Original Order was Appealable, but the Party Aggrieved Thereby Could not Appeal from It.*—Thus where a writ of assistance was granted to remove a person *not a party to the action* and such person moved to set aside the order allowing the writ, and appealed from the order denying his motion, the supreme court reversed the order appealed from with directions to the court below to set aside the order allowing the writ, saying: "The purchaser from the grantee of the sheriff having by intrusion into the case, and without notice to the tenant or his landlord, obtained an order for the writ, the latter had no remedy except a motion to set it aside, or had he been evicted under the writ, a motion to be restored to the possession, in which latter case there can be no doubt that he could have appealed from an order denying his motion. In no other way could he become a party upon the record so as to enable him to support an appeal. The cases in which we have held that the appeal should be taken from the order itself as originally entered, and not from a subsequent order refusing to set it aside, are cases in which the party might have prosecuted an appeal from the original order. We have never held that anyone was concluded by the lapse of sixty days from the entry of an order from which he had never had an opportunity to bring an appeal. Had Torney

<sup>7</sup> *Morris v. De Celis*, 41 Cal. 331. See, also, *De Gaze v. Lynch*, 42 Cal. 362; *Hall v. Polck*, 42 Cal. 218; *Odd Fellows' Bank v. Deuprey*, 66 Cal. 168, 4 Pac. 1173; and see section 134, *ante*.

In *Northern Pacific Co. v. Black*, 3 Wash. 327, 28 Pac. 538, it was held that an order denying a motion to set aside a judgment on the ground of "excusable inadvertence or mistake" was appealable. See, also, *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33.

<sup>8</sup> *Coombs v. Hibbard*, 43 Cal. 452; *Wiggin v. Superior Court*, 68 Cal. 398,

9 Pac. 646; *Page v. Page*, 77 Cal. 83, 19 Pac. 183; *Whitney v. Superior Court*, 147 Cal. 536, 82 Pac. 37; and as to the principle compare *Rouseet v. Boyle*, 45 Cal. 64; and *Rowland v. Kreyenhagen*, 24 Cal. 52; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Cummings v. Ross*, 90 Cal. 68, 27 Pac. 62; *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; *People v. Curtis*, 113 Cal. 68, 45 Pac. 180.

appealed directly from the order of May 13, 1872, the appeal must have been dismissed here, upon the ground that he was not a party to the record, and unless he could be permitted to move in the court below to set that order aside, he would be left without remedy."\*

So in the case of orders *ex parte*, the rule cannot be said to apply.<sup>10</sup> For the aggrieved party may not have had any knowledge of the order until after the time for appeal therefrom has elapsed. And even if he should have had such knowledge, such an appeal would in most cases be of no avail. For it must be heard upon the case which was before the court below, and the aggrieved party, not having had any opportunity to present the facts in support of his side of the question, would, if compelled to appeal from the *ex parte* order, for all practical purposes, be deprived of his "day in court." The principle of this exception to the general rule seems to be recognized in the *City of San Jose v. Fulton*,<sup>11</sup> although the decision in that case was based in part upon the fact that the order granting the writ of assistance was obtained by a stranger to the record. The facts were that a writ of assistance was obtained, without notice, by the grantee of the person to whom a sheriff's deed had been issued. The court below denied a motion to set aside the order allowing the writ. But the order denying such motion was reversed on appeal, and Wallace, C. J., delivering the opinion, said:

"It is objected, however, that *Fulton* should have appealed directly from the order obtained by *Reauda*, instead of moving to set it aside, and then appealing from the order denying his motion. It is well settled that where an order which is the subject of appeal is regularly entered in a cause, a party supposing himself to be affected thereby is not ordinarily at liberty to assail it by means of a subsequent motion to set it aside, but is held to the taking of an appeal therefrom within the time limited by statute

\* *People v. Grant*, 45 Cal. 97. In the case of *Horn v. Volcano Water Co.*, 18 Cal. 141, it was held that where the party moved to set aside the order allowing the writ of assistance he should appeal from the order denying his motion, and not from the order allowing the writ. But this was not put upon the ground that he was not a party to the record. The ground was stated by Baldwin, J., as follows: "The appellants, having resorted to their summary remedy by motion to set aside the first order, and having tried this motion on the merits, cannot

fall back upon the first order, and seek to reverse it by direct appeal in this court. If this were tolerated, appeals might be multiplied indefinitely, to the great cost and vexation of parties, without any corresponding benefit."

<sup>10</sup> Section 937 of the California Code of Civil Procedure provides that "an order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it," etc. See, also, section 334 of old Practice Act.

<sup>11</sup> 45 Cal. 316.

for that purpose. But the rule applies only to such proceedings as are *regularly* had. It does not apply to an *ex parte* order taken at the instance of a mere intruder into the case; for in the absence of notice of the application actually given, a party is not to be held to knowledge of the entry of an order obtained by one who is not already a recognized adversary in the case. It would be unreasonable to impute to him notice of the steps taken by a mere stranger to the litigation resulting in an order injurious to his rights, and a knowledge of which may not, in fact, reach him until too late to take his appeal."

It is true that in the case of *Henly v. Hastings*,<sup>12</sup> quoted in the first part of this section, the rule was applied to an *ex parte* order. But the court did not advert to the distinction above mentioned, and it is believed that the rule was wrongly applied in that case. It is apparent from the later case of *Pignaz v. Burnett*<sup>12a</sup> that the supreme court itself shared the same view, for upon a similar order the appeal was entertained, the court saying:

"As to every order finally disposing of the rights of the parties, as to any matter involved in the litigation—orders, final in the sense that the question cannot be again considered in the case—the parties affected have the right to be heard.

"When they are made *ex parte*, the right to move to vacate the order, and upon such motion to show cause against the order, is implied. In such case, the only appeal which can avail is an appeal from the order refusing to vacate. In no other way, where evidence is submitted, can the appellant present to this court his showing against the order. To say he cannot do this is to deny him his right of appeal.

"With the general rule laid down in the numerous cases cited by respondent I have no quarrel. Exceptions to the rule have heretofore been made, and this case falls within the reason of those exceptions. It must be admitted that this court has not always discriminated between the cases which are within and those which are not. They will not justify us, however, in refusing to appellant a right secured to him by the Constitution and the statute."

The cases referred to in this opinion are the cases above cited, *People v. Grant*, and *San Jose v. Fulton*, in the 45th California Report, and *Green v. Hebbard*.<sup>12b</sup>

<sup>12</sup> 3 Cal. 341.

<sup>12a</sup> 119 Cal. 157, 51 Pac. 48.

<sup>12b</sup> 95 Cal. 39, 30 Pac. 202. And see *Gordan v. Graham*, 153 Cal. 297,

95 Pac. 145. Another exception of this description is to be noted in *People v. Walker*, 132 Cal. 137, 64 Pac. 133, where it was suggested that in



It seems that there are cases not strictly *ex parte*, which constitute exceptions to the rule. Of these are to be noted cases where the service was constructive, and the judgment rendered was a judgment in default. Of such class of cases was *De La Montanya v. De La Montanya, supra*. And it would seem to be the same whether such service was defective or otherwise.<sup>13</sup>

3. *Where the Aggrieved Party in the Original Order is not the Party Aggrieved by the Second Order.*—The rule applies only to the party aggrieved by the first order. If the court makes an appealable order, and the party aggrieved, instead of appealing from it, make a motion to have it set aside, and the court below *grant* such motion, the party whose order is set aside may appeal from the order setting it aside. Otherwise he would be without remedy. This is too clear for discussion.<sup>14</sup>

If the original order is not appealable, no appeal lies from the subsequent order denying a motion to set it aside.<sup>15</sup> And the same thing is true in cases where the time to appeal has elapsed.<sup>16</sup> But this last rule is believed to be subject to the exception above outlined, where the party aggrieved was without knowledge of the order.<sup>17</sup>

Where the original order is void on the face of the record, it is believed not to be subject to the above rule. Such an order has been described as a dead limb upon the judicial tree, which should be lopped off, if the power to do so exists. It bears no fruit for the

criminal cases where the record upon which erroneous proceedings might be reviewed was specifically defined, beyond which the appellant could not depart; so that, as to certain proceedings, as, for example, a defective sentence, the only means of securing a review thereof is by motion to vacate.

See, also, *Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009; *Elliott v. Superior Court*, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109. As to an appeal from an order refusing to set aside a judgment by default, see *McCormick v. Belvin*, 96 Cal. 182. An appeal cannot be prosecuted in any event from an order entering a default. *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

<sup>13</sup> See *Ward v. Ward*, 59 Cal. 139. In *State v. Huston*, 32 Wash. 154, 72

Pac. 1015, where the judgment was prematurely entered without hearing any evidence on the issues joined, it was held that an appeal might properly be prosecuted from the order denying the motion to vacate.

<sup>14</sup> For instances of such appeals, see *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Natoma Water Co. v. Parker*, 16 Cal. 83; *James v. Center*, 53 Cal. 31; and see *Livermore v. Campbell*, 52 Cal. 75.

<sup>15</sup> *Estate of Keane*, 56 Cal. 407; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171.

<sup>16</sup> *Thompson v. Lynch*, 43 Cal. 482; *Kittridge v. Stevens*, 23 Cal. 283.

<sup>17</sup> See subdivision 2, herein.

plaintiff, and is a constant menace to the defendant. It may be vacated upon motion at any time, and the refusal of the court to do so, as well as the contrary order, is no doubt appealable.<sup>18</sup>

As to the application of the rule in probate proceedings, see section 200, *post*.

<sup>18</sup> See section 344, *post*.

## CHAPTER XXX.

## WHAT MAY BE APPEALED FROM—PROBATE PROCEEDINGS—PROCEEDINGS IN INSOLVENCY—ACTIONS OF FORCIBLE ENTRY AND DETAINER.

§ 200. Appeals from probate proceedings.

§ 201. Proceedings in insolvency.

§ 202. Actions of forcible entry and detainer.

§ 202a. Judgments and orders in criminal cases.

§ 200. **Appeals from Probate Proceedings.**—The provisions of the Constitution in relation to the jurisdiction of the supreme court over appeals from probate courts have already been considered.<sup>1</sup> By the act of 1851 no appeal from the probate courts to the supreme court was provided.<sup>2</sup> That act provided an appeal from such courts to the district courts.<sup>3</sup> This provision, however, was held to be unconstitutional,<sup>4</sup> and in 1855 the legislature amended section 297 of the Probate Act so as to read as follows:<sup>5</sup>

"Sec. 297. An appeal may be taken to the supreme court from an order, decree, or judgment of the probate court where the estate or amount in dispute exceeds two hundred dollars in the following cases:—

"*First.* For or against granting or revoking letters testamentary or of administration.

"*Second.* For or against admitting a will to probate.

"*Third.* For or against the validity of a will or revoking the probate thereof.

"*Fourth.* For or against setting apart property, or making an allowance for a widow or child.

"*Fifth.* For or against directing the sale or conveyance of real property.

"*Sixth.* On the settlement of an executor or administrator.

"*Seventh.* For or against declaring, allowing, or directing the payment of a debt, claim, legacy, or distributive share."

This section was construed in *Peralta v. Castro*,<sup>6</sup> and it was there held that the right of appeal from probate proceedings depended

<sup>1</sup> See section 178, *ante*.

<sup>2</sup> Laws of 1851, p. 104, c. 1, title 9.

<sup>3</sup> Laws of 1851, p. 108, secs. 363–365; and also p. 486, sec. 294.

<sup>4</sup> *Reed v. McCormick*, 4 Cal. 342.

<sup>5</sup> Laws of 1855, p. 301, sec. 297.

<sup>6</sup> 15 Cal. 511.

upon it, and that an order of the probate court "setting aside a judgment rendered by the court refusing to admit a will to probate" did not come within its provisions, and was therefore not appealable.

By the amendment of 1861,<sup>7</sup> the words "*or of guardianship*" were added to the first subdivision of section 297, above quoted, and the sixth subdivision was changed so as to read as follows: "On the settlement of *any account* of an executor, or administrator, or *guardian*." In other respects the section remained as above quoted, and no further change<sup>8</sup> was made until the adoption of the Code of Civil Procedure. Under the section as amended in 1861 it was held in *Estate of Johnson v. Tyson*<sup>9</sup> that an order setting aside proceedings *then pending* to set apart to the widow certain property as a homestead was not appealable, the court saying: "The proceedings upon the petition appear to be still pending in the probate court, and the order complained of, therefore, does not amount to an order, decree, or judgment, either 'for or against setting apart property,' etc., for the widow."

The section of the Code of Civil Procedure corresponding to section 297 of the old Practice Act was (as first enacted) as follows:

"Sec. 969. An appeal may be taken to the supreme court from a judgment or order of the probate court,—

"1. Granting or revoking letters testamentary, or of administration, or of guardianship.

"2. Admitting or refusing to admit a will to probate.

"3. Against or in favor of the validity of any will or revoking the probate thereof.

"4. Against or in favor of setting apart property or making an allowance for a widow or child.

"5. Against or in favor of directing the partition, sale, or conveyance of real property.

"6. Settling the account of an executor, or administrator, or guardian.

<sup>7</sup> Laws of 1861, pp. 654, 655.

<sup>8</sup> In 1868 section 294, in relation to framing the issues of fact upon contests of wills, was amended so as to provide among other things, that exceptions could be taken to the failure of the court to submit proper issues, and that "either party shall be entitled to move for a new trial, and to appeal for or on account of error committed by the probate court in settling the issues of fact to be sub-

mitted to the jury, or for errors occurring at the trial of such issues," etc. Laws of 1867-68, p. 629. But this does not mean that an order settling or refusing to settle the issues was appealable, but merely that any error committed in relation thereto could be reviewed on appeal from the order admitting or refusing to admit the will to probate.

<sup>9</sup> 45 Cal. 257.

"7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share.

"8. Overruling a motion for a new trial.

"9. Confirming report of appraisers setting apart the homestead."

Under this provision it was held, in the *Estate of McKinley*,<sup>10</sup> that an order dismissing a petition to have an administrator show cause why a claim which had been allowed should not be paid was an appealable order.

In 1874 the section was amended so that the first subdivision read as follows: "Granting, *refusing*, or revoking letters testamentary, or of administration, or of guardianship." But the amendment made no change in the other subdivisions of the section. Under the section as so amended it was held in *Blum v. Brownstone Bros.*<sup>11</sup> that an order refusing to quash an execution was not appealable, and in the *Estate of Smith*<sup>12</sup> that an order refusing to set aside an order of sale of real estate previously made was not appealable, but the order of sale was appealable, and in the *Estate of Dunne*<sup>13</sup> that an order setting aside an order settling the annual account of an executor was not appealable.

In 1878 the section was amended so as to make the eighth and ninth subdivisions read as follows:

"8. *Granting* or overruling a motion for a new trial.

"9. *Confirming or refusing to confirm* a report of an appraiser setting apart the homestead."

The amendment made no change in the other subdivisions. Under the section as so amended it was held in the *Estate of Montgomery*<sup>14</sup> that an order denying a petition for a revocation of letters of administration is not appealable, and in the *Estate of Martin*,<sup>15</sup> it was held that an order directing an executor to proceed with the sale of real estate previously ordered could not be appealed from. As to orders on motion for new trial, see opinion of McKee, J., in *Estate of Keane*.<sup>16</sup>

In 1880 the code was amended so as to conform to the provisions of the Constitution of 1879, by which the old courts were abolished

<sup>10</sup> 49 Cal. 152.

<sup>11</sup> 50 Cal. 293.

<sup>12</sup> 51 Cal. 563.

<sup>13</sup> 53 Cal. 631.

<sup>14</sup> 55 Cal. 210; look at *Estate of Keane*, 56 Cal. 407.

<sup>15</sup> 56 Cal. 208.

<sup>16</sup> 56 Cal. 407. This opinion was not concurred in and consequently is not authority.

and the superior courts created in their place. By the amendment of 1880, section 969 was abolished, and in lieu of it a third subdivision was added to section 963, which before that time related only to appeals from the district courts. Since that time the entire section, subdivision 3 included, has undergone repeated amendment, and many minor changes have found their way into the latter without materially altering its essential characteristics. As at present constituted it reads: <sup>16a</sup>

<sup>16a</sup> The practice with respect to appeals in probate proceedings differs widely in other states.

*Arizona*: Section 1945, Revised Statutes (section 737, Civil Practice), is as follows: "Any person who may consider himself aggrieved by any decision, order, decree or judgment of a probate court shall have the right to appeal therefrom to the district court of the county upon complying with the provisions of this chapter."

*Colorado*: Section 1091, Mills' Annotated Statutes, authorizes review by writ of error in probate matters; and appeals to the supreme court, instead of the district court, "where the final judgment or decree exclusive of cost shall exceed twenty dollars."

*Idaho*: Section 4831, Revised Codes, is as follows: "An appeal may be taken to the district court of the county from a judgment or order of the probate court in probate matters:

"1. Granting, refusing or revoking letters testamentary, or of administration, or of guardianship;

"2. Admitting, or refusing to admit, a will to probate;

"3. Against or in favor of the validity of a will, or revoking the probate thereof;

"4. Against or in favor of setting apart property, or making an allowance for a widow or child;

"5. Against or in favor of directing the partition, sale or conveyance of real property;

"6. Settling an account of an executor, or administrator or guardian;

"7. Refusing, allowing, or directing the distribution of estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share;

"8. Confirming report of appraisers setting apart the homestead."

Appeals from the district court to the supreme court in probate matters

may be prosecuted under the authorization of subdivision 2 of section 4807, which is as follows:

"2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment."

*Montana*: Section 7098, Revised Codes, subdivision 3, is identical with the same subdivision of section 963, California Code of Civil Procedure, with the exception of the phrase "refusing to revoke" the probate of a will, and the word "appraisers," after "appraiser," which are omitted. Section 7712, Revised Codes (section 2921, Code of Civil Procedure), provides that the provisions of the code relative to new trial and appeals in general shall apply to probate proceedings, so far as the same are applicable.

*Nevada*: Section 3041, Cutting's Compiled Laws (section 255, Civil Practice), authorizes appeals to the supreme court from "the decision and decree of the district court appointing an executor or administrator, revoking letters, allowing a final account, or disallowing it, decreeing a distribution or partition, order or decree, confirming or setting aside a report of commissioners, admitting or refusing a will for probate, and any other decision wherein the amount in controversy equals or exceeds, exclusive of costs, one thousand dollars," the procedure to be governed "in all respects as an appeal from a final decision and judgment in action at law."

*New Mexico*: Section 928, Compiled Laws, specifically authorizes appeals from the probate to the district court in numerous orders and decrees of the former court, covering the usual ground of probate jurisdiction. Section 1984 authorizes appeals from orders of the probate judge declining to approve the appointment of an

"Section 963. An appeal may be taken to the supreme court, from a superior court, in the following cases:

"3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting, or refusing to admit, a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against

executor by the will; and section 2014 provides for appeals in orders relating to the probate of wills or estates in certain cases. The decision of the district court on appeal from the probate court may be reviewed by the supreme court on appeal. *Clancey v. Clancey*, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168.

*North Dakota*: Section 7964 et seq. (article 9, chapter 3, of the Probate Code), Revised Codes, outlines the practice in the prosecution of appeals from the county court (in probate matters) to the district courts.

*Oklahoma*: By the organic act appeals in probate proceedings were authorized to the supreme court on questions of law alone without regard to the amount; as to matters of law and fact appeals were taken to the district court. *Decker v. Cahill*, 10 Okl. 251, 61 Pac. 1101; *Randolph v. Hudson*, 10 Okl. 398, 61 Pac. 1103; *McMaster v. Bank*, 13 Okl. 326, 73 Pac. 946.

Section 5451, Compiled Laws, is the same as the Idaho section, *supra*, except that in place of subdivision 8, is the following: "8. From any other judgment, decree or order of county court, or of the judge thereof affecting a substantial right."

*Oregon*: The Constitution confers jurisdiction in probate matters upon the county courts (section 12, article 7), and provides for appeals therefrom to the circuit courts (section 8, article 7). Section 1224, Lord's Oregon Laws, authorizes appeals "from all final orders, judgments, and decrees," in probate matters "made or rendered by the county court" to the circuit court. "All such appeals shall be had and tried in the same manner and with like effect as appeals in suits in equity are now heard and tried."

*South Dakota*: Section 345, Probate Code, is the same as section 5451, Compiled Laws of Oklahoma, *supra*.

*Utah*: Section 3300, Compiled Laws: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the district court. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship."

*Washington*: Upon the admission of the state into the Union the probate courts were continued temporarily for the expiration of the term of office of the probate judges, and provision made thereafter for the transfer of the probate jurisdiction theretofore invested in such courts to the superior court (section 10, article 27). No specific provision is made for the appeal of causes from the superior court to the supreme court, but it has never been seriously denied. (See section 6, article 4, as to superior court jurisdiction; section 4, article 4, supreme court jurisdiction; and section 1716, Rem. & Bal. Code; section 6500, Bal. Code.)

*Wyoming*: Section 5467, Compiled Statutes, contains the following: "The provisions of the Code of Civil Procedure, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of the Probate Code—apply to the proceedings mentioned therein." No special provisions are made for appeals in probate matters.

or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property; or settling an account of an executor, administrator or guardian; or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead."

It was early held that, under the rule of construction expressed in the maxim, *Expressio unius est exclusio alterius*, the subdivision above quoted offered the sole authority for appeals from probate orders under the provision of the Constitution that appeals will lie "in all such probate matters as may be provided by law," and that no appeal could be taken from a probate order, judgment, or decree not included in the list therein enumerated. One of the earliest expressions to be found in the reports is that in *Estate of Calahan*,<sup>17</sup> where an appeal was sought from an order vacating a decree

<sup>17</sup> 60 Cal. 232. In *Estate of Ohm*, 82 Cal. 160, 22 Pac. 927, the administratrix attempted to prosecute an appeal from an order compelling her to allow her name to be used by a creditor of the estate, in a suit to set aside a conveyance by the decedent on the ground that it was made to defraud his creditors. The only point made by the respondent is that the order was not appealable, and the court sustained him, saying:

"The appellant's counsel, however, contends that the order appealed from was made in a 'special proceeding commenced in a superior court,' and is the 'final judgment entered' therein, in the sense of the first division of section 963 of the Code of Civil Procedure, and is therefore appealable.

"Whether this proceeding is 'a special proceeding' or not, it certainly is a 'probate matter.' Its purpose is to control the official action of the administratrix in the matter of collecting and applying alleged assets of the estate.

"The Constitution provides that 'the supreme court shall have appellate jurisdiction . . . in all such probate matters as may be provided by law.' (Art. 6, sec. 4.) The only provisions of law, as to appeals in probate matters, are contained in the

third subdivision of section 963 of the Code of Civil Procedure, in which is to be found no provision for an appeal from such an order as that appealed from in this case. In *Estate of Montgomery*, 55 Cal. 210, *Estate of Sbarboro*, 70 Cal. 147, 11 Pac. 563, and *Estate of Keane*, 56 Cal. 407, it was decided that an appeal does not lie from an order denying a petition for the revocation of letters of administration, because such order is not included in section 963 of the Code of Civil Procedure. In *Estate of Carpenter*, 73 Cal. 202, 14 Pac. 677, it was held, for the same reason, that an appeal does not lie from an order appointing a special administrator; and in *Estate of Poten*, 72 Cal. 576, 14 Pac. 209, that an appeal does not lie from an order refusing to compel the clerk of the court to pay over money in his hands belonging to the estate to a special administrator. Were not the proceedings in which the orders appealed from were made, in all the cases here cited, special proceedings in the same sense that the proceeding in the case at bar is a special proceeding?

"This question, however, need not be answered here, further than to say that the construction, by this court,



of distribution, and was dismissed on the ground that it was not included in subdivision 3 of section 963 of the Code of Civil Procedure, as an appealable order, and was therefore not appealable.

of the constitutional provision above quoted excepts final orders in special probate proceedings, if any such there be, from the operation of the code rule, that appeals lie from 'a final judgment entered . . . in a special proceeding commenced in a superior court'; and this construction was probably given in view of the maxim, *Expressio unius est exclusio alterius*. The constitutional expression that appeals lie 'in all such probate matters as may be provided by law' excludes appeals in probate matters not provided for by law. At all events this is the effect of the cases above cited."

In *Estate of Smith*, 98 Cal. 636, 33 Pac. 744, where there were appeals from an order granting a new trial, and from an order amending a statement on motion for new trial, the court thus referred to the right of appeal from probate matters:

"The first question presented is as to the right of appeal from the order amending the statement. Counsel for appellant contend that the appeal is properly taken from both orders under subdivision 2 of section 963 of the Code of Civil Procedure. The subdivision of section 963 referred to provides for an appeal from various enumerated orders, among which are 'from an order granting or refusing a new trial,' and 'from any special order made after final judgment.' It is urged that the judgment refusing to admit the will to probate is a final judgment within the purview of the code, and as the order permitting the amendment to the statement was subsequent thereto in point of time, it is 'a special order made after final judgment,' and hence appealable.

"In *Estate of Calahan*, 60 Cal. 232, which was an appeal from an order of the superior court vacating a decree of distribution and settlement of the final account of the executor, this court, in determining whether or not the order was appealable, held that the orders in probate proceedings, from which an appeal would lie,

were only those enumerated in the third subdivision of section 963 of the Code of Civil Procedure, and in referring to the provision in subdivision 2 of the section which gives an appeal from 'a special order made after final judgment,' said:

"'But we think that the final judgment there referred to is the one mentioned in subdivision 1, viz., a final judgment in an action or special proceeding commenced in a superior court, or brought into a superior court from another court. It seems to us quite clear that the appealable judgments and orders made in probate proceedings are all enumerated in subdivision 3, and as this order is not therein mentioned, it is not an appealable order.'

"In *Re Walkerly*, 94 Cal. 352, 29 Pac. 719, the court through McFarland, J., said: 'The general rule is well established that appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in subdivision 3 of section 963 of the Code of Civil Procedure.' The court further added as follows: 'And that the order here appealed from is not a "special order made after final judgment," within the meaning of the second subdivision of section 963, is also settled by the authorities first above cited. (*Estate of Dean*, 62 Cal. 613; *In re Moore*, 86 Cal. 58, 24 Pac. 816; *In re Wiard*, 83 Cal. 619, 24 Pac. 45; *Estate of Calahan*, 60 Cal. 232.) If it were otherwise, the third subdivision of said section could be entirely disregarded by simply assuming that a probate order not therein mentioned was a final judgment, and that an order refusing to vacate it was a "special order made after final judgment."

"In *Re Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, this court held that 'the provision in subdivision 2 of section 963 of the Code of Civil Procedure, which authorizes an appeal to be taken to the supreme court "from an order granting or refusing a new

trial," embraces all such orders, whether made in probate proceedings or civil actions.'

"The statutory proceedings provided for in probate matters lead up to numerous independent decisions, some of which possess most, if not all, the essential requisites of a judgment. The question is, Are they such final judgments as are contemplated by the code when it gives an appeal from a special order made after final judgment? A judgment is the final determination of the rights of the parties in an action or proceeding. (Code Civ. Proc., sec. 577.) 'Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order.' (Code Civ. Proc., sec. 1003.) The supreme court in *Loring v. Illsley*, 1 Cal. 24, in discussing the distinction between an order and a final judgment, said: 'The former (an order) is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice collateral to the main issue presented by the proceedings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect.'

"In *Gilman v. Contra Costa Co.*, 8 Cal. 52, 68 Am. Dec. 290, it was said: 'An order is the judgment or conclusion of the court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief, and cases where affirmative relief is denied.' Every order of a court or judge is in one sense a judgment. . . .

"The term 'final judgment' from which an appeal can be taken under the first subdivision of section 963 of the Code of Civil Procedure, evidently means the ultimate or last judgment which puts an end to the suit or proceeding. . . .

"If the term 'final judgment,' as used in the first subdivision of section 963, applies to 'a judgment or order admitting or refusing to admit a will to probate,' then appeal would lie to this court therefrom, under such first subdivision, and the provision in the third subdivision would be surplusage. We think the term

'final judgment,' as used in the section under consideration, applies only to those judgments known at common law as final judgments, and that as to the statutory determinations termed 'orders or judgments,' defined in the third subdivision, the term 'final judgment' does not apply; hence the right to appeal is expressly given from certain 'orders or judgments.'

"As they are not final judgments, a special order made subsequent to their entry is not appealable, for the right to appeal from the special orders is only given in case of those made after final judgment.

"The appeal from the order permitting the amendment of the statement, not being an appealable order, should be dismissed."

And see to same effect, *In re Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722.

But see *In re McFarland's Estate*, 10 Mont. 445, 26 Pac. 185, where a decree of distribution was held to be a final judgment and appealable as such. Also in *Re Davis' Estate*, 11 Mont. 196, 28 Pac. 645, and other cases reported there, a similar ruling was made.

In *Bellinger v. Ingalls*, 21 Or. 191, 27 Pac. 1038, an order refusing to require an executor to make a final settlement was held to be a final judgment and appealable under general provisions. And a similar conclusion was reached in the early Colorado case of *Greathouse v. Jameson*, 3 Colo. 397.

The general character of the phraseology employed in authorizing appeals from probate proceedings, in some states, may seem to contravene the rule stated. Thus in *Wilson v. Meyer*, 23 Utah, 529, 65 Pac. 488, it was held that under the provision of the Constitution (article 8, section 9) authorizing appeals from such final orders and decrees of the court in the administration of estates as may be provided by law, and of section 3300, Revised Statutes, authorizing appeals from all such orders and decrees, an appeal would lie from an order refusing to confirm a sale of decedent's personal property. See, also, to same effect, *North Point etc. Co. v. Utah etc. Co.*, 14 Utah, 155, 46 Pac. 824, and *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479.

This rule was followed in subsequent cases,<sup>18</sup> and no principle of appellate practice is more firmly established than that which confines appeals from probate orders, judgments and decrees to such as are specifically designated in the subdivision above referred to, or to those which may be properly included, by definition, in some order so designated.

Thus, an order settling the account of an administrator has been held an appealable order.<sup>19</sup> So, in like manner, are orders settling

<sup>18</sup> Estate of Corwin, 61 Cal. 160; Estate of Dean, 62 Cal. 613; Lutz v. Christy, 67 Cal. 457, 8 Pac. 39; In re Doyle, 68 Cal. 132, 8 Pac. 691; Moore v. Moore, 68 Cal. 394, 9 Pac. 315; Estate of Sbarboro, 70 Cal. 147, 11 Pac. 563; In re Cahalan, 70 Cal. 604, 12 Pac. 427; Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270; Estate of Carpenter, 73 Cal. 202, 14 Pac. 677; Estate of Rose, 80 Cal. 166, 22 Pac. 86; In re Ohm, 82 Cal. 160, 22 Pac. 927; Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938; In re Wiard, 83 Cal. 619, 24 Pac. 45; Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310; Estate of Moore, 86 Cal. 58, 24 Pac. 816; In re Bauquier, 88 Cal. 302, 26 Pac. 178; Leach v. Pierce, 93 Cal. 627, 29 Pac. 239; In re Walkerly, 94 Cal. 352, 29 Pac. 719; In re Smith, 98 Cal. 636, 33 Pac. 744; Iverson v. Superior Court, 115 Cal. 27, 46 Pac. 817; Estate of Wittmeier, 118 Cal. 225, 50 Pac. 393; Estate of Hickey, 121 Cal. 378, 53 Pac. 818; Estate of Murphy, 128 Cal. 339, 60 Pac. 930; In re Hathaway, 111 Cal. 270, 43 Pac. 754; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; Estate of Cahill, 142 Cal. 628, 76 Pac. 383; Estate of Potter, 141 Cal. 350, 74 Pac. 986; S. C., 141 Cal. 424, 75 Pac. 850; Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

The following decisions in other states illustrate the principles which control in the prosecution of appeals from probate matters:

In *Re Tasanen's Estate*, 25 Utah, 396, 71 Pac. 984, it was held that the denial of a petition to set aside the appointment of an administrator was appealable. In *Re Williamson's*

*Estate*, 26 Utah, 50, 72 Pac. 2, it was held that an order directing the sale by an executor of his decedent's real estate is not appealable. In *State v. O'Day*, 41 Or. 495, 69 Pac. 542, it was held that an order directing an escheat in administration proceedings was appealable. In *New Mexico* it was held in *Gentz's Estate*, 14 N. M. 341, 93 Pac. 702, that appeals from the probate court from other than final orders, decisions, or judgments were improper. This was with reference to appeals to the district court, but the rule would apply no doubt in the case of appeals to the supreme court.

In *Ryan v. Geigel*, 39 Colo. 355, 89 Pac. 775, it was held that proceedings to sell the real estate of a decedent were distinct from administration proceedings proper, and that decisions of the county court thereunder were final judgments and appealable as such.

In *Montana* it was held that while an order settling the account of an administrator was not technically a final judgment, it must be treated as such for purposes of appeal. In *re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

And see the following cases: In *re Sinclair's Estate*, 44 Wash. 119, 86 Pac. 1117; In *re Sullivan's Estate*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297; In *re Crosby*, 42 Wash. 366, 85 Pac. 1; *Vowell v. Taylor*, 8 Okl. 625, 58 Pac. 944; *Decker v. Cahill*, 10 Okl. 251, 61 Pac. 1101; *Randolph v. Hudson*, 10 Okl. 398, 61 Pac. 1103; *McMaster v. Bank*, 13 Okl. 326, 73 Pac. 946.

<sup>19</sup> *Estate of Rose*, 80 Cal. 166, 22 Pac. 86; *Estate of Fernandez*, 119 Cal. 579, 51 Pac. 851.

the account of an executor,<sup>30</sup> setting apart a homestead,<sup>31</sup> making an allowance for a minor,<sup>32</sup> for a family,<sup>33</sup> and directing payment thereof,<sup>34</sup> directing the conveyance of real estate,<sup>35</sup> refusing to so direct,<sup>36</sup> directing partial distribution,<sup>37</sup> final distribution,<sup>38</sup> appointing a guardian,<sup>39</sup> an administrator,<sup>40</sup> authorizing the mortgage of lands,<sup>41</sup> refusing to confirm the sale of real property,<sup>42</sup> refusing to revoke the probate of a will,<sup>43</sup> dismissing the contest of a proved will,<sup>44</sup> amending and modifying a judgment of dismissal of an action for specific performance, and directing an entry of a judgment *nunc pro tunc*, so as to include costs,<sup>45</sup> refusing probate of a holographic will,<sup>46</sup> against setting apart a homestead and making an allowance to a widow,<sup>47</sup> revoking letters of administration,<sup>48</sup> directing payment of collateral inheritance tax,<sup>49</sup> settling final account of executor deducting collateral inheritance tax,<sup>50</sup> directing payment of claim,<sup>51</sup> directing payment of attorney's fees incurred in course of administration.<sup>52</sup>

<sup>30</sup> In re Delaney, 110 Cal. 563, 42 Pac. 981; Estate of Grant, 131 Cal. 426, 63 Pac. 731; Estate of Richmond, 9 Cal. App. 402, 99 Pac. 554.

<sup>31</sup> Estate of Burns, 54 Cal. 223; Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938; Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

<sup>32</sup> Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310.

<sup>33</sup> In re Welch, 106 Cal. 427, 39 Pac. 805; In re Smith, 117 Cal. 505, 49 Pac. 456; Estate of Nolan, 145 Cal. 559, 79 Pac. 428; Estate of Fretwell, 152 Cal. 573, 93 Pac. 283.

<sup>34</sup> In re Stevens, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379, and cases cited in note 23, *supra*.

<sup>35</sup> Estate of Corwin, 61 Cal. 160; In re McConnell, 74 Cal. 217, 15 Pac. 746; Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270; Estate of Leonis, 138 Cal. 194, 71 Pac. 171; Estate of Potter, 141 Cal. 350, 74 Pac. 986; S. C., 141 Cal. 424, 75 Pac. 850.

<sup>36</sup> See cases cited in note 25, *supra*.

<sup>37</sup> In re Welch, 106 Cal. 427, 39 Pac. 805; Estate of Mitchell, 121 Cal. 391, 53 Pac. 810; Estate of Sutro, 152 Cal. 249, 92 Pac. 486.

<sup>38</sup> In re Delaney, 110 Cal. 563, 42 Pac. 981; Estate of Sutro, 152 Cal. 249, 92 Pac. 486.

<sup>39</sup> In re Moss, 120 Cal. 695, 53 Pac. 357.

<sup>40</sup> Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711.

<sup>41</sup> In re McConnell, 74 Cal. 217, 15 Pac. 746. This decision was placed upon the ground that a mortgage was in reality a conveyance of real property.

<sup>42</sup> Estate of Leonis, 138 Cal. 194, 71 Pac. 171.

<sup>43</sup> Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7; Mahoney v. Superior Court, 140 Cal. 513, 74 Pac. 13.

<sup>44</sup> Mahoney v. Superior Court, 140 Cal. 513, 74 Pac. 13.

<sup>45</sup> Estate of Potter, 141 Cal. 350, 74 Pac. 986.

<sup>46</sup> Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340.

<sup>47</sup> Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000; S. C., 140 Cal. 294, 74 Pac. 136; S. C., 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546.

<sup>48</sup> Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

<sup>49</sup> Estate of Cross, 2 Cal. App. 342, 83 Pac. 815. This decision was placed upon the ground that it was the payment of a claim.

<sup>50</sup> Estate of Cross, 2 Cal. App. 342, 83 Pac. 815. See note 39, *supra*.

<sup>51</sup> Estate of Grant, 131 Cal. 426, 63 Pac. 731.

<sup>52</sup> Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35. This de-

So, for the same reason, an order refusing to remove an administrator,<sup>43</sup> dismissing petition for revocation of probate of will,<sup>44</sup> denying motion to set aside and vacate prior order of dismissal, and orders and decrees subsequent thereto,<sup>45</sup> an order setting aside a decree settling the final account of an executor,<sup>46</sup> appointing a special administrator,<sup>47</sup> vacating an order of substitution of trustees under a will,<sup>48</sup> have each been held to be not appealable. So in other cases.<sup>49</sup>

The rule here stated does not apply to appeals from new trial orders in probate proceedings, and the general rule is that when-

cision was placed upon the ground that such a payment was that of a claim, although the court seemed to be inclined to the opinion that it was not technically so. It was intimated that it would be treated as a claim in that case, and it is to be doubted that the decision is to be accepted as having a general application. And to same effect, see *Leach v. Pierce*, 93 Cal. 627, 29 Pac. 239; *Estate of Kasson*, 119 Cal. 489, 51 Pac. 706; *Estate of Kruger*, 123 Cal. 391, 55 Pac. 1056.

<sup>43</sup> *Moore v. Moore*, 68 Cal. 394, 9 Pac. 315.

<sup>44</sup> *Estate of Sbarboro*, 70 Cal. 147, 11 Pac. 563. And see *Estate of Winslow*, 128 Cal. 311, 60 Pac. 931. Such an order is now appealable. *Estate of Hughston*, 133 Cal. 321, 65 Pac. 742.

<sup>45</sup> *Estate of Sbarboro*, 70 Cal. 147, 11 Pac. 563. The prior order here referred to seems to have been the order dismissing the petition for the revocation of the will.

<sup>46</sup> *Estate of Cahalan*, 70 Cal. 604, 12 Pac. 427. Such order would be reviewable on appeal from a subsequent decree settling such account.

<sup>47</sup> *Estate of Carpenter*, 73 Cal. 202, 14 Pac. 677. This ruling would hardly seem to be wholly upon the ground stated, that the order is not one of those designated in subdivision 3 of section 963, California Code of Civil Procedure. Section 1413 of the same code provides that there shall be no appeal from such an order. In the case cited, the court, by way of an attempt to harmonize the two sections, held that the first included only general administrators. In the earlier

case of *Estate of Crozier*, 65 Cal. 332, 4 Pac. 109, the court said that such an order was appealable, but it was no more than a *dictum*, and the court clearly was not called upon to construe the effect of section 1413, taken in connection with the other section providing for appeals in probate matters generally. The ruling in *Estate of Carpenter*, *supra*, seems to have been sustained later. See *In re Ohm*, 82 Cal. 160, 22 Pac. 927, and *Guardianship of Van Loan*, 142 Cal. 429, 76 Pac. 39.

<sup>48</sup> *Estate of Moore*, 86 Cal. 58, 24 Pac. 816.

<sup>49</sup> For instances of orders not appealable, see *Estate of Dean*, 62 Cal. 613; *Lutz v. Christy*, 67 Cal. 457, 8 Pac. 39; *Estate of Poten*, 72 Cal. 576, 14 Pac. 209; *In re Ohm*, 82 Cal. 160, 22 Pac. 927; *In re Wiard*, 83 Cal. 619, 24 Pac. 45; *In re Bauquier*, 88 Cal. 302, 26 Pac. 178; *In re Walkerly*, 94 Cal. 352, 29 Pac. 719; *In re Hathaway*, 111 Cal. 270, 43 Pac. 754; *In re Burdick*, 112 Cal. 387, 44 Pac. 734; *Iverson v. Superior Court*, 115 Cal. 27, 46 Pac. 817; *Estate of Wittmeier*, 118 Cal. 255, 50 Pac. 393; *Estate of Hickey*, 121 Cal. 378, 53 Pac. 818; *Estate of Winslow*, 128 Cal. 311, 60 Pac. 931; *Estate of Murphy*, 128 Cal. 339, 60 Pac. 930; *Estate of Turner*, 123 Cal. 388, 60 Pac. 967; *Estate of Hickey*, 129 Cal. 14, 61 Pac. 475; *Estate of Cahill*, 142 Cal. 628, 76 Pac. 383; *Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; *Estate of Bouyssou*, 1 Cal. App. 657, 82 Pac. 1066; *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467.

ever new trials are proper in probate proceedings,<sup>50</sup> an appeal therefrom may be prosecuted by the party aggrieved thereby without regard to the character of the order or decree affected by such appeal.<sup>51</sup> If a new trial is proper, an appeal is also proper.

<sup>50</sup> See section 5, *ante*, for a discussion of the subject of new trials in probate proceedings.

<sup>51</sup> In *Re Bauquier*, 88 Cal. 302, 26 Pac. 178, a rehearing was asked, and granted, upon the contention that the supreme court, in deciding that the order denying a new trial was an appealable order, disregarded its former decisions upon the point. The court thereupon said:

"In *Estate of Wiard*, 83 Cal. 619, 24 Pac. 45, the court used the following language: 'Subdivision 3 of section 963, Code of Civil Procedure, enumerates all the cases in which an appeal may be taken to this court from the superior court in probate proceedings, and an order refusing to vacate a decree of distribution and settlement of final account is not one of them.' In this case, after the entry of a decree of distribution, the contestant gave notice of her intention to move the court 'to vacate and set aside the decree of distribution, and for a new trial in the matter of said petition for distribution.' The motion, when brought on for hearing, was denied, and an appeal was taken from that order, but the record brought here did not contain any statement of the case or bill of exceptions to enable this court to pass upon that portion of the order denying the motion for a new trial, and the appeal was dismissed. In support of what is said above in dismissing the appeal, the court cited *Estate of Calahan*, 60 Cal. 232, and *Estate of Lutz*, 67 Cal. 457, 8 Pac. 39. In *Estate of Calahan*, an order had been made in 1875, purporting to settle the final account of the executor, and discharge him from his trust. In 1880, upon a petition therefor, the superior court made an order vacating the order made in 1875, and an appeal therefrom was dismissed by this court upon the ground that such order was not appealable. In *Estate of Lutz*, an order settling the final account of the exec-

utor and distributing the estate was made in 1881, and a petition filed in 1884 to vacate that order was denied by the superior court. An appeal from this order was dismissed by this court, upon the ground that it was not an appealable order. In each of the foregoing cases the court was simply called upon to determine whether an order vacating or refusing to vacate a decree of distribution is an appealable order, and its language must be construed in connection with the matter which it decided. Taken literally, the language of the court in each of those cases would imply that an appeal does not lie from an order made in probate proceedings granting or refusing a new trial, but as such construction is in direct conflict with the expressed language of the statute, it must be disregarded.

"Prior to 1880, section 969 of the California Code of Civil Procedure provided that 'an appeal may be taken to the supreme court from a judgment or order of the probate court: . . . 8. Granting or overruling a motion for a new trial.'

"In 1880 the legislature, in order to adapt the provisions of the code to the Constitution, which had given to the superior court the jurisdiction previously exercised by the district and probate courts, repealed section 969, and added subdivision 3 to section 963 of the Code of Civil Procedure, in which is contained the provisions of section 969, excepting subdivision 8. The provision in subdivision 2 of section 963 of the Code of Civil Procedure, which authorizes an appeal to be taken to the supreme court from a superior court, 'from an order granting or refusing a new trial,' embraces all such orders whether made in probate proceedings or in civil actions. In all cases in which the superior court, when sitting as a court of probate, is authorized to entertain a motion for a new trial, an appeal will lie from its

As to the application of the rule heretofore outlined,<sup>52</sup> requiring appeals to be prosecuted from the original order rather than from the order refusing to vacate the original order, no express decision is to be found upon the point. Orders to vacate prior decisions have often been held to be nonappealable, but in every case the non-appealability of the order has been referred to the rule here stated, that appeals in probate proceedings are confined to the orders designated in the third subdivision of section 963 of the Code of Civil Procedure, and it may be concluded, therefore, that the former doctrine does not apply.<sup>53</sup>

order thereon. Section 1714 of the Code of Civil Procedure provides: 'The provisions of part 2 of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.' Section 656 of the Code of Civil Procedure defines a new trial to be 'a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees.' And section 588 of the Code of Civil Procedure declares the manner in which issues of fact arise upon the pleadings.

"It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises, which, after its decision, may be re-examined by the court upon a motion for a new trial. Under this rule a motion for a new trial was permissible in this case. . . . And, as we have stated, its order . . . was appealable."

In *Re Walkerly*, 94 Cal. 352, 29 Pac. 719, upon this point, the court said:

"The only modification of the rule established by the cases just cited (where orders not included in subdivision 3, section 963, Code of Civil Procedure, were held not appealable) is

to be found in *Estate of Banquier*, 88 Cal. 302, 26 Pac. 178. In that case there was a regular contest and trial over the question of issuing letters testamentary to an executrix, and an appeal to this court from an order denying a new trial; and this court merely held that 'in all cases in which the superior court, when sitting as a court of probate, is authorized to entertain a motion for a new trial, an appeal will lie from its order thereon.'"

See, also, *Leach v. Pierce*, 93 Cal. 624, 29 Pac. 238; *Estate of Spencer*, 96 Cal. 448, 31 Pac. 453; *Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082; *Estate of Hartmann*, 140 Cal. 461, 74 Pac. 7; *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486; and see, also, *Estate of Learned*, 70 Cal. 140, 11 Pac. 587; *Estate of Briswalter*, 72 Cal. 107, 13 Pac. 164; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125.

<sup>52</sup> See section 199, *ante*.

<sup>53</sup> The following are some of the cases where orders vacating or refusing to vacate prior orders in probate proceedings were held to be not appealable, not because of the appealability of the prior order, but because the orders in question were not designated in subdivision 3 of section 963, California Code of Civil Procedure: *Estate of Calahan*, 60 Cal. 232; *Estate of Dean*, 62 Cal. 613; *Estate of Lutz*, 67 Cal. 457, 8 Pac. 39; *Estate of Sbarboro*, 70 Cal. 147, 11 Pac. 563; *In re Cahalan*, 70 Cal. 604, 12 Pac. 427; *In re Wiard*, 83 Cal. 619; *In re Hathaway*, 111 Cal. 270, 43 Pac. 754; *Estate of Hickey*, 121 Cal. 378, 53 Pac. 818; *Estate of Murphy*, 128 Cal. 339, 60 Pac. 930; *Estate of Hickey*, 129

The amendments that have been adopted from time to time to the subdivision here referred to are not retroactive.<sup>54</sup>

The provisions of the subdivision under consideration governing appeals from probate proceedings refer solely to such proceedings, and have no application whatever to appeals in actions which may be brought under the ordinary jurisdiction of the superior court in civil actions, between parties who may be interested in the estate or between the official representative thereof and claimants of the funds or property belonging thereto. Of actions of this character the probate court has no jurisdiction whatever, and appeals therefrom are to be determined by other rules and regulations than are to be found in subdivision 3 of section 963 of the Code of Civil Procedure, or statutes which govern appeals in probate proceedings strictly so called.<sup>55</sup>

So, by special enactment, certain proceedings, in their nature strictly "matters of probate," have been excepted from the general provisions of the section above referred to, and appeals therefrom specially provided for. Of this description are the proceedings outlined in section 1664 of the Code of Civil Procedure for the determination of heirship. By that section it is specifically provided that appeals shall be prosecuted as in civil actions in general, the sole exception being as to the time within which an appeal must be taken, which is the same as in other probate proceedings.<sup>56</sup>

Cal. 14, 61 Pac. 475; Estate of Hughston, 133 Cal. 321, 65 Pac. 742; Estate of Cahill, 142 Cal. 628, 76 Pac. 383.

<sup>54</sup> This was held in Estate of Hughston, 133 Cal. 321, 65 Pac. 742, with reference to an order refusing to revoke the probate of a will. The order was entered in January, 1901. It was not then appealable. See Estate of Winslow, 128 Cal. 311, 60 Pac. 931; and see, also, Estate of Sbarboro, 70 Cal. 147, 11 Pac. 563. In February, 1901, by an amendment to subdivision 3, the legislature made such an order appealable. An appeal was therefore attempted, but the court declined to entertain it, holding that the date of entry of the order fixed the right of appeal, and that the law was not retroactive.

<sup>55</sup> See Theller v. Such, 57 Cal. 447; Bath v. Valdez, 70 Cal. 350, 11 Pac. 724; Barnard v. Wilson, 74 Cal. 512, 16 Pac. 307; Chever v. Ching Hong

Poy, 82 Cal. 68, 22 Pac. 1081; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; In re Burton, 93 Cal. 459, 29 Pac. 36; Guardianship of Breslin, 135 Cal. 21, 66 Pac. 962.

The rejection of a claim against the estate is not usually appealable. Such claim must be prosecuted by civil suit, and the remedy by appeal would be valueless. Wilkins v. Wilkins, 1 Wash. 87, 23 Pac. 411; In re Barker's Estate, 26 Mont. 279, 67 Pac. 941. But see Corning v. Ryan, 3 Colo. 525, where the contrary was held with regard to a claim which was fully supported and the motion accompanied by a showing of all the facts. And see Squires v. Ryan, 3 Colo. 532; Morse v. Clarke, 10 Colo. 216, 14 Pac. 327.

<sup>56</sup> See Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; In re Burton, 93 Cal. 459, 29 Pac. 36; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; In re Blythe, 110 Cal. 229, 42 Pac. 642.



§ 201. **Proceedings in Insolvency.**—The grounds of the appellate jurisdiction of the supreme court over insolvency proceedings have been considered in another place.<sup>1</sup> It remains only to examine the provisions of the statute in relation to the subject of appeal. Neither the act of 1852 nor any of its amendments provided an appeal from any of the proceedings authorized by it.<sup>2</sup> The matter of appeals was left to be regulated by the Practice Act. Before 1866 the Practice Act did not contain any express provision as to appeals in insolvency cases. But, as has been stated, proceedings in insolvency were held to be “special cases,”<sup>3</sup> and in *Fiske v. His Creditors*<sup>4</sup> it was held that an order granting a discharge to an insolvent was a final judgment in a special case, and therefore appealable under section 336.

The act of 1852 provided that only the district court should have original jurisdiction of the proceedings authorized by it.<sup>5</sup> But in 1853 jurisdiction of such proceedings was given to the county court,<sup>6</sup> and after that time the district and county courts had concurrent jurisdiction of insolvency cases.<sup>7</sup> After the constitutional amendments of 1862, which provided in express terms that the county courts should have original jurisdiction in “proceedings in insolvency,” the legislature passed an act transferring to the county courts all insolvency cases pending in the district courts.<sup>8</sup>

As already stated<sup>9</sup> it was not until 1866 that the statute made any specific enumeration of the judgments and orders in the county courts which were appealable. In that year section 359 was amended so as to read as follows:<sup>10</sup>

“Sec. 359. An appeal may be taken to the supreme court from a final judgment of the county court.

“*Firstly.* In an action of forcible entry and detainer; in an action to prevent or abate a nuisance; *in a proceeding in insolvency*; in an action wherein the legality of any tax, impost, assessment, toll, or municipal fine is in question; and in any special case within the appellate jurisdiction of the supreme court, over which the legislature may require said county court to exercise jurisdiction.

<sup>1</sup> See section 176, *ante*.

<sup>2</sup> Laws of 1852, p. 69; Laws of 1858, p. 58; Laws of 1860, p. 283; Laws of 1863, p. 750; Laws of 1875–76, p. 581.

<sup>3</sup> *Harper v. Freelon*, 6 Cal. 76; *Kohlman v. Wright*, 6 Cal. 230; *Fisk v. His Creditors*, 12 Cal. 281; *Sturgis*

*v. Shepard*, 28 Cal. 115; *People v. Rosborough*, 29 Cal. 415.

<sup>4</sup> 12 Cal. 281.

<sup>5</sup> See section 1, *ante*.

<sup>6</sup> Laws of 1853, pp. 293, 294.

<sup>7</sup> *Harper v. Freelon*, 6 Cal. 76.

<sup>8</sup> Laws of 1863–64, p. 3, sec. 3.

<sup>9</sup> See section 191, *ante*.

<sup>10</sup> Laws of 1865–66, p. 846.

**"Secondly.** From an order granting or refusing a new trial; from an order granting or dissolving, or an order refusing to grant or dissolve an injunction; and from any special order made after final judgment *in the cases in this section before enumerated.*"

This section stood until the adoption of the Code of Civil Procedure. The provision of the code as first enacted was as follows:

"Sec. 966. An appeal may be taken to the supreme court from the county courts in the following cases:—

"1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; *in a proceeding in insolvency*; and in any special proceeding.

"2. From an order granting or refusing a new trial; from an order granting or dissolving, or an order refusing to grant or dissolve an injunction; from an order changing or refusing to change the place of trial; and from any special order made after final judgment *in the cases in this section before enumerated.*"

In 1874 section 966 was amended so as to read as follows:

"Sec. 966. An appeal may be taken to the supreme court from the county courts in the following cases:

"1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; *in a proceeding in insolvency*; and in any special cases and proceedings; and in cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

"2. From an order granting or refusing a new trial in the cases designated in this section, and from any special order made after final judgment *in such cases.*"

After the Constitution of 1879, by which the county and district courts were abolished, and the superior courts were substituted for them, the code was amended so as to leave out all mention of appeals in insolvency cases. In 1880 a new Insolvent Act was passed,<sup>11</sup> and provision was made for appeals from certain orders made in the proceedings authorized thereby.<sup>12</sup> This last act was amended in

<sup>11</sup> Laws of 1880, p. 99. This law was doubtless prompted by the repeal of the Federal Bankruptcy Act in 1878.

<sup>12</sup> Section 67 was as follows:

"Sec. 67. An appeal may be taken to the supreme court in the following cases:—

"1. From an order granting or refusing an adjudication of insolvency.

"2. Allowing or rejecting a creditor's claim, in whole or in part.

"3. Overruling a motion for a new trial.

1891,<sup>13</sup> and in 1893,<sup>14</sup> but the section covering appeals remained practically unchanged. In 1895 a new act was passed,<sup>15</sup> and this act expressly repealed that of 1880, and all amendments thereto,<sup>16</sup> just as the latter expressly repealed all previous inconsistent legislation.<sup>17</sup>

The act of 1895 contained the following section with reference to appeals:

"Section 71. An appeal may be taken to the supreme court<sup>18</sup> in the following cases:—

"1. From an order granting or refusing an adjudication of insolvency;

"2. From an order made at the hearing of any account of an assignee, allowing or rejecting a creditor's claim, in whole or in part;

"3. From an order granting or overruling a motion for a new trial;

"4. From an order settling an account of an assignee;

"5. From an order against or in favor of setting apart homestead or other property claimed as exempt from execution;

"6. From an order granting or refusing a discharge to the debtor."

This act was amended in 1897,<sup>19</sup> but without changing the above section. In 1898 this law, in so far as involuntary bankruptcy is concerned, was superseded by the Federal Bankruptcy Act of that year, and to that extent is no longer in operation.<sup>20</sup>

Applying the maxim, *Expressio unius est exclusio alterius*, here as in the case of probate orders and proceedings, it would seem that appeals in insolvency proceedings must be held to be confined to those designated in the section above quoted. The point does not appear to have been adjudicated, however. In *Sullivan v. Washburn etc. Co.*,<sup>21</sup> the supreme court declined to say whether an order granting a discharge to an insolvent debtor was a final judgment, from which an appeal taken within six months was in time, or an

"4. Settling an account of an assignee.

"5. Against or in favor of setting apart homestead or other property claimed as exempt from execution.

"6. Granting or refusing a discharge to the debtor."

<sup>13</sup> Stats. 1891, p. 511. Section 63 was repealed, and section 6 amended.

<sup>14</sup> Stats. 1893, p. 45.

<sup>15</sup> Stats. 1895, p. 131.

<sup>16</sup> See section 72, act of 1895.

<sup>17</sup> See Stats. 1880, p. 82.

<sup>18</sup> Under the constitutional amendment of 1904 (article 6, section 4), appellate jurisdiction in insolvency proceedings was conferred upon the district courts of appeals, instead of the supreme court, as it was theretofore.

<sup>19</sup> Stats. 1897, p. 35.

<sup>20</sup> See *Keystone etc. Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398.

<sup>21</sup> 139 Cal. 257, 72 Pac. 992.

order covered by some designation in subdivision 3 of section 939, Code of Civil Procedure, so as to require an appeal within sixty days, although the court held that an appeal taken within sixty days was in time.<sup>22</sup>

Appeals in insolvency proceedings, so far as the notice, undertaking and procedure on appeal is concerned, must conform to the general laws of the state regulating appeals in civil cases, "except that when an assignee has given an official undertaking and appeals from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal."<sup>23</sup>

**§ 202. Actions of Forcible Entry and Detainer.**—The grounds of the appellate jurisdiction of the supreme court over actions of forcible entry and detainer have already been considered.<sup>1</sup> It re-

<sup>22</sup> No specific provision is made as to the time within which an appeal in insolvency may be taken. The court, in the case cited, said: "There is, however, no description of an order in that subdivision which would include an order granting a discharge."

<sup>23</sup> See section 71, Insolvent Act of 1895. See, also, section 5931, Revised Codes of Colorado; section 3979, Cutting's Compiled Laws of Nevada (section 50, Civil Practice); section 2867, Compiled Laws of New Mexico; section 7804, Revised Codes of North Dakota; section 3888, Compiled Statutes of Wyoming.

<sup>1</sup> See section 175, *ante*.

*Arizona:* No specific provision is made for appeals from the district courts to the supreme court, although section 2684, Revised Statutes (section 17), authorizes appeals from the justice's court to the district court. The language of section 1493 (section 284, Civil Practice) is broad enough, however, to cover such an appeal, provided the amount in dispute (see section 1212 [section 3, Civil Practice], subdivision 1), is sufficient. See *Bishop v. Perrin*, 3 Ariz. 350, 29 Pac. 648.

*California:* Section 52, subdivision 3, Code of Civil Procedure, authorizes appeals from judgments in actions in forcible entry and detainer, from the superior to the supreme court, and this provision, by the effect of the 1904 amendment to section 4, article 6,

transfers such appellate jurisdiction to the district courts of appeals. Section 1178, Code of Civil Procedure, also furnishes the necessary authority for appeals to the higher court.

*Colorado:* Section 1992, Mills' Annotated Statutes, provides for appeals and writs of error in actions for forcible entry and detainer to the supreme courts "as in other cases," with certain provisos as to the undertaking on appeal, q. v.

*Idaho:* Section 5109, Revised Codes of Idaho, provides that the provisions of the code relating to new trials and appeals shall apply to the action of forcible entry and detainer, so far as applicable. (Corresponding to section 1178, California Code of Civil Procedure.)

*Montana:* Section 7287, Revised Codes (section 2098, Code of Civil Procedure), makes the same application of the general rules as to new trials and appeals that the codes of California and Idaho make.

*Nevada:* Section 3834, Cutting's Compiled Laws (section 13), provides as follows: "The proceedings . . . shall be the same as in other civil cases, except as herein otherwise provided, and judgment shall be entered, . . . and all other proceedings, both before and subsequent to judgment, be had as in other civil cases."

*New Mexico:* No specific provision is made for appeal to the supreme court, but sections 3357-3360 provide

mains only to consider the provisions of the statute in relation to appeals in such actions. Prior to 1866 there was no express provision of the statute authorizing appeals in these actions. And the question as to whether the statute authorized appeals to the supreme court does not seem to have been decided. In 1866 section 359 of the Practice Act was amended so as to provide (among other things) that appeals could be taken to the supreme court from the final judgment, and from certain orders in actions of "forcible entry and detainer." This provision was reproduced in substance in section 966 of the Code of Civil Procedure, as first enacted, and as amended in 1874. The sections referred to are quoted in the preceding section of this treatise, and need not be repeated here. After the creation of the superior courts by the Constitution of 1879, these actions were required to be commenced therein, and the subject of appeals is regulated by section 963, providing for appeals from those courts.

The term "actions of forcible entry and detainer" includes actions of unlawful detainer.<sup>3</sup>

**§ 202a. Judgments and Orders in Criminal Cases.**—As heretofore noted,<sup>1</sup> the Constitution gives to both appellate tribunals jurisdiction in criminal cases, but "on questions of law alone." No further limitation than is contained in this quoted phrase is to be found. Unlike the provision in reference to probate matters, jurisdiction in criminal cases is not limited to such "as may be provided by law." Yet, the legislature has apparently attempted to limit appeals in criminal as it has in probate matters, and in the same way, but without the same constitutional authority,<sup>2</sup> and the

for appeals to the district court from lower courts, and the last-numbered section contains a reference to a subsequent appeal to the higher court.

*Oklahoma:* No specific provision is made for an appeal to the supreme court in actions of forcible entry or detainer; but provision is made for appeals to the county court. Section 6386 et seq., and section 6396, Compiled Laws of 1909.

*South Dakota:* The remark above made with respect to Oklahoma is applicable here. See section 108, Code of Civil Procedure.

*Utah:* Section 3586, as to specific, and section 3587, as to general, provision for appeals.

*Washington:* Section 829, Rem. & Bal. Code (section 5544, Bal. Code), provides for the application of the general provisions as to new trials and appeals in actions of forcible entry and detainer.

<sup>2</sup> *Caulfield v. Stevens*, 28 Cal. 118; *Brummagim v. Spencer*, 29 Cal. 661; *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Johnson v. Chely*, 43 Cal. 299. And see *Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657.

<sup>1</sup> Section 178a, *ante*.

<sup>2</sup> The sections of the code covering the subject are 1237, 1238 and 1259, California Penal Code. The first designates what judgments and orders are appealable by the defendant; the

courts have seemed to recognize this exercise of power, and to apply the same doctrine of *expressio unius est exclusio alterius* that has so

second, what by the people, and the third provides for the review on appeal from the judgment of "any question of law involved in any ruling, order, instruction, or thing whatsoever," etc. The first two sections provide:

"Sec. 1237. An appeal may be taken by the defendant:—

"1. From a final judgment of conviction;

"2. From an order denying a motion for a new trial;

"3. From any order made after judgment, affecting the substantial rights of the party.

"Sec. 1238. An appeal may be taken by the people:—

"1. From an order setting aside the indictment or information;

"2. From a judgment for the defendant on a demurrer to the indictment, accusation or information;

"3. From an order granting a new trial;

"4. From an order arresting judgment;

"5. From an order made after judgment, affecting the substantial rights of the people."

Prior to 1905 there was a sixth subdivision providing for an appeal from an order directing the jury to bring in a verdict of acquittal. The legislature of that year, however, in recognition of the decisions of the supreme court (see *People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Terrill*, 132 Cal. 497, 64 Pac. 894; *People v. Stoll*, 143 Cal. 689, 77 Pac. 818), to the effect that such an appeal would in any case be unavailing, repealed that subdivision. With reference to this amendment, the code commissioner says: "The change consists in the omission of subdivision 6, because the court cannot make the order therein referred to, its action therein being limited to advising the jury to acquit (see section 1118, Penal Code), and if this advice is followed, an appeal is necessarily unavailing, because a defendant after his acquittal cannot be placed on trial."

Corresponding provisions in other codes are as follows:

*Appeal by People, or State:* Section 1038, Penal Code of Arizona, from the judgment, on a question of law alone. Section 8043, Revised Codes of Idaho, is substantially the same as the California section, except that an appeal is allowed from a judgment on a demurrer to the indictment or information, and from any ruling upon the testimony or instructions. Section 9398, Revised Codes of Montana (section 2273, Code of Civil Procedure), same as the California section except that the first subdivision is omitted, and another subdivision is added, allowing an appeal from an order directing a judgment for the defendant. Section 3411, Compiled Laws of New Mexico, when the indictment is quashed, or held insufficient on demurrer, or judgment arrested, the defendant may be committed for another indictment, or an appeal may be prosecuted. Section 10,138, Revised Codes of North Dakota, same as the Idaho section. Section 6947, Compiled Laws of Oklahoma, authorizes an appeal by the state in the following cases only: 1. Upon judgment for the defendant on quashing or setting aside an indictment or information; 2. Upon an order of court arresting judgment. 3. Upon a question reserved by the state. Section 1607, Lord's Oregon Laws, from a judgment for the defendant on a demurrer to the indictment, and in arrest of judgment. Section 483, Criminal Code of South Dakota, authorizes a review on writ of error in the supreme court, in the following cases: 1. From a judgment for the defendant on a demurrer to the indictment or information; 2. From an order setting aside the indictment or information, or arresting the judgment; 3. From an order granting a new trial. Section 4958, Compiled Laws of Utah, authorizes appeals by the state, as follows: 1. From a judgment for the defendant on a demurrer to the information or indictment; 2. From an order arresting judgment; 3. From an order made after judgment affecting the substantial rights of the state; 4. From an order of the court directing the jury to find for the

often been applied in probate appeals.<sup>3</sup> They have thus frequently entertained, and refused to entertain,<sup>4</sup> appeals from judgments and

defendant. Section 1716, Rem. & Bal. Code of Washington (section 6500, Bal. Code), provides that the state shall not be allowed to appeal "except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or is some other material error in law not affecting the acquittal of the prisoner on the merits."

*Appeal by Defendant:* Section 1042, Penal Code of Arizona, from a final judgment of conviction, and from any order after judgment affecting the substantial rights of the party. Section 8042, Revised Codes of Idaho, same as the California section. Section 9397, Revised Codes of Montana (section 2272, Penal Code), same as California. Section 3406, Compiled Laws of New Mexico, from all final judgments. Section 10,137, Revised Codes of North Dakota, same as California, except that an appeal may be prosecuted from an order refusing a motion in arrest of judgment. Section 6945, Compiled Laws of Oklahoma, authorizes an appeal as a matter of right by defendant from any judgment against him. Section 1606, Lord's Oregon Laws, from a judgment of conviction, refusing to dismiss the indictment, and any intermediate order or proceeding forming a part of the judgment-roll may be reviewed on appeal. Section 481, Criminal Code of South Dakota, a writ of error by defendant lies to the supreme court: 1. From a final judgment of conviction; 2. From an order refusing a motion in arrest of judgment; 3. From an order refusing a motion for a new trial; 4. Upon bills of exceptions for any of the causes mentioned in section 419 of this code; section 4957, Compiled Laws of Utah, authorizes an appeal by the defendant: 1. From a final judgment of conviction; 2. From an order made after judgment, affecting the substantial rights of the party. Section 4434, Cutting's Compiled Laws of Nevada (section 469, Civil Practice), provides that either party, the defendant or

people, may appeal from the final judgment, and "from an order of the district court allowing a demurrer granting or refusing a new trial."

No special provision is made for appeals by the defendant in criminal proceedings in the Washington code.

Sections 1478 and 1479, Mills' Annotated Statutes, provide for appeals by either party indiscriminately.

<sup>3</sup> See section 200, *ante*, as to appeals in probate matters.

<sup>4</sup> The following appeals by the defendant have been entertained: From an order under section 1227 directing the execution of an unexecuted sentence of death, and fixing the date therefor. *People v. Sprague*, 54 Cal. 92; *People v. McNulty*, 95 Cal. 594, 30 Pac. 963; *People v. Durrant*, 119 Cal. 54, 50 Pac. 1070; S. C., 119 Cal. 201, 51 Pac. 185. From a similar order *signing a death warrant* under the provisions of section 1217, Penal Code. *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; but see *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; and see note 25k, section 196, *ante*. From an order directing entry of judgment *nunc pro tunc*. *Ward v. Dunne*, 136 Cal. 19, 68 Pac. 105; and see *People v. Lenon*, 79 Cal. 625, 631, 21 Pac. 967. From an order refusing to vacate an order correcting the minutes in respect of the defendant's plea. *People v. O'Brien*, 4 Cal. App. 723, 89 Pac. 438. From an order denying a motion to set aside a sentence upon a plea of guilty for alleged duress. *People v. Perez*, 9 Cal. App. 265, 98 Pac. 870.

The following appeals by the people have been entertained: From a judgment for the defendant upon a demurrer to the indictment. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683. Prior to 1905 appeals were entertained from orders directing the jury to return a verdict of acquittal, but subdivision 6, under which the appeals were taken was repealed. See note 2, *supra*. From an order sustaining a demurrer to the indictment. *People v. Lee*, 107 Cal. 477, 40 Pac. 754.

In all the above cases, if the order was not one designated *eo nomine* in one or the other of the two sections

orders in criminal actions, upon the sole ground that they were or were not authorized by the code.

It must be granted that the language of the code is sufficiently comprehensive to provide a right of review on appeal of practically every possible judgment, order, ruling, or matter, that can be said

(1237 and 1238, Penal Code) as appealable, the right of appeal was referred to either the third subdivision of section 1237 or the fifth subdivision of section 1238, as an order after judgment affecting the substantial rights of the appellant.

In other jurisdictions the following appeals were allowed:

From an order denying a motion in arrest of judgment. *State v. Kingsley*, 10 Mont. 537, 26 Pac. 1066. From a judgment of dismissal, discharging the defendant, and releasing his bail. *State v. Booth*, 21 Utah, 88, 59 Pac. 553. From an order refusing to set aside the judgment and grant a new trial on facts discovered after rendition. *State v. Morgan*, 23 Utah, 212, 64 Pac. 356.

A right of appeal does not exist in the state or people from a judgment or order in favor of a defendant in a criminal case unless expressly given by statute. *State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750. And see *State v. Minnick*, 33 Or. 158, 54 Pac. 223; *City v. Erickson*, 39 Or. 1, 62 Pac. 753.

The following appeals by the defendant were refused: From a judgment upon a plea of former conviction. *People v. Majors*, 65 Cal. 100, 3 Pac. 401. From an order denying a motion in arrest of judgment. See section 184, *ante*, note 21a, and section 195, *ante*, note 11m. From an order denying a motion to set aside an indictment. *People v. Simmons*, 119 Cal. 1, 50 Pac. 844. From an order refusing to settle a bill of exceptions. See *People v. Jackson*, 138 Cal. 32, 70 Pac. 918; and see section 146, *ante*. From an order denying a postponement of a trial. *People v. Buck*, 151 Cal. 667, 91 Pac. 529; *People v. Besold*, 154 Cal. 363, 97 Pac. 871. From an order refusing to set aside an information or indictment. *People v. Izlar*, 8 Cal. App. 600, 97 Pac. 685. From a verdict. *People v. Zimmer-*

man, 11 Cal. App. 115, 104 Pac. 590; *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113.

The following appeals by the people were refused: From an order dismissing an information for want of prosecution. *People v. Hollis*, 65 Cal. 78, 2 Pac. 893. And from an order dismissing a criminal action under section 1385, Penal Code. *People v. More*, 71 Cal. 546, 12 Pac. 631; and see *People v. Jordan*, 65 Cal. 644. These two orders are akin to the *nolle prosequi* of the English practice and of that of many of the states of the Union. From an order setting aside an information. *People v. Richter*, 113 Cal. 473, 45 Pac. 811; *People v. Higgins*, 114 Cal. 63, 45 Pac. 1004. From an order setting down a bill of exceptions for settlement, and giving the district attorney time to file amendments thereto. *People v. Blis*, 3 Cal. App. 162, 84 Pac. 676.

In all of these cases the refusal to entertain the appeal was based upon the failure of sections 1237 and 1238, California Penal Code, to designate the same as appealable orders, but it is to be noted that in every single case another reason is apparent which might well be referred to as a reason for the decision. In most of the cases cited, the order was one reviewable on appeal from the judgment.

In other jurisdictions the following appeals were disallowed: From an order of discharge on *habeas corpus*. *Clasby v. Hampton*, 3 Utah, 183, 1 Pac. 852. Also *Mead v. Metcalf*, 7 Utah, 103, 25 Pac. 729. From an order granting defendant a new trial an appeal by the state is not allowed upon "a question of law reserved" by it. *State v. Northrup*, 13 Mont. 522, 35 Pac. 228. An order overruling an application for a change of the place of trial. *State v. Reed*, 3 Idaho, 554, 32 Pac. 202. An order of forfeiture of cash bail. *People v.*



to affect the substantial rights either of the people or the defendant,<sup>5</sup> and for this reason may be said to prescribe what orders or judgments may be separately appealable, and what reviewable on appeal from some other order or judgment, and thus rather to provide a procedure than to limit appeals; but in one instance the right of review on appeal is expressly denied, and it is a serious question, and one which the supreme court has not determined, although it had at least one opportunity to do so,<sup>6</sup> whether this denial is not in effect the denial of a constitutional right.

Section 1227, Penal Code, provides for an order directing the warden of the state prison to execute a sentence of death, and fixing the date of such execution. This order was held appealable, as an order after judgment affecting the substantial rights of the defendant, but the legislature, in recognition of this condition, and apparently seeking to curtail the power of a convicted person to delay the administration of justice, provided that there should be no appeal from such an order. As elsewhere noted, this proviso has not received judicial construction. Until it does it must remain an open question as to whether the power of the legislature extends to such a limitation.

*Tremayne*, 3 Utah, 331, 8 Pac. 85. An order directing the jury to acquit. *Territory v. Laun*, 8 Mont. 322, 20 Pac. 652. Also *State v. Hubbell*, 18 Wash. 482, 51 Pac. 1039. An order overruling a demurrer by the state to defendant's plea. *State v. Minnick*, 33 Or. 158, 54 Pac. 223. A judgment of acquittal in which the error alleged affected the acquittal on the merits. *State v. Heron*, 19 Wash. 706, 53 Pac. 348; *State v. Armstrong*, 19 Wash. 706, 53 Pac. 351. Order granting defendant a new trial. *State v. Johnson*, 24 Wash. 75, 63 Pac. 1124. A refusal of a district judge to grant a certificate of probable cause. *State v. Broadbent*, 27 Mont. 63, 69 Pac. 323. An order overruling a demurrer to a plea of former acquittal. *Territory v. Pratt*, 11 N. M. 500, 70 Pac. 562. The denial of a motion for a new trial is not appealable in Washington. *State v. Landes*, 26 Wash. 325, 67 Pac. 72. An order fixing the

date of the execution of a sentence of death. *State v. Seaton*, 27 Wash. 120, 67 Pac. 572. An order sustaining and granting a motion by the county attorney to dismiss the action. *State v. Barnard*, 13 Idaho, 439, 90 Pac. 1. An order overruling a motion in arrest of judgment. *State v. Beeskove*, 34 Mont. 41, 85 Pac. 376. A judgment overruling a motion for a new trial. *McLellan v. State*, 2 Okl. Cr. 633, 103 Pac. 876.

<sup>5</sup> It is to be noted that every possible matter is here well covered except a judgment of acquittal, from which no appeal would be availing by reason of the provision of the Constitution (article 1, section 13) with reference to the inhibition as to second jeopardy.

<sup>6</sup> See *People v. Fallon*, 154 Cal. 743, 99 Pac. 202, where the court declined to decide this point, but went to the merits. See, also, section 196, *ante*, note 25k.

New Trial—67

## CHAPTER XXXI.

## PARTIES WHO MAY APPEAL.

§ 203. **Who may Appeal.**—The provision of the act of 1850 was that an appeal could be taken “by any person interested.”<sup>1</sup> The provision of the act of 1851 was that “any party aggrieved may appeal in the cases prescribed in this title.”<sup>2</sup> This provision has never been amended.<sup>3a</sup> It was reproduced in the Code of Civil Procedure upon the latter’s adoption, and is still in force in the exact language of the old Practice Act.<sup>3</sup> The section of the code also defines the parties to an appeal in the following language: “The party appealing is known as the appellant, and the adverse party as the respondent.”<sup>3a</sup>

In order to be entitled to an appeal under this provision a person must, therefore, be a “party,” and he must be “aggrieved.” These two requirements will be separately considered.

1. The appellant must be a “party.” Only *parties to the record* can prosecute an appeal from the action of the *nisi prius* court. Strangers to the *record* have no direct right of appeal.<sup>3b</sup> This has been held to be the true significance of the word “party” as here used. It was formerly held that the meaning was even more restricted, as that no *person* not a *party to the action or proceeding* can, as a general rule, prosecute an appeal from an order or judgment made therein. And it is not entirely clear that such is not

<sup>1</sup> Laws of 1850, p. 451, sec. 258.

<sup>2</sup> Laws of 1851, p. 104, sec. 335.

<sup>3a</sup> An attempt was made to amend this section along with numerous others in accordance with the recommendations of the code commissioners in 1901, but the act of amendment was held unconstitutional.

<sup>3</sup> Section 938, California Code of Civil Procedure.

See, also, to same effect, section 4802, Revised Codes of Idaho; section 7097, Revised Codes of Montana; section 3424, Cutting’s Compiled Laws of Nevada; section 2685, subsection 161, Compiled Laws of New Mexico; section 1716, Rem. & Bal. Code of Washington (section 6500, Bal. Code).

<sup>3a</sup> Section 938, California Code of Civil Procedure.

See code sections set out in the preceding note. Also section 1494, Revised Statutes of Arizona, where the parties are called the appellant and appellee, and section 1495, where the parties to the writ of error are called plaintiff and defendant in error. Also section 7203, Revised Codes of North Dakota, and section 1717, Rem. & Bal. Code of Washington (section 6501, Bal. Code).

<sup>3b</sup> *De Lappe v. Sullivan*, 7 Colo. 182, 2 Pac. 926; *Chapman v. Pocock*, 7 Colo. 204, 3 Pac. 219; *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462; *Metzler v. James*, 12 Colo. 322, 19 Pac. 885; *Schiffer v. Adams*, 13 Colo. 572, 22 Pac. 964; *Teller v. Hartman*, 16 Colo. 447, 27 Pac. 947.

now the recognized rule. In *Montgomery v. Leavenworth*,<sup>4</sup> it was held that the assignee of the plaintiff could not take an appeal from an order distributing funds realized under the judgment, and the court said:

"This order gives him no right in this suit, and no appeal prosecuted by him can be sustained, as he is not a party to the cause."

So in *Senter v. De Bernal*<sup>5</sup> the court said:

"The code provides that *any party* aggrieved by the judgment of the district court may appeal. . . . By 'any party' is to be understood, as we consider, any person who is a party to the action."

So in *Estate of McDermott*,<sup>6a</sup> where there was an attempted appeal by the surety on an administratrix's bond, from an order disallowing her accounts, the court said:

"A surety, merely as such, has no right to appeal from a judgment against the principal. In order to be entitled to an appeal under the section of the code above referred to, a person must have been a party to the action or proceeding in the court below."

But in *Estate of Crooks*<sup>6b</sup> somewhat different phraseology was made use of. The court there said:

"As a rule one who is not a party to the *record* cannot appeal in his own name. One not a party to an *action or a proceeding* may sometimes appeal, but in some way his interest must be made to appear in the record, and he may be a party to the ruling appealed from."

So, also, in *Elliott v. Superior Court*,<sup>6c</sup> the court made use of the following language:

<sup>4</sup> 2 Cal. 57. It is not clear whether this decision was under the act of 1850 or that of 1851.

<sup>5</sup> 38 Cal. 637. The decision in this case was that on an appeal from the whole of a judgment in a partition suit the notice of appeal must be served on all the parties to the action.

<sup>6a</sup> 127 Cal. 450, 58 Pac. 783.

<sup>6b</sup> 125 Cal. 459, 58 Pac. 89.

<sup>6c</sup> 144 Cal. 501, 77 Pac. 1109. See, also, *Delmas v. Superior Court*, 144 Cal. 510, 77 Pac. 1132.

The rule here stated was upheld in the following cases: *Commissioners v. Churning*, 4 Colo. App. 321, 35 Pac. 918; *Eyster v. Gaff*, 2 Colo. 225; *Fischer v. Hanna*, 21 Colo. 9, 39 Pac. 420; *Nicol v. Skagit etc. Co.*, 12 Wash. 230, 40 Pac. 984.

The husband is not a party to a judgment on his petition for the removal of the administrator of the estate of his deceased wife on the ground of fraud in the procurement of the appointment, after a hearing upon the issue of fact raised by such petition. *Roberts v. More*, 5 Colo. App. 511, 39 Pac. 346. Since proceedings for the removal of a county officer are not criminal proceedings, the informant is a party in interest and entitled to appeal from the judgment. *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680. A garnishee is a party to the proceedings between the creditor and original defendant, and can appeal from a final judgment thereon. *Santa Fe etc. Co. v. Bossut*, 10 N. M. 322, 62 Pac. 977.

"But it has been settled as a rule of practice by a long series of decisions that only a *party to the record* can appeal," etc.

The words italicized were thus emphasized by the learned chief justice who wrote the opinion. It is not to be understood that the mere mention of a person *eo nomine* in the record is sufficient, any more than it is essential that he should be made a party to the original action. The true rule is believed to be, that although not an original party plaintiff or defendant, a person interested in the litigation may be made a "party" within the meaning of section 938, so as to enable him, if aggrieved, to prosecute an appeal from the judgment or order, although as such *party* his interest may be so distinct from that of either of the original parties that he cannot be said to be a party to the action as originally constituted at all. In other words, he becomes what may be best defined as a party to the record. Intimations of this distinction are to be found in some of the later cases. Thus in the case last above cited (*Elliott v. Superior Court*) it was said of such an interested party: "He may make himself a party by moving to set aside such judgment or order, and if his motion is denied, may, on appeal from that order, have the proceeding of which he complains reviewed. . . . " This is the method most often pursued by those who are aggrieved by *ex parte* orders. Indeed, none other is available.<sup>54</sup> Conceding that such persons were not parties to the action at the outset, the mere motion to vacate or set aside the obnoxious order or judgment can in no ordinary sense be held to make them so, particularly when their motion is denied. But, as above intimated, they may become thereby parties to the *record*.

The most common methods open to such as are not original parties, but are aggrieved by the judgment or order, are, by intervention and by motion to vacate or set aside. It was held in an early case that a motion for leave to intervene, although denied, makes the mover a "party" within the meaning of the provision.<sup>55</sup> So where a person who was not a party to the action was about to be removed from the possession of land under a writ of assistance, it was held that he could move in the court below for an order setting aside the order allowing the writ, and could appeal from the order

<sup>54</sup> See section 199, *ante*.

<sup>55</sup> *Coburn v. Smart*, 53 Cal. 742. Compare *People v. Pfeifer*, 59 Cal.

89. But application must be made in time. *Whalen v. McMahon*, 16 Colo. 373, 26 Pac. 583.

denying his motion.<sup>7</sup> But he could not take an appeal without first moving in the court below.<sup>8</sup>

But there are other methods which are sometimes available. Thus where persons not parties to the action as commenced were made parties by a petition for an injunction subsequently filed, and were thereafter treated as parties to the cause, and an injunction was granted against them, and made perpetual, it was held that they were parties within the meaning of the code provision, and could appeal.<sup>9</sup> And the opportunity arises sometimes in connection with collateral matters in the course of litigation, where persons not original parties to the action may make themselves parties to the record so as to enable them to prosecute appeals from judgments or orders by which they are aggrieved. Thus where a receiver in an action to dissolve a partnership was authorized to employ counsel, and did employ them, upon an agreement that they were to receive such compensation as the court should allow out of the fund, and the court denied a petition of the counsel for the payment of their fees out of the fund, it was held that they could appeal from the order denying their petition.<sup>10</sup>

In all of the above cases, however, it is essential that the record should show affirmatively the interest of the person who seeks, as a party aggrieved within the meaning of the provision under consideration, to prosecute an appeal, if he is not a formal party thereto. "One not a party to an action or proceeding may sometimes appeal, but in some way his interest must be made to appear in the record."<sup>10a</sup>

It may be doubted if the rule above stated is strictly applicable to probate proceedings. In probate matters several distinct classes of individuals are interested, often vitally so, in the various steps taken in the settlement of estates. Almost every important step affects one or another of these classes, either directly or indirectly, and although neither heirs, devisees, legatees or creditors may be otherwise than nominally privy to the record, they may be often aggrieved by the court's action. If so, it is well settled that they may prosecute an appeal therefrom; provided the particular order

<sup>7</sup> *People v. Grant*, 45 Cal. 97; *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202. Look at *San Jose v. Fulton*, 45 Cal. 316. See, also, *Gutierrez v. Superior Court*, 106 Cal. 171, 39 Pac. 530.

<sup>8</sup> *People v. Grant*, 45 Cal. 97; *Miller v. Bate*, 56 Cal. 135; and look at *Horn v. Volcano Water Co.*, 18 Cal. 141; *Reed v. Calderwood*, 22 Cal. 463.

<sup>9</sup> *Jones v. Thompson*, 12 Cal. 191.

The following decision illustrates the rule governing the practice as to intervention: *Eyster v. Gaff*, 2 Colo. 225.

<sup>10</sup> *Adams v. Woods*, 8 Cal. 306.

<sup>10a</sup> *Estate of Crooks*, 125 Cal. 459, 58 Pac. 89.

is one of those made appealable by a statute (see section 963, subdivision 3, California Code of Civil Procedure). Thus a creditor may be aggrieved by an erroneous order for a family allowance, and may prosecute an independent appeal therefrom, although the administrator or executor has also the right to appeal.<sup>10b</sup>

When a party to the action dies, he ceases to be "a party," and an appeal taken in his name after his death is of no effect and void,<sup>11</sup> unless taken under the new and alternative method of appeal prescribed in sections 941a, 941b and 941c, of the Code of Civil Procedure; i. e., an appeal may be taken, under the authority of section 941b, in the name of the decedent, by his attorney of record, in a case where the right of appeal existed at death, and such action may be taken without waiting for the appointment of an executor or administrator.<sup>11a</sup>

A landlord who has defended an action brought against his tenant may appeal in the tenant's name, and a release of errors by the tenant is of no avail.<sup>12</sup> An attorney of the court is presumed to have authority to sign a notice of appeal.<sup>13</sup>

2. The party must be "aggrieved." Any party against whom a judgment has been entered is "aggrieved" by it, and entitled to appeal. In the case of *Ricketson v. Compton*<sup>14</sup> a motion was made

<sup>10b</sup> *Estate of Fretwell*, 152 Cal. 573, 93 Pac. 283. See, also, *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617. See, also, *Estate of Boland*, 55 Cal. 310.

<sup>11</sup> *Sanchez v. Roach*, 5 Cal. 248. Upon the same principle an appeal taken after the death of the successful party is of no effect. *Judson v. Love*, 35 Cal. 463; *Schartz v. Love*, 40 Cal. 93; *Sheldon v. Dalton*, 57 Cal. 19. As to death of party after argument of appeal, see *Black v. Shaw*, 20 Cal. 68; *S. & L. Soc. v. Gibb*, 21 Cal. 595; *Holloway v. Gallic*, 49 Cal. 149.

<sup>11a</sup> See section 941b, California Code of Civil Procedure.

<sup>12</sup> *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765.

<sup>13</sup> *Ricketson v. Compton*, 23 Cal. 636. As to signature of the notice of appeal, see section 208, *post*.

<sup>14</sup> 23 Cal. 636. The slightest interest is sufficient to entitle party to appeal. *United States v. Armijo*, 5 Wall. 444, 18 L. ed. 492.

This language, while wholly true, and frequently made use of, is some-

what misleading in view of the statements made in the preceding subdivision to the effect that it is essential that one must be a party to the record before his right to prosecute an appeal from the judgment or order complained of will be recognized. The explanation is simply that while the slightest degree of interest is sufficient to support the right of appeal, the right itself exists only as to parties. Having the interest, one must take the steps necessary to make himself a party to the record in the lower court before his right of appeal is vitalized. This may be done without any special formality, but it must be done. See *Tattenham v. Superior Court*, 155 Cal. 205, 100 Pac. 248.

See note 32, below, where are collected miscellaneous cases illustrating the necessity of an interest, and outlining the degree of interest required, as well as its character.

As to party aggrieved, see generally *Estate of Boland*, 55 Cal. 310.

The right of appeal is limited strictly to "aggrieved" parties. Pres-

to dismiss the appeal on the ground that the appellant had no interest whatever in the action. But the supreme court denied the motion, and Crocker, J., delivering the opinion, said: "If such be the case that he has no interest, and ought not to have been made a party, the plaintiff ought not to have made him a party, and it is the fault of the respondents that he was a party, and affords no proper ground for this motion. If he ought not to have been made a party, the plaintiff ought not to have made him a party, and he should have dismissed the case as to him. But the plaintiff cannot hold a judgment against him, and at the same time deny him the right to appeal from that judgment. By admitting that the appellant had no interest in the subject matter, the respondent virtually admits that he is not entitled to any judgment against him, which would of itself form a good ground for the appeal."

The fact, therefore, that a judgment stands against a party is sufficient to make him a party aggrieved; and the mere existence

cott v. Brooks, 11 N. D. 93, 90 N. W. 129; Sands v. Cruickshank, 12 S. D. 1, 80 N. W. 173; Gales v. Bank, 13 S. D. 622, 84 N. W. 192; Schlegel v. Sisson, 8 S. D. 476, 66 N. W. 1087; Williams v. Wait, 2 S. D. 210, 39 Am. St. Rep. 768, 49 N. W. 209; State v. Donaldson, 12 S. D. 259, 81 N. W. 299; Adams v. Smith, 6 Dak. 94, 50 N. W. 720; Hughes v. Stearns, 13 S. D. 627, 84 N. W. 196; Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967; Williams v. Rd. Co., 10 S. D. 336, 73 N. W. 74; Norden v. Berner, 15 S. D. 611, 91 N. W. 308; In re Ault's Disbarment, 15 Wash. 417, 46 Pac. 644; Schulze v. Oregon etc. Co., 41 Wash. 614, 84 Pac. 587; Smith v. Hagan, 45 Colo. 408, 101 Pac. 402; Wilson v. Regents, 46 Colo. 100, 102 Pac. 1088.

But if one is aggrieved by a judgment, the right of appeal follows. Phillips v. Salmon River Co., 9 Idaho, 149, 72 Pac. 886.

A person who is adjudged insane, and of whose person a guardian has been appointed, is a person aggrieved by such judgment. Appeal of Kane, 12 Mont. 197, 29 Pac. 424. In an action upon a usurious contract, where the statutory penalty in favor of the school fund is not enforced, the state is an aggrieved party upon a judgment against the lender. State v. Eves, 6 Idaho, 144, 53 Pac. 543.

When a judgment purports to determine that parties to the action have no rights in the subject matter of the controversy in which they claim an interest, they are aggrieved thereby. New York Ins. Co. v. Brown, 32 Colo. 365, 76 Pac. 799. One upon whom process was not served is not aggrieved by any judgment thereafter rendered against him. MacGinniss v. Boston etc. Co., 29 Mont. 428, 75 Pac. 89.

The beneficiary of a judgment is not aggrieved thereby; nor is one in whose favor such judgment is rendered. Bernard v. Boggs, 4 Colo. 73; Todd v. De La Mott, 9 Colo. 222, 11 Pac. 90; Vallette v. San Juan etc. Co., 11 Colo. 204, 17 Pac. 509; Hall v. Pay Rock etc. Co., 6 Colo. 81; Harvey v. Insurance Co., 18 Colo. 354, 32 Pac. 925; Fischer v. Hanna, 21 Colo. 9, 39 Pac. 420; Sutton v. Jones, 9 Colo. App. 36, 47 Pac. 400; Northrop v. Jenison, 12 Colo. App. 523, 56 Pac. 187; Chicago etc. Co. v. White, 36 Mont. 437, 93 Pac. 350; Murto v. Lemon, 19 Colo. App. 313, 76 Pac. 541; Florence etc. Co. v. Maloney, 17 Colo. App. 526, 69 Pac. 270.

As to the acceptance of benefits, and other methods of nullifying the right of appeal, see note 18x, below, and text.

of the judgment is sufficient. It is not necessary to wait until the judgment results in some actual injury. Thus where an order directed the issuance of an injunction upon the filing of an undertaking, it was held that an appeal could be taken before the undertaking was filed, and Field, C. J., delivering the opinion, said: "The objection that as the order directs the injunction only upon condition that an undertaking be executed and filed, and as it does not appear that there was any such undertaking, the defendants are not 'parties aggrieved,' and as such entitled to appeal, is untenable." The parties aggrieved within the meaning of the three hundred and thirty-fifth section of the Practice Act who are entitled to appeal are the parties against whom an appealable order or judgment has been entered. All orders for injunctions are made either upon an approval of an undertaking at the time or upon condition that an undertaking be filed; and it is to prevent the execution of such orders that appeals are taken. It is not necessary for the party against whom an order has passed to wait until the injunction has already issued before taking his appeal."<sup>15</sup>

But a judgment is not in all cases against all the parties to the action; and a party to the action is not "aggrieved" unless the judgment is against him. Thus where an action to recover delinquent taxes was brought against one Wilson and certain real estate, and Wilson answered denying ownership, and the court dismissed the action as to him and rendered judgment against the real estate, it was held that Wilson was not aggrieved by it and could not appeal from it.<sup>16</sup> So, where in an action to foreclose a mechanic's lien the default of two of the defendants, who were alleged to have some interest in the property, was entered, but the decree foreclosing the lien and directing the property to be sold did not purport to affect their interests, it was held that they could not appeal from it.<sup>17</sup> So where a judgment is rendered against one of two defendants, upon a verdict that was silent as to the second defendant, the latter is not an aggrieved party, and cannot prosecute an appeal therefrom.<sup>17a</sup>

The test, therefore, of whether a party is aggrieved is this, Is there a judgment against him? In *Adams v. Woods*,<sup>18</sup> the court said that

<sup>15</sup> *Ely v. Frisbie*, 17 Cal. 250.

<sup>16</sup> *People v. Wilson*, 26 Cal. 127.

In this case the statute authorized a judgment against the land alone. When the statute or ordinance contemplates that the action must be brought against the owner, the rule in

*People v. Wilson* does not apply. See *Santa Barbara v. Huse*, 51 Cal. 217.

<sup>17</sup> *Scotland v. East Branch M. Co.*, 56 Cal. 625; and look at *People v. Pfeiffer*, 59 Cal. 89.

<sup>17a</sup> *Rankin v. C. P. R. B. Co.*, 73 Cal. 96, 15 Pac. 57.

<sup>18</sup> 8 Cal. 306.



the most clear and simple test that can be devised is, "Would the party have had the thing if the erroneous judgment had not been given?" This may sometimes assist in determining the question as to whether the judgment is "against" the appellant. But this test is calculated to mislead, and would be worse than useless, without a clear recognition of the distinction that must be kept in view between judgments actually, and those that are merely nominally, or formally, *against* the party seeking to prosecute an appeal therefrom. An illustration of this is to be found in the case of *Martin v. Porter*,<sup>12a</sup> which was an action for claim and delivery. The following excerpt from the opinion of the court contains both the point under consideration, and the facts necessary to its understanding:

"The judgment was that the 'plaintiff do have and recover of and from the defendant the possession of all the personal property described in the complaint,' etc. No costs were awarded the plaintiff, and the judgment was not in the alternative form. It is claimed, therefore, that the defendant was in no way 'aggrieved' by the judgment, and hence had no right to appeal from it. This claim cannot be sustained. If the case had been tried and the denials of the answer sustained, the proper judgment would have been that the plaintiff take nothing, and that defendant recover his costs. Having been brought into court against his will, and required to contest the case, the defendant should not be turned out without his costs, if the plaintiff failed to show that he was entitled to recover."

In this case, although the judgment was nominally in favor of the plaintiff and "against" the defendant, it is apparent that both parties were *aggrieved* and both parties might have maintained an appeal. So in *Nevills v. Shortridge*,<sup>12b</sup> which was a foreclosure suit, brought prematurely and dismissed, on defendant's motion, on that ground. The judgment was nominally *against* the plaintiff, and the latter might, no doubt, have prosecuted an appeal therefrom, yet, by reason of a clause in the judgment to the effect that it was "not to be a bar to another action," it was held that defendant was aggrieved thereby, and might appeal.

<sup>12a</sup> 34 Cal. 476, 24 Pac. 109. In *Wilson v. Regents etc.*, 46 Colo. 100, 102 Pac. 1088, the following utterance of the court expresses a more recent view: "The word 'aggrieved' refers to a substantial grievance; the

denial to the party of some claim of right, either of property, of person, or the imposition upon him of some burden or obligation."

<sup>12b</sup> 129 Cal. 575, 62 Pac. 120.

Aside from this or any other test, the cases themselves best illustrate the principle which governs the determination of the question as to whether a party is "aggrieved" by a judgment or order entered or rendered *against* him. Thus in proceedings under section 1664, Code of Civil Procedure, where there is an unassailed finding that one of the claimants is the sole heir at law of the decedent, and that the claims of all others are without validity, the defeated parties claimant are not aggrieved with respect to any alleged error, improper ruling, instruction, or defect in such proceedings, and their substantial rights remain unaffected thereby, and any attempted appeal on their part which does not involve an attack upon the finding referred to will be disregarded.<sup>180</sup> And this want of interest of an appealable character is unaffected by the fact that the claimants, or some of them, might be entitled to recover costs upon the reversal of a decree of distribution based upon such finding and the judgment thereupon.<sup>181</sup> The court will not retain the appeal and decide such alleged errors merely for the purpose of determining who shall pay, and who is entitled to receive, the costs which are alone in issue.<sup>182</sup> So contestants of a will, who are not heirs at law of the testator, or related to him, are not "aggrieved" by an order denying a new trial of the contest under the section above cited.<sup>183</sup> So a surety on the bond of an administratrix is not "aggrieved" by an order disallowing her account, and has therefore no right of appeal therefrom.<sup>184</sup> So a judgment creditor whose attachment lien is subsequent to a mortgagor's conveyance of the mortgaged premises, is not an "aggrieved party," having a right of appeal from the judgment of foreclosure, where there was a finding that he had no lien, and could not, therefore, participate in any surplus there might be after satisfaction of the mortgage debt.<sup>185</sup> So a lienholder who fails or neglects to appear at the trial, and endeavor to establish his lien, after demurrer overruled and answer, is not "aggrieved" by a finding against the averments of the answer, and has no right of appeal from a judgment based

<sup>180</sup> *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522. See section 475, Code of Civil Procedure. See, also, to same effect, *Estate of Piper*, 147 Cal. 606, 82 Pac. 246. And see section 286, *post*.

<sup>181</sup> See *In re Blythe*, 108 Cal. 24, 41 Pac. 33.

<sup>182</sup> See *Nelson v. Nelson*, 153 Cal. 204, 94 Pac. 880.

<sup>183</sup> *Estate of Antoldi* (Cal.), 81 Pac. 278.

<sup>184</sup> *Estate of McDermott*, 127 Cal. 450, 59 Pac. 783.

<sup>185</sup> *Dayton v. McAllister*, 129 Cal. 192, 61 Pac. 913.

thereon.<sup>181</sup> So trustees whose names are not mentioned in the will, claiming funds in the hands of the executor adversely to the estate, but who have not presented a claim therefor as prescribed by law, are not parties aggrieved by a decree of distribution, and cannot appeal therefrom.<sup>181</sup> So an intervener, who seeks to subject the proceeds of a note in action to an equitable interest in his favor against the assignor, the assignee being plaintiff, and the maker defendant, is not an "aggrieved" party as against such maker, and has no right of appeal.<sup>182</sup> A mortgagee of a deceased devisee, who failed to make himself a party to the decree of distribution, by petition or otherwise, is not one who may be said to be "aggrieved" by the decree, and cannot prosecute an appeal therefrom.<sup>182</sup>

Generally speaking, parties who have no interest in a controversy, or who bring a suit without right,<sup>183</sup> and parties who have received all they ask for,<sup>184</sup> are not "aggrieved" by a judgment, and cannot appeal therefrom. Nor is one who asks or consents to the making of an order,<sup>185</sup> or who consents to the entry of judgment against him, aggrieved thereby.<sup>186</sup> Nor is a party aggrieved, within the meaning of the code, so as to have the right to prosecute an appeal from a judgment or order the benefits of which he has already and voluntarily accepted. The privilege of accepting the fruits of a judgment or order, and the right to appeal therefrom, are not consistent. On the contrary, an election of either is a waiver or renunciation of the other.<sup>187</sup>

It is to be noted, however, that judgments are often capable of separation into parts, and that these parts are sometimes wholly independent of each other; so that, it is often possible to accept one part and reject another, without inconsistency; and, on this ground, it is said that a party may sometimes accept one part of a judgment

<sup>181</sup> *Foster v. Bowles*, 138 Cal. 449, 71 Pac. 495.

<sup>182</sup> *In re Burdick*, 112 Cal. 387, 44 Pac. 734. Such a claim, being one adverse to the estate, would require adjudication as any other of a strictly civil character, and the probate court has no jurisdiction to determine it, either in this or any other proceeding strictly probate.

<sup>183</sup> *Mohr v. Byrne*, 135 Cal. 87, 67 Pac. 11.

<sup>184</sup> *In re Crooks*, 125 Cal. 459, 58 Pac. 89.

<sup>185</sup> *Williams v. Savings & Loan Soc.*, 133 Cal. 360, 65 Pac. 822.

<sup>186</sup> *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062.

<sup>187</sup> *In re Radovich*, 74 Cal. 536, 5 Am. St. Rep. 466, 16 Pac. 321.

<sup>188</sup> See section 282, *post*.

<sup>189</sup> See section 2, *ante*; and section 272, *post*; also see *Estate of Shaver*, 131 Cal. 219, 63 Pac. 340; *Storke v. Storke*, 132 Cal. 349, 64 Pac. 578, *San Bernardino Co. v. Riverside Co.*, 135 Cal. 618, 67 Pac. 1047.

See *San Diego Dist. v. Supervisors*, 97 Cal. 438, 32 Pac. 517, as to right of appeal after judgment satisfied.

and appeal from another, if the two parts are not so connected or independent that to accept the one and reject the other would be so inconsistent as to shock a sense of justice and equity. In such case only is it proper to enter satisfaction of one part of a judgment and prosecute an appeal from another.<sup>18u</sup>

But while a party is precluded from maintaining an appeal from a judgment in his favor, the rule is limited to judgments which concede all that he asked, or all that he may be lawfully entitled to receive under the pleadings; and that while he cannot appeal from a judgment after accepting its fruits, such acceptance must be wholly voluntary.

Thus, in *Warner v. Freud*,<sup>18v</sup> where the judgment required the administratrix of an estate to pay the amount thereof within sixty days under penalty of forfeiture of the estate's interest in certain lands, foreclosure of which was sought under a mortgage lien executed by the decedent, the supreme court held that payment under such conditions might well be regarded as compulsory, and hence defendant's right of appeal was not concluded. So in *San Bernardino Co. v. Riverside Co.*,<sup>18w</sup> it was held that the party might accept what the judgment gave him and yet maintain an appeal therefrom, if the amount accepted was really uncontroverted, the actual contest being for the difference between that and a larger sum claimed by the appellant. Again, in the same case, the court said:

"To terminate the right to maintain the appeal, the payment must have been made and accepted by way of compromise, or with an agreement not to take or pursue an appeal."

So, in *Kenney v. Parks*,<sup>18x</sup> the supreme court held that a party could not be deprived of his right to an appeal from the judgment by an enforced satisfaction thereof by execution.

<sup>18u</sup> See *National Bank v. Wakefield*, 138 Cal. 561, 72 Pac. 151; also see *Storke v. Storke*, 132 Cal. 349, 64 Pac. 578.

<sup>18v</sup> 131 Cal. 639, 63 Pac. 1017.

<sup>18w</sup> 135 Cal. 618, 67 Pac. 1047.

<sup>18x</sup> 120 Cal. 22, 52 Pac. 40.

This branch of the subject is illustrated by the following decisions of other states: Where a dismissal is made at appellant's request they are bound thereby and cannot appeal. *Mahneke v. Tacoma*, 1 Wash. 18, 23 Pac. 804; *Liebman v. McGraw*, 3 Wash. 520, 28 Pac. 1107. A party at

whose request a judgment is rendered cannot appeal therefrom. *Schmidt v. Oregon etc. Co.*, 28 Or. 9, 52 Am. St. Rep. 759, 40 Pac. 406. Where a party asks leave to amend his answer, consents to the setting of the case for trial, and demands a jury, he cannot afterward appeal from the order granting a new trial. *State v. Court*, 17 Mont. 329, 42 Pac. 850. Neither party can appeal from an order setting aside the verdict and awarding a new trial, where both have asked for the latter. *Clallam Co. v. Clump*, 15 Wash. 593, 47 Pac. 13.

Another method of parting with the right to appeal from a judgment or order is by a transfer of the property involved or the right of which enforcement is sought. It has been said that a complete transfer of the right of the party, or any other cessation or succession of interest, prior to appeal, generally destroys the right of appeal.<sup>157</sup> The assignee, grantee, or legal representative, however, may pursue the remedy by appeal, in some cases in the name of the original party,<sup>158</sup> as effectually as the original party might have done.<sup>19</sup>

It is well settled that a party may be aggrieved by a void order.<sup>19a</sup> So the beneficiaries of a trust created by will are parties aggrieved by an order refusing to admit the will to probate, and may maintain an appeal therefrom.<sup>19b</sup> So a person adjudged incompetent or insane is aggrieved by such judgment, and may appeal therefrom.<sup>19c</sup>

The appellate court will not pass upon the validity of a tax upon an appeal prosecuted by a party who has paid the tax. *Johnson v. Golden*, 6 Wyo. 537, 48 Pac. 196. As to accepting benefits, see *Bush v. Mitchell*, 28 Or. 92, 41 Pac. 155; *Hinchman v. Railway Co.*, 14 Wash. 349, 44 Pac. 867; *Utterback v. Meeker*, 16 Wash. 185, 47 Pac. 428.

Upon the general subject of estoppel, see the following: *Ehrman v. Astoria etc. Co.*, 26 Or. 377, 38 Pac. 306; *Seattle v. Lieberman*, 9 Wash. 276, 37 Pac. 433; *Bingel v. Brown*, 15 Colo. App. 241, 61 Pac. 435; *Barnes v. Lynch*, 9 Okl. 11, 59 Pac. 995; *German etc. Soc. v. Kern*, 38 Or. 232, 62 Pac. 788, 63 Pac. 1052; *Collett v. Northern Pacific Co.*, 23 Wash. 600, 63 Pac. 225; *Merriam v. Victory etc. Co.*, 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; *Thompson v. Sines*, 18 Wash. 359, 51 Pac. 474; *Geraghty v. Randall*, 18 Colo. App. 194, 70 Pac. 767; *Diefenderfer v. State*, 13 Wyo. 387, 80 Pac. 667; *In re Black's Estate*, 32 Mont. 51, 79 Pac. 554; *Territory v. Cooper*, 11 Okl. 699, 69 Pac. 813; *Duggan v. Smith*, 27 Wash. 702, 68 Pac. 356; *Betchel v. Evans*, 10 Idaho, 147, 77 Pac. 212; *Hale v. Broe*, 18 Okl. 147, 90 Pac. 5; *Blangy v. Sylvester*, 48 Wash. 699, 93 Pac. 210; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *Ogden v. Chehalis Co.*, 41 Wash. 45,

82 Pac. 1095; *Roots v. Boring etc. Co.*, 52 Or. 298, 92 Pac. 811, 94 Pac. 182.

<sup>157</sup> *Norton v. Walsh*, 94 Cal. 564, 29 Pac. 1109.

<sup>158</sup> Section 385, Code of Civil Procedure, provides that upon any transfer of interest in a cause of action, the action may be continued in the name of the original party. This section was held, in *Emerson v. McWhirter*, 128 Cal. 268, 60 Pac. 744, to apply to transfers prior to judgment; at the same time an application on the part of the respondent on appeal to be substituted for the original party, to whose rights he had succeeded, was denied, as not being necessary, the same attorney representing both assignor and assignee. See, also, *Reay v. Heazleton*, 128 Cal. 335, 60 Pac. 977, and *Fay v. Steubensbach*, 138 Cal. 656, 72 Pac. 156.

<sup>19</sup> See *Heilbron v. Land etc. Co.*, 96 Cal. 7, 30 Pac. 802; also see *Malone v. Big Flat Co.*, 93 Cal. 384, 28 Pac. 1063.

<sup>19a</sup> *Bond v. Pacheco*, 30 Cal. 530; *Livermore v. Campbell*, 52 Cal. 75; *Huerstal v. Muir*, 62 Cal. 479.

<sup>19b</sup> *Estate of Fay*, 145 Cal. 87, 104 Am. St. Rep. 17, 78 Pac. 340.

<sup>19c</sup> *In re Moss*, 120 Cal. 695, 53 Pac. 357. The question of incompetency once determined adversely to the incompetent, an appeal by him would be governed by the statutory

So one claiming a prior right to administer upon the estate of a deceased person is, upon the denial of that right, an "aggrieved party," and entitled to appeal from the order granting letters of administration to another.<sup>194</sup> So a purchaser at a sale under a partition decree is aggrieved by an order confirming or refusing to confirm such sale. Such purchaser may either be deprived of an advantageous purchase, or he may have a burden improperly imposed upon him.<sup>195</sup> So, as a matter of course, may the adverse parties, the tenants in common, who might be aggrieved by the failure of those in charge to conduct the sale in conformity with the law, or to secure a fair price or one as advantageous as possible.<sup>196</sup>

A receiver, generally speaking, has no right of appeal. He is merely the creature of the court, and has no standing or relation to the case which would make him an "aggrieved party" within the meaning of the code, having the right to prosecute an appeal. He cannot petition for a rehearing, or even file a brief in the appellate court otherwise than as *amicus curiae*.<sup>197</sup>

This neutral character is shared, in a somewhat minor degree, perhaps, by certain other officials, such as executors, administrators, guardians, trustees, and others, who are called upon to act, not in their own, but "in another's right." In their official character these are all more or less indifferent persons as between the real parties in interest. They receive their appointment from the court, and may be said to be, as above suggested, in effect, or *quasi*, officers of the court, in dealing with the rights and interests of all who claim an interest in the subject matter of their trust, the *res custodia* in their hands. They have no concern in the matter except in their official capacity, and are not "aggrieved parties" within the mean-

provision requiring his appearance in court to be by guardian, either general or *ad litem*. See section 372, California Code of Civil Procedure.

<sup>194</sup> Estate of Damke, 133 Cal. 433, 65 Pac. 885.

<sup>195</sup> Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607; Dunn v. Dunn, 137 Cal. 51, 69 Pac. 847. It is the same, in principle, with sales under probate decrees. But in the case of sales in partition the order is a final judgment within the meaning of subdivision 1 of section 963, Code of Civil Procedure, while, in probate sales, the order is one "against or in favor of directing

the partition, sale, or conveyance of real property," within the meaning of the language of the third subdivision of that section. See Estate of Corwin, 61 Cal. 160; In re McConnell, 74 Cal. 217, 15 Pac. 746; Estate of Pearsons, 98 Cal. 603, 33 Pac. 451; Estate of Leonis, 138 Cal. 194, 71 Pac. 171. See, also, In re Auerbach's Estate, 23 Utah, 529, 65 Pac. 488.

<sup>196</sup> See Gordan v. Graham, 153 Cal. 297, 95 Pac. 145.

<sup>197</sup> People v. Union Building Assn., 127 Cal. 400, 58 Pac. 822, 59 Pac. 692.

ing of section 938 of the Code of Civil Procedure. They cannot litigate questions arising between the real parties in interest, and cannot appeal from orders, judgments, or decrees, otherwise than in an official capacity.<sup>19a</sup>

In accordance with the principle here stated, it has often been held that an executor is not aggrieved by an erroneous decree of distribution.<sup>20</sup> In *Roach v. Coffey*,<sup>20a</sup> the supreme court thus expressed the principle involved:

"We think that it is the settled law of this state that the administrator cannot represent either side of a contest between heirs, devisees, or legatees contesting for the distribution of an estate. He

<sup>19a</sup> See *Adams v. Woods*, 8 Cal. 306; *Bates v. Ryberg*, 40 Cal. 463; *Estate of Wright*, 49 Cal. 550; *Rosenberg v. Frank*, 58 Cal. 387; *Estate of Parsons*, 65 Cal. 240, 3 Pac. 817; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. 1176; *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840; *In re Jessup*, 80 Cal. 625, 22 Pac. 260; *Goldtree v. Thompson*, 83 Cal. 420, 23 Pac. 383; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *In re Sanborn*, 98 Cal. 103, 32 Pac. 865; *In re Welch*, 106 Cal. 427, 39 Pac. 805; *Jones v. Lamont*, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766; *Estate of Olmstead*, 120 Cal. 447, 52 Pac. 804; *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560; *Estate of Williams*, 122 Cal. 76, 54 Pac. 386; *Estate of Healy*, 137 Cal. 474, 70 Pac. 455; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; *Estate of Murphy*, 145 Cal. 464, 78 Pac. 960; *Estate of Piper*, 147 Cal. 606, 82 Pac. 246; *Estate of Stewart*, 1 Cal. App. 57, 81 Pac. 728; *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667.

Decisions in other states are as follows: An objection that an administratrix cannot appeal from an order affecting her in her official capacity alone is not available where it appears that the notice and undertaking on appeal were in her individual and not her representative capacity. *Wilbur v. Wilbur*, 17 Wash. 683, 50 Pac. 589. An administrator who has no personal interest in the estate cannot prosecute an appeal from an order of distribution. *In re Dewar's Estate*, 10 Mont. 422, 25 Pac. 1025.

Nor from a decree declaring an offered will a nullity. *Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113. An administratrix has no appealable interest in a settled account, and can prosecute an appeal therefrom only as to her personal interest and in her individual capacity. *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38. As to a right of appeal of an administrator with reference to an order affecting the estate, see *In re Smith's Estate*, 43 Or. 595, 73 Pac. 336, 75 Pac. 133.

One sued as an executor, and against whom judgment for costs was rendered personally, was not entitled to review the judgment where he failed to make himself a party to the litigation individually. *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706.

<sup>20</sup> *Bates v. Ryberg*, 40 Cal. 463; *Estate of Wright*, 49 Cal. 550; *Rosenberg v. Frank*, 58 Cal. 387; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. 1176; *Estate of Healey*, 137 Cal. 474, 70 Pac. 455; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; and see *Estate of Murphy*, 145 Cal. 464, 78 Pac. 960; *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667. See, also, *Estate of Piper*, 147 Cal. 606, 82 Pac. 246. Nor, for the same reason, is he an "adverse" party to such a decree, requiring him to defend an appeal from the order. *Jones v. Lamont*, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766. And see *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560.

<sup>20a</sup> 73 Cal. 281, 14 Pac. 840.

cannot litigate the claims of one set against another. His duty is to preserve the estate, and distribute it as the court shall direct."

So in *Re Welch*,<sup>20b</sup> where there were motions to dismiss certain appeals, one of which was an order for partial distribution, the court said, referring to the decision last above cited, and others:<sup>20c</sup>

"The rule as declared by these cases does not admit of question. It is a sound proposition that administrators, general or special, like receivers and other trustees or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and, therefore, will not be heard to appeal from such orders."

So in *Estate of Williams*,<sup>20d</sup> *Harrison, J.*, for the court, thus stated the principle involved:

"The executor has no interest in the distribution of the estate further than to be protected, if he shall dispose of the property in accordance with its (order of distribution) terms; and, if the court had jurisdiction to hear the petition, the order of distribution will be a complete protection against any claim that may be made against him by reason of his compliance therewith. The statute declares that the error is 'conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside or modified on appeal.' (Code Civ. Proc., sec. 1666.) The persons here enumerated are the only ones who can be 'aggrieved' by an order of court made in a matter in which it had jurisdiction of the subject matter and of the parties entitled thereto."

So, upon the same principle, it has been held that it is no part of the duty of an administrator to contest the probate of a will,<sup>20e</sup> and hence he cannot appeal from an order with reference to the payment of an attorney's fees for services rendered in such a contest.<sup>20f</sup> So an administrator is not a "party aggrieved" by an order refusing to direct the sale of a parcel of real estate belonging to his decedent, and cannot prosecute an appeal therefrom.<sup>20g</sup> So, the trustees under a will are not "aggrieved" by an order allowing

<sup>20b</sup> 106 Cal. 427, 39 Pac. 805.

<sup>20c</sup> *Bates v. Ryberg*, 40 Cal. 463; *Estate of Wright*, 49 Cal. 550; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896; *Estate of Jessup*, 80 Cal. 625, 22 Pac. 260; *In re Sanborn*, 98 Cal. 103, 32 Pac. 865.

<sup>20d</sup> 122 Cal. 76, 54 Pac. 386.

<sup>20e</sup> *Estate of Parsons*, 65 Cal. 240, 3 Pac. 817. See as to public ad-

ministrator, *In re Sanborn*, 98 Cal. 103, 32 Pac. 865, and special administrator, *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230.

<sup>20f</sup> See cases cited in note 20e, *supra*; and see *In re Jessup*, 80 Cal. 625, 22 Pac. 260. See, also, *Estate of Olmstead*, 120 Cal. 447, 52 Pac. 804.

<sup>20g</sup> *Estate of Steward*, 1 Cal. App. 57, 81 Pac. 728.



payment of compensation and attorney's fees to a guardian *ad litem*.<sup>20a</sup>

In the matter of orders for partial distribution under the provisions of section 1658 *et seq.*, Code of Civil Procedure, the right to contest the same is expressly given, and this has been held to imply the right to prosecute an appeal from an unfavorable order.<sup>21</sup>

But aside from this exception, the general rule has its well-defined limitations. In *Re Welch*,<sup>22</sup> the supreme court thus referred to this feature of the subject:

"Wherever the order or decree involves a construction of the proper exercise of the duties of the officer, whenever it presents a question as to the right or power of the trustees to comply with it, wherever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it, and personal liability may attach, the right of the officer to appeal is recognized and upheld."

This language was quoted with approval in the later case of *Estate of Murphy*.<sup>23</sup> But the supreme court has apparently gone even further than is here indicated toward a mitigation of the harshness of a rule which clearly multiplies the personal risks of this class of officials, without any corresponding increase in the degree of protection accorded to the beneficiaries of estates. In this connection, Temple, J., delivering the opinion of the court in *Estate of Heydenfeldt*,<sup>24</sup> said:

"I think there has been a disposition to carry the doctrine of that case (*Bates v. Ryberg*) beyond its legitimate scope, and further than it should be carried on principle. An administrator, or an executor, is a trustee of an express trust. He is authorized to sue or be sued without joining with him the beneficiaries of the trust, but the suits which may thus be brought are suits affecting the trust, and not those in which he is individually interested. Among his beneficiaries are creditors. He not only may, but it is his duty, to defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees, or creditors. He cannot be kept out of such litigation upon the claim that he is

<sup>20a</sup> *Goldtree v. Thompson*, 83 Cal. 420, 23 Pac. 383.

<sup>21</sup> See *Estate of Kelly*, 63 Cal. 106; *In re Welch*, 106 Cal. 427, 39 Pac. 805; *Estate of Mitchell*, 121

Cal. 391, 53 Pac. 810; *Estate of Murphy*, 145 Cal. 464, 78 Pac. 960.

<sup>22</sup> 106 Cal. 427, 39 Pac. 805.

<sup>23</sup> 145 Cal. 464, 78 Pac. 960.

<sup>24</sup> 117 Cal. 551, 49 Pac. 713.

not personally injured. In fact, if that were the nature of his grievance, he ought not to litigate at the expense of the estate. When, however, he has administered the estate, and under the statute has called all parties into court by a proper notice and petition, his only remaining duty is to deliver the estate over to those designated by the court.

"The administration has then served its purpose, and the claimants, including creditors, are specially notified and called into court. They are then to protect their own rights, and it is no part of the duty of the administrator to decide between them. If he were to take sides with one claimant as against another, and his views were not sustained, it would result that he has been making an assault upon the estate of his real beneficiary at his expense and in the interest of the spoiler.

"I cannot see that it matters that a claim is made against the estate under the will or by one who claims to be an heir, or a part of the family of the deceased, and as such entitled to an allowance. If it may diminish the estate to be finally distributed, or may make the fund from which the creditors are to be paid insufficient for that purpose, the administrator is interested, and in the event of an adverse ruling is a party aggrieved. Indeed, although it has been held that the persons who are likely to be distributees may be heard in some matters pending the administration, yet no doubt the logical conclusion would be that the administrator is specially intrusted with the duty and power to defend the rights of all beneficiaries until distribution.

"The case of *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840, is in accord with these views. That was really a special proceeding in the distribution of the estate. In some cases the rule laid down in *Bates v. Ryberg*, *supra*, has been carelessly applied, but I think the court has never intended to push that doctrine beyond the limits above defined."

In *Guardianship of Breslin* <sup>25</sup> the supreme court, in allowing an appeal by a guardian from an order requiring him to pay out the

<sup>25</sup> 135 Cal. 21, 66 Pac. 962. And see *In re Smith*, 117 Cal. 505, 49 Pac. 456. Also *Estate of Heaton*, 139 Cal. 237, 73 Pac. 186, where the court took the ground that it would not dismiss an appeal from an order settling the account of a special administrator, and directing

him to pay the money found to be in his custody over to another special administrator. The court said:

"If the order is erroneous he is aggrieved, for it runs against him, is enforceable against him, and commands him to pay money to a person who is not entitled to receive it. To

funds of his ward, made use of somewhat similar language, holding, in effect, that it was the duty of the guardian to protect the interests of his ward, and that this duty gave him the right of an appeal from an erroneous order of court.

It goes without saying that the executor or administrator, in his representative capacity, is never aggrieved except when the estate itself is aggrieved, and cannot maintain an appeal, as such official, in a case where he alone, in his personal and individual capacity, is aggrieved by the judgment or order in question.<sup>26</sup> And this is, perhaps, the better test, after all. If the estate itself as an entity is attacked, it is the duty of the representative of the estate to defend, and if such defense requires that an appeal be prosecuted, then it is the duty of such representative, and he has the undoubted right, to prosecute an appeal. So, if the interests of the estate require the bringing of a suit, such suit should be brought in the name of the estate's representative, and, in the event of an unfavorable judgment or order, such representative should appeal therefrom, if such an appeal would be proper. Beyond this, neither his duty nor his right will permit him to go. With controversies which affect the individual interests alone of those who may be interested in his trust he has nothing to do, and consequently he cannot be "aggrieved" within the meaning of the code by any order or ruling which affects those individual interests.

A party who, whether as plaintiff or defendant, pays into court the amount in controversy, disclaiming any interest in the subject matter in dispute, is not a party who may be aggrieved by the resulting judgment,<sup>27</sup> unless he abandon the neutral character thus assumed, and actively contest the claim or claims of one or another of the parties to the money so deposited.<sup>28</sup>

Parties having a common interest in the subject matter in controversy, or who are aggrieved in the same way in the same proceeding, may prosecute a joint or a several appeal from the order or judgment whereby they are so aggrieved. Thus the separate credi-

determine that he is not aggrieved is to determine the merits of the appeal."

See, also, *Estate of Levy*, 141 Cal. 646, 99 Am. St. Rep. 92, 75 Pac. 301, where the supreme court held that the executors under a will, as well as the devisees and legatees named therein, were parties aggrieved by an order setting apart a homestead to the

widow; citing *Estate of Heydenfeldt*, *supra*.

<sup>26</sup> See *Estate of Wood*, 142 Cal. 522, 77 Pac. 481.

<sup>27</sup> See *San Francisco Savings Union v. Long*, 123 Cal. 107, 55 Pac. 708; *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105. Also *Fox v. Sutton*, 127 Cal. 515, 59 Pac. 939.

<sup>28</sup> See cases cited in note 27.

tors of an insolvent, having a common interest in the reversal of the decree, growing out of the common interest in the mode of payment of their claims, and affecting the fund out of which they are to be paid, are aggrieved in the same way by the same portion of the decree, and may prosecute a joint appeal therefrom.<sup>29</sup>

The record itself is the sole arbiter in the determination of the question as to who is aggrieved by the judgment or order. Such determination is not affected by matter *dehors* the record, nor by *ex parte* affidavits addressed to such question.<sup>30</sup>

An attorney, whose sole interest in the litigation arises from an employment as the professional representative of a party thereto, and the fact of an unpaid fee, cannot be aggrieved by a judgment or order, either in favor of or against his client. This has been repeatedly decided, not only in civil actions, but in probate proceedings also. In the latter, however, the legislature of 1905 adopted certain amendments to the code which gave to attorneys representing executors and administrators certain special rights in connection with orders fixing their compensation in "ordinary probate proceedings," including the right to prosecute an appeal from such an order.<sup>31</sup> These amendments did not affect the general rule,

<sup>29</sup> See *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486, 1027. Also *Downing v. Rademacher*, 136 Cal. 673, 69 Pac. 415. There may be cases where the interests of the several joint appellants are so different and distinct, not merely divergent, that a joint appeal would not be permitted. See *Sangamon Co. v. Brown*, 13 Ill. 207.

<sup>30</sup> See *Woodbury v. Nevada etc. Co.*, 120 Cal. 367, 52 Pac. 650. And see *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Mohr v. Byrne*, 132 Cal. 250, 64 Pac. 257; *In re Ryer*, 110 Cal. 566, 42 Pac. 1082; *Potrero etc. Co. v. All Persons*, 155 Cal. 371, 101 Pac. 12.

As to "adverse" parties, and the application of the same principle thereto, see section 210, *post*.

<sup>31</sup> See sections 1616 and 1619, California Code of Civil Procedure. The rule, prior to the adoption of these amendments, based upon the principle that there was no such official recognized by the code as an "attorney for the estate," was that the attorney was the personal representative of the executor or administrator, and his fee

must come through the latter official or not at all. It could not come direct from the estate. See *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Estate of Ogier*, 101 Cal. 381, 40 Am. St. Rep. 61, 35 Pac. 900; *In re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886; *McKee v. Soher*, 138 Cal. 367, 71 Pac. 438, 649. It is error, therefore, for the court to make an allowance direct to an attorney. As in the case of other necessary expenses, counsel fees should be allowed to the executor or administrator. See *Estate of Ogier*, *supra*; *Estate of Levinson*, *supra*; *Estate of Kruger*, 123 Cal. 391, 55 Pac. 1056; *McKee v. Soher*, *supra*; *Estate of Willard*, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554; *Estate of Kruger*, 143 Cal. 141, 76 Pac. 891; *Estate of Scott*, 1 Cal. App. 740, 83 Pac. 85. Prior to the adoption of these amendments, it was early held that the attorney was employed by the executor or administrator to assist him in the execution of his trust, and has no claim that he can enforce against the

however, and an attorney has no such interest in the subject matter of the controversy, in which he is professionally employed as the representative of a party thereto, as will enable him to take an individual appeal, as an aggrieved party, from an order or a judgment entered therein.<sup>22</sup>

estate, either by action or in any other way, as by exceptions to the settlement of an account which fails to make provision for the payment of his fee. See *Gurnes v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352. Whatever claim he may have for such compensation is solely against the executor or administrator who selects and employs him, and whose attorney he is. He is not a person "interested in the estate" within the meaning of the statute (*Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886), and exceptions filed by him are ineffectual for any purpose. (Id.) See, also, dissenting opinion of Chief Justice Beatty in *Briggs v. Breen*, *supra*. And see *Estate of Carpenter*, 146 Cal. 661, 80 Pac. 1072. As stated in the text, the amendments of 1905 cover only "ordinary probate proceedings." See section 1619, Code of Civil Procedure. It also covers, by designation, "any extraordinary service, such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as it may be necessary or proper for the executor or administrator to prosecute or defend." This language would seem to be sufficiently broad to cover every possible employment of an attorney. If so, the attorney so employed may undoubtedly make application for a fee, under the provisions of section 1616, and if dissatisfied with the fee allowed, may also appeal from the order, as authorized under the last sentence of the last section. But if there are any cases not included within the language of section 1619, wherein an attorney is employed by the representative of an estate, such employment is subject to the rule which governed prior to the amendments of 1905 to the sections in question.

<sup>22</sup> Inasmuch as the rule applied in probate matters prior to the amendment of 1905 to section 1616, Code of Civil Procedure, and the adoption of

section 1919 of the same code at the same time, was not based upon any principle confined particularly to probate matters, but, on the contrary, was based upon principles having a general application, which were applied in probate matters in the absence of special provisions of law (adopted afterward in the enactment of 1905 referred to), the probate cases above cited may be appropriately cited as authority for such general principles. Indeed, the argument of the court in most of the cases so cited justifies this position.

The following decisions illustrate the degree and extent or interest necessary to sustain the right of appeal:

A guardian has such an interest in the subject matter of an order of removal which requires him to pay over a certain portion of the funds in his hands belonging to the estate of his ward. In *re Hill Estate*, 7 Wash. 421, 35 Pac. 131. Citizens and taxpayers of a municipality sought to be annexed to another have such an interest in the subject matter that they are entitled to a writ of error from the supreme court to review the judgment approving the proceedings. *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092. Applicants for a street railway franchise have an appealable interest sufficient to enable them to maintain an appeal from an order enjoining them from taking any action under an ordinance offering such franchise to the highest and best bidder while refusing to enjoin the city from withholding the same from sale under the ordinance. *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. Stockholders have an appealable interest in an insolvency proceeding against a corporation instituted for the purpose of assessing their interest. *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113. A sheriff who has been restrained from levying an execution on certain land has an

appealable interest in the decrees. *Heintz v. Brown*, 46 Wash. 387, 123 Am. St. Rep. 937, 90 Pac. 211. Non-resident taxpayers have an appealable interest in incorporation proceedings of a municipality, under certain provisions of statutes. *Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126.

An administrator who has no interest in an estate cannot appeal from an order of distribution. In re *Dewar's Estate*, 10 Mont. 422, 25 Pac. 1025. Nor has an administrator an

appealable interest in an order declaring an offered will a nullity, in the absence of a showing of a personal interest in the estate. *Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113.

Defendants to a suit to foreclose a tax lien, who have no interest in the property, cannot complain of a judgment of foreclosure. *Port Townsend v. Trumbull*, 40 Wash. 386, 82 Pac. 715; and see *Lazier v. Cady*, 44 Wash. 339, 87 Pac. 344; *Hume v. Turner*, 42 Or. 202, 70 Pac. 611.

## CHAPTER XXXII.

## TIME IN WHICH APPEALS MUST BE TAKEN.

§ 204. Appeals must be taken within the time prescribed by statute.

§ 205. Statutory provisions in relation to the time for taking appeals.

§ 204. Appeals must be Taken Within the Time Prescribed by Statute.—As has been stated,<sup>1</sup> an appeal under our practice is purely the creature of statute, and consequently the time within which it must be taken is a matter to be regulated by the legislature. Accordingly, it has been uniformly held that an appeal taken prematurely,<sup>2</sup> or after the expiration of the statutory time,<sup>3</sup> is of no

<sup>1</sup> See section 181, *ante*.

<sup>2</sup> *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189; *Schroeder v. Schmidt*, 71 Cal. 399, 12 Pac. 302; *Tyrrell v. Baldwin*, 72 Cal. 192, 13 Pac. 475; *In re Rose*, 72 Cal. 577, 14 Pac. 369; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384; *Home etc. Assn. v. Kaplan*, 84 Cal. 486, 24 Pac. 119; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2; *Wells v. Kreyenhagen*, 117 Cal. 329, 49 Pac. 128; *Estate of Pearsons*, 119 Cal. 27, 50 Pac. 929; *Wood v. Etowanda etc. Co.*, 122 Cal. 152, 54 Pac. 726; *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328; *Estate of Scott*, 124 Cal. 671; *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64; *Estate of Devincenzi*, 131 Cal. 452, 63 Pac. 723; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171; *Estate of More*, 143 Cal. 493, 77 Pac. 407; *Wood etc. Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868.

The rule stated in the text, which requires appellate proceedings to be instituted within the statutory time, under penalty of dismissal, is practically uniform in all jurisdictions; although, as will hereafter appear (note 51, section 205, *post*), the statutory time itself varies widely. The rule as to appeals taken prematurely was sustained in the following decisions:

*Hays v. Dennis*, 11 Wash. 360, 39 Pac. 658; *Vollmer v. Nez Perces Co.*, 7 Idaho, 302, 62 Pac. 925; *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440; *Oliver v. Kootenai Co.*, 13 Idaho, 281, 90 Pac. 107; *Elko-Tuscarora M. Co. v. Wines*, 24 Nev. 305, 53 Pac. 177; *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757; *Nordin v. Berner*, 15 S. D. 611, 91 N. W. 308; *Dyea etc. Co. v. Easton*, 14 S. D. 520, 86 N. W. 23; *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001; *State v. Lamm*, 9 S. D. 418, 69 N. W. 592; *Bank v. Oliver*, 11 S. D. 444, 78 N. W. 1002; *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75; *Greenly v. Hopkins*, 7 S. D. 561, 64 N. W. 1128; *Coburn v. Board*, 10 S. D. 552, 74 N. W. 1026; *Minn. Machine Co. v. Skau*, 10 S. D. 636, 75 N. W. 199; *Sinkling v. Ry. Co.*, 10 S. D. 560, 74 N. W. 1029; *Hughes v. Stearns*, 13 S. D. 627, 84 N. W. 196; *Smith v. Hawley*, 11 S. D. 399, 78 N. W. 355; *Elwert v. Norton*, 34 Or. 567, 51 Pac. 1097; *Robertson v. Shine*, 50 Wash. 433, 97 Pac. 497.

<sup>3</sup> The rule as to appeals taken too late was upheld in the following decisions:

*California*: *Emerson v. Bergin*, 71 Cal. 335, 12 Pac. 242; *Gruell v. Spooner*, 71 Cal. 493, 12 Pac. 511; *Lowrie v. Salz*, 75 Cal. 349, 17 Pac. 232; *Heilbron v. Irrigation Co.*, 76 Cal. 8, 17 Pac. 932; *Gray v. Winder*, 77 Cal. 525, 20 Pac. 47; *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359;

Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; McLaughlin v. Menotti, 89 Cal. 354, 26 Pac. 880; Kirman v. Hunnewell, 91 Cal. 157, 27 Pac. 587; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Borderre v. Den, 106 Cal. 594, 39 Pac. 946; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387; Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. 756, 31 L. R. A. 411; United States v. Crooks, 116 Cal. 43, 47 Pac. 870; Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141; Sutter Co. v. Tisdale, 128 Cal. 180, 60 Pac. 767; Houser etc. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264; Bartlett v. Mackey, 130 Cal. 181, 62 Pac. 482; McGorray v. Stockton etc. Co., 131 Cal. 321, 63 Pac. 479; People v. Walker, 132 Cal. 137, 64 Pac. 133; McDonald v. Lee, 132 Cal. 252, 64 Pac. 250; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; Hayes v. Silver Creek Co., 136 Cal. 238, 68 Pac. 704; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Contra Costa v. Soto, 138 Cal. 57, 70 Pac. 1019; Estate of Campbell, 141 Cal. 72, 74 Pac. 550; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Bank v. Jack, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705; Robinson v. Eberhart, 148 Cal. 495, 83 Pac. 452; Roney v. Reynolds, 152 Cal. 323, 92 Pac. 847; Sequeira v. Collins, 153 Cal. 426, 95 Pac. 876; Hellman v. Longley, 154 Cal. 78, 97 Pac. 17; Dundas v. Lankershim School District, 155 Cal. 692, 102 Pac. 925; Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Land v. Johnston, 156 Cal. 253, 104 Pac. 449; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661; Walbridge v. Cousins, 2 Cal. App. 302, 83 Pac. 462; Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280; Pogue v. Ball, 4 Cal. App. 406, 88 Pac. 376; Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931.

*Colorado:* Colorado Springs etc. v. Godding, 20 Colo. 71, 36 Pac. 884; Best v. Bank, 31 Colo. 474, 73 Pac.

845; Roseberry v. Valley etc. Co., 35 Colo. 132, 83 Pac. 637; McVicker v. Rouse, 44 Colo. 255, 98 Pac. 807; Hamill v. Bank, 7 Colo. App. 472, 43 Pac. 903; Van Buskirk v. Balch, 19 Colo. App. 292, 74 Pac. 792.

*Idaho:* Young v. Tiner, 4 Idaho, 269, 38 Pac. 697; Shiller v. Small, 4 Idaho, 422, 40 Pac. 53; Carter v. Buck, 9 Idaho, 571, 75 Pac. 612; Robson v. Colson, 9 Idaho, 215, 72 Pac. 591; McCrea v. McGrew, 9 Idaho, 382, 75 Pac. 67; Moe v. Harger, 10 Idaho, 194, (302), 77 Pac. 645; Richardson v. Ruddy, 10 Idaho, 151, 77 Pac. 972; White v. Whitecomb, 13 Idaho, 490, 90 Pac. 1080.

*Montana:* Gallagher v. Cornelius, 23 Mont. 27, 57 Pac. 447; Ramsey v. Burns, 24 Mont. 234, 61 Pac. 129; Schatzlein v. Passmore, 26 Mont. 500, 68 Pac. 1113; Hopkins v. Kitts, 37 Mont. 26, 94 Pac. 201; Reynolds v. Fitzpatrick, 40 Mont. 593, 107 Pac. 902.

*Nevada:* Solomon v. Fuller, 13 Nev. 276; Candler v. Ditch Co., 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946; S. C., 28 Nev. 422, 82 Pac. 458; Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280; Luke v. Coffee, 31 Nev. 165, 101 Pac. 555.

*Oklahoma:* Keokuk etc. Co. v. Beale, 4 Okl. 712, 47 Pac. 481; Wedd v. Gates, 15 Okl. 602, 82 Pac. 808; Hebeisen v. Hatchell, 17 Okl. 260, 87 Pac. 643; Tennison v. Engle, 23 Okl. 679, 101 Pac. 1132; Sumner v. Sherwood, 25 Okl. 70, 105 Pac. 642; Bellamy v. Telephone Co., 25 Okl. 792, 108 Pac. 389; Watson v. Rein, 26 Okl. 47, 108 Pac. 397; Palmer-Gregory etc. College v. Hart, 26 Okl. 855, 110 Pac. 725.

*South Dakota:* In re Houghton, 5 S. D. 537, 59 Pac. 733.

*Utah:* Blyth etc. Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027; Henderson v. Barnes, 27 Utah, 348, 75 Pac. 759; Everett v. Jones, 32 Utah, 489, 91 Pac. 360; Warnock etc. Agency v. Peterson etc. Co., 35 Utah, 542, 101 Pac. 699; Price v. Western etc. Co., 35 Utah, 379, 100 Pac. 677.

*Washington:* In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093; Hight v. Batley, 32 Wash. 165, 98 Am. St. Rep. 851, 72 Pac. 1034; Dean v. Oregon etc. Co., 38 Wash. 565, 80



avail, and must be dismissed.<sup>4</sup> Under the old Practice Act the time to appeal from a final judgment was within one year after its rendition,<sup>5</sup> and appeals taken after the expiration of that time were held to be of no avail.<sup>6</sup> After the Code of Civil Procedure went into effect the one year period ran from *entry* of judgment,<sup>7</sup> but the same rule was followed, and the appeal was required to be taken within the year.<sup>8</sup> The amendment of 1897 changed the one year period to six months, so that now appeals from final judgments, except *judgments rendered on appeal from an inferior court*,<sup>9</sup> must be taken within six months after entry thereof.<sup>10</sup>

Pac. 842; *Harris v. Levy*, 39 Wash. 158, 81 Pac. 550; *Shipley v. McPherson*, 46 Wash. 172, 89 Pac. 408; *Chilcott v. Globe etc. Co.*, 49 Wash. 302, 95 Pac. 264.

*Wyoming*: *Kuhn v. McKay*, 6 Wyo. 466, 46 Pac. 853.

<sup>4</sup> See section 272 et seq., *post*, as to dismissal of appeal. Cases cited in the two notes immediately preceding state this rule, in the main.

<sup>5</sup> *Gray v. Palmer*, 28 Cal. 416; *Peck v. Curtis*, 31 Cal. 207; *Genella v. Relyea*, 32 Cal. 159; *Wetherbee v. Dunn*, 36 Cal. 249; *McCourtney v. Fortune*, 42 Cal. 387.

<sup>6</sup> See *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Lucas v. Todd*, 28 Cal. 182; *Waggenheim v. Hook*, 35 Cal. 216; *Bornheimer v. Baldwin*, 38 Cal. 671.

<sup>7</sup> *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43; *Preston v. Hearst*, 54 Cal. 595; *Trenouth v. Farrington*, 54 Cal. 273; *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; and see section 183, *ante*.

The rule in other states is the same. *Robinson v. Salt Lake City (Utah)*, 109 Pac. 817; *Lindsey v. Scott*, 56 Wash. 206, 105 Pac. 462; *Wadhams v. Allen*, 45 Or. 485, 78 Pac. 362. From the denial of a motion for new trial. *O'Brien v. Casualty Co.*, 57 Wash. 598, 107 Pac. 519.

Statutory provisions are inserted in section 205, note 5f, et seq.

<sup>8</sup> *Brandow v. Whitney*, 54 Cal. 585; *Douglas v. Fulda*, 54 Cal. 589; *Parks v. Barney*, 55 Cal. 239.

<sup>9</sup> Under the provisions of subdivision 2 of section 939, Code of

Civil Procedure, judgments of this description must be appealed from within ninety days after entry. See *Dooling v. Moore*, 19 Cal. 81; *Calderwood v. Peyser*, 42 Cal. 110. But it is doubtful if this provision is any longer effective. It would seem that the amendment of 1904 to the Constitution, whereby the provision as to appellate jurisdiction in actions of forcible entry and detainer was changed by the insertion of the clause in parenthesis, "except such as arise in justices' courts," thereafter, has rendered the provision nugatory; inasmuch as that was the only class of cases in which double appeals were permissible. Cases transferred from justices' courts to the superior courts under the provisions of section 838, Code of Civil Procedure, were expressly held not to be appeals in the ordinary acceptance of the word. See *Ditch Co. v. Superior Court*, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54; *Raisch v. Sausalito etc. Co.*, 131 Cal. 215, 63 Pac. 346. But there has been no judicial expression on the point, and until there is one, it must remain doubtful.

Also *Welcome v. Howell*, 20 Mont. 42, 49 Pac. 393; *Morris v. McLaughlin*, 25 Mont. 151, 64 Pac. 219; *Warren v. Humble*, 26 Mont. 495, 68 Pac. 851; *Schatzlein Co. v. Passmore*, 26 Mont. 500, 68 Pac. 1113; *Hopkins v. Kitts*, 37 Mont. 26, 94 Pac. 201; *Latah Co. v. Hasfurther*, 12 Idaho, 797, 88 Pac. 433.

<sup>10</sup> See subdivision 1, section 939, California Code of Civil Procedure. See note 5f, section 205, *post*.

Under the same section, appeals from orders, and from interlocutory judgments and decrees, must be taken within sixty days.<sup>11</sup> Thus appeals from new trial orders, not taken within the sixty day period, have always been held unavailing.<sup>12</sup> So, likewise, appeals

<sup>11</sup> See subdivision 3, section 939, California Code of Civil Procedure. Under the designation, "interlocutory judgment, order, or decree," is generally comprised all interlocutory orders that are appealable and the appeal must be taken within sixty days. See *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88; *Illinois T. & S. Bank v. Alvord*, 99 Cal. 407, 33 Pac. 1132; *Bartlett v. Mackey*, 130 Cal. 181, 62 Pac. 482. To this rule section 131, Civil Code, provided an exception in the case of interlocutory decrees in divorce, which were thereby made appealable within six months after entry, as in the case of final judgments under the first subdivision of section 939; but the 1907 amendment to the third subdivision of section 939 included divorce decrees along with other interlocutory decrees, and made them appealable within sixty days. See note 5t, section 205, *post*.

The same remark as to the statutory provisions as to time, made in note 2, *supra*, is applicable here; but the general rule requiring appeals from orders to be taken within the time prescribed was upheld in the following decisions:

*Oliver v. Kootenai Co.*, 13 Idaho, 281, 90 Pac. 107; *Campbell v. Bank*, 13 Idaho, 95, 88 Pac. 639; *Balfour v. Eves*, 4 Idaho, 488, 42 Pac. 508; *Richardson v. Ruddy*, 10 Idaho, 151, 77 Pac. 972; *Weinrich v. Porteous*, 12 Nev. 102; *Winter v. Winter*, 8 Nev. 129; *Dietrich v. Dredge Co.*, 14 Mont. 261, 36 Pac. 81; *Reinert v. Company D*, 23 Nev. 369, 47 Pac. 979; *Hibbard v. De Lanty*, 20 Wash. 539, 56 Pac. 34; *Herring v. Wiggins*, 7 Okl. 312, 54 Pac. 483; *Richter v. Eagle etc. Assn.*, 24 Mont. 346, 61 Pac. 878; *Donison v. Spokane*, 27 Wash. 317, 67 Pac. 561; *Hewitt v. Root*, 31 Wash. 312, 71 Pac. 1021; *Mahoney v. Commissioners*, 8 Idaho, 375, 69 Pac. 108; *Latah Co. v. Has-further*, 12 Idaho, 797, 88 Pac. 433;

*Buxton v. Mercantile Co.*, 18 Okl. 287, 90 Pac. 19.

<sup>12</sup> *Lower v. Knox*, 10 Cal. 480; *Heihn v. Stansbury*, 12 Cal. 412; *Towdy v. Ellis*, 22 Cal. 650; *Peck v. Vandenberg*, 30 Cal. 11; *Hihn v. Peck*, 30 Cal. 280; *Peck v. Courtis*, 31 Cal. 207; *Thompson v. Connelly*, 43 Cal. 636; *Waggenheim v. Hook*, 35 Cal. 216; *Coombs v. Hibberd*, 45 Cal. 174; *Turner v. Reynolds*, 81 Cal. 214, 22 Pac. 546; *Wise v. Ballou*, 129 Cal. 45, 61 Pac. 574; *McDonald v. Lee*, 132 Cal. 252, 64 Pac. 250; *Hellman v. Longley*, 154 Cal. 78, 97 Pac. 17; *Walbridge v. Cousins*, 2 Cal. App. 302, 83 Pac. 462; *Davey v. Mulroy*, 7 Cal. App. 1, 93 Pac. 297.

As to new trial orders, the rule in other jurisdictions is expressed in the following cases:

*Globe etc. Co. v. Spann*, 6 Colo. App. 146, 40 Pac. 198; *Brown v. Willoughby*, 5 Colo. 1; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Bear Valley Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611; *Burchinell v. Bennett*, 10 Colo. App. 150, 50 Pac. 206; *Hibbard v. De Lanty*, 20 Wash. 539, 56 Pac. 34; *Snow v. Rich*, 22 Utah, 123, 61 Pac. 336; *Hoffman v. Commissioners*, 8 Okl. 225, 57 Pac. 167; *Trull v. Modern Woodmen*, 12 Idaho, 318, 85 Pac. 1081, 10 Ann. Cas. 53; *Buxton v. Mercantile Co.*, 18 Okl. 287, 90 Pac. 19; *Felt v. Cook*, 31 Utah, 299, 87 Pac. 1092; *Bowman v. Ogden*, 33 Utah, 196, 93 Pac. 561; *Wittler-Corbin Co. v. Martin*, 47 Wash. 123, 91 Pac. 629; *Chilcott v. Globe etc. Co.*, 49 Wash. 302, 95 Pac. 264; *Biordan v. Horton*, 16 Wyo. 363, 94 Pac. 448; *Smith v. American Falls etc. Co.*, 15 Idaho, 89, 95 Pac. 1059; *Powell v. May*, 29 Mont. 71, 74 Pac. 80; *Rice etc. Co. v. Pacific etc. Co.*, 35 Wash. 535, 77 Pac. 839; *Conrad v. Lepper*, 13 Wyo. 99, 78 Pac. 1, 3 Ann. Cas. 627; *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67.

As to appeals from the judgment where a review of the evidence is

from special orders after final judgment,<sup>13</sup> interlocutory decrees in partition,<sup>14</sup> final orders of condemnation,<sup>15</sup> and orders dissolving an injunction,<sup>16</sup> unless taken within that statutory period, must be dismissed.

Whether taken too early or too late, appeals, or attempted appeals, taken otherwise than in the manner or within the time prescribed by the code, may be said to be abortive. They accomplish nothing. Such an appeal not only does not take the case to the higher court, but it really leaves it undisturbed in the trial court, just as though no attempt had been made to remove it.<sup>17</sup> No jurisdiction is conferred upon the appellate court, and the dismissal of such attempted appeal does not operate, as in other cases of dismissal, as an affirmation of the judgment or order from which the appeal is prosecuted.<sup>18</sup>

The failure to take an appeal in time goes to the jurisdiction of the appellate court;<sup>19</sup> the statutory limitation is express and peremptory, and the right given must be exercised, if at all, within the period fixed. It "is not a flexible rule to be varied by extrinsic circumstances."<sup>20</sup> In the case of *Williams v. Long*,<sup>21</sup> the supreme court said: "Statutes limiting the time of appeal are jurisdictional and mandatory"; and in the more recent case of *Estate of Brewer*,<sup>22</sup> the court thus definitely expressed the law: "The objection that an

sought, the following cases illustrate the rule:

*Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697; *Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303; *Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. 153; *White v. Whitecomb*, 13 Idaho, 490, 90 Pac. 1080.

<sup>13</sup> *Wells, Fargo & Co. v. Anthony*, 35 Cal. 696; *Stoddart v. Burge*, 53 Cal. 394; *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588; *Estate of Heldt*, 98 Cal. 553, 33 Pac. 549; *Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770; *Doyle v. Insurance Co.*, 125 Cal. 15, 57 Pac. 667.

<sup>14</sup> *Regan v. McMahon*, 43 Cal. 625.

<sup>15</sup> *California So. R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59, 7 Pac. 123.

<sup>16</sup> *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. 689.

<sup>17</sup> *Home etc. Assn. v. Kaplan*, 84 Cal. 486, 24 Pac. 119; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *McHugh v.*

*Adkins*, 117 Cal. 228, 49 Pac. 2; *Estate of Devincenzi*, 131 Cal. 452, 63 Pac. 723.

<sup>18</sup> *Estate of Pearsons*, 119 Cal. 27, 50 Pac. 929; *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64.

<sup>19</sup> *Fairchild v. Doten*, 38 Cal. 286; *Dalzell v. Superior Court*, 67 Cal. 453, 7 Pac. 910; *In re Fisher*, 75 Cal. 523, 17 Pac. 640; *Mohr v. Byrne*, 131 Cal. 288, 63 Pac. 341; *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *San Francisco etc. Co. v. California*, 141 Cal. 354, 74 Pac. 1047; *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486.

See in this connection, *Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645; *Barde v. Wilson*, 54 Or. 68, 102 Pac. 301; *Taylor v. Lapham*, 41 Or. 479, 69 Pac. 439.

<sup>20</sup> *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387.

<sup>21</sup> 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264.

<sup>22</sup> 156 Cal. 89, 103 Pac. 486.

appeal has not been taken within the time limited by law goes to the jurisdiction of the appellate court."

Following the principle above stated, it has been held that the time for taking an appeal is not extended by the sickness of counsel, or other hardship;<sup>23</sup> that it cannot be evaded by renewals of the motion, even though the same may be varied in terms;<sup>24</sup> that it cannot be extended by moving to vacate or set aside, and then appeal from the order of denial;<sup>25</sup> nor, by order of court,<sup>26</sup> or stipulation of the parties,<sup>27</sup> or the death of the respondent, generally speaking, although such an event leaves no one upon whom notice of appeal can be served.<sup>28</sup> Nor does the pendency of one appeal

<sup>23</sup> *Yturbide v. United States*, 22 How. (U. S.) 290, 16 L. ed. 342.

<sup>24</sup> *Kittridge v. Stevens*, 23 Cal. 283; *Estate of Burns*, 54 Cal. 223; and see *Romine v. Cralle*, 80 Cal. 626, 22 Pac. 296, where it was held that the requirement as to the time for taking appeals could not be evaded or extended by calling up the same motion a second time.

<sup>25</sup> See section 199, *ante*.

<sup>26</sup> As to extensions in general, see section 1054, California Code of Civil Procedure, old Practice Act, section 530. See, also, *Williams v. Long*, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264. Section 1054, *supra*, expressly excepts notices of appeal from the extensions that may be granted by the court.

<sup>27</sup> See *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654. Parties may stipulate that the record which shows that the appeal was taken in time is correct, and the respondent will not be permitted to show the contrary, but the parties will not be permitted to stipulate that an appeal may be considered, even though the record shows that it was not in time, or does not show the time at all. See *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888; *In re Mackay*, 107 Cal. 303, 40 Pac. 558; *Estate of Pichoir*, 139 Cal. 694, 70 Pac. 214; 73 Pac. 604; *Estate of More*, 143 Cal. 493, 77 Pac. 407.

And see *John v. Paullin*, 24 Okl. 642, 106 Pac. 838; *Land v. Johnston*, 156 Cal. 253, 104 Pac. 449; *Grove v. Foutch*, 6 Colo. App. 357, 40 Pac. 852; *Penny v. Nez Perce*, 4 Idaho, 642, 43 Pac. 570; *Anderson v. Halthusen Co.*, 30 Utah, 31, 83 Pac. 560.

<sup>28</sup> *Williams v. Long*, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264. In this case the death of the respondent took place within so short a time before the expiration of the statutory time for taking the appeal that it was not possible to serve the notice, the administrator not being appointed until it was too late. An attempt was made by an order of court to extend the time, but the supreme court declined to uphold it. See, also, *Estate of Turner*, 139 Cal. 85, 72 Pac. 718; *S. C.*, 142 Cal. 549, 77 Pac. 1099; *S. C.*, 143 Cal. 438, 77 Pac. 144. In *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225, where the circumstances are somewhat similar, the supreme court said:

" . . . The appellant must, within the time allowed for taking an appeal, serve his notice of appeal upon all adverse parties. If any of the said parties have died, service must be made upon the personal representatives of the decedent, and if the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost."

Query: Section 941b of the new and alternative method of appeal provides: "In the event of the death of any person having at his death a right of appeal, the attorney of record representing the decedent in the court in which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or administrator of the estate of the decedent." The same section dispenses with personal service of the

enlarge the time to appeal from another case.<sup>29</sup> Nor is the time to appeal from the judgment extended by excluding from the computation of the time the period lapsing between the date of the order granting a new trial and the appeal therefrom.<sup>30</sup>

The facts which give jurisdiction to the appellate court, as the fact that the appeal was taken within the statutory period, cannot be presumed, but must affirmatively appear upon the record.<sup>31</sup>

The modification of a judgment resulting from a new trial is in effect a new judgment, and an appeal may be taken from the entry of the modified judgment, as from the original.<sup>32</sup> The same rule applies to amended judgments generally.<sup>33</sup>

**§ 205. Provisions of the Statute in Relation to the Time for Taking Appeals.**—The limitation of time for taking appeals was contained in section 336 of the old Practice Act. As enacted in 1851,<sup>1</sup> this section was as follows:

“Sec. 336. An appeal may be taken,—

notice of appeal. Could an appeal under the new method be perfected against a deceased respondent prior to the appointment of an administrator or executor?

<sup>29</sup> *Bornheimer v. Baldwin*, 42 Cal. 27.

<sup>30</sup> An order granting a new trial is said to have the effect of vacating the judgment, and an appeal from the latter cannot be taken unless an appeal from the order is previously taken. In *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387, it was held that although an appeal from the judgment could not be taken after a new trial is granted, and before an appeal from the order is taken, yet the time lapsing between the two judicial acts was not to be excluded from the entire period within which an appeal from the judgment must be taken.

Decisions as to extension of time in other jurisdictions are in harmony with these principles, in the main. Thus in *Doorley v. Buford*, 5 Okl. 594, 49 Pac. 936, it was held that the time was not extended by the filing of a new trial motion. In *Dusing v. Nelson*, 6 Colo. 39, pendency of a motion for new trial was held not to have a like effect. But statutory provisions may change this rule. See chapter on “Dismissal of Appeals.”

<sup>31</sup> *Estate of More*, 143 Cal. 493, 77 Pac. 407.

<sup>32</sup> *Mann v. Haley*, 45 Cal. 63.

<sup>33</sup> *Hayes v. Silver Creek Co.*, 136 Cal. 238, 68 Pac. 704. But see *Savings & Loan Soc. v. Horton*, 63 Cal. 310, and *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381, where the court seems to have held that an amendment of the judgment did not extend the time of appeal from the date of the original judgment so as to begin to run from the date of entry of the amended judgment. The amendments in these cases were not, however, amendments in the sense of modifications of the judgment, but were merely corrections made necessary by clerical misprisions, which the court might make at any time even after appeal. The modifications were in no sense jurisdictional (*Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083), and neither case can be said to affect the rule that the time to appeal dates from the actual entry of the order or judgment appealed from, which in the case of judgments or orders amended or modified, either of that or of a previous date, is the date of entry of the order or judgment as amended.

<sup>1</sup> Laws of 1851, p. 104.

*"First.* From a final judgment in an action or special proceeding, commenced in the court in which the judgment is rendered, within one year after the *rendition* of the judgment.

*"Second.* From a judgment rendered on an appeal from an inferior court, within ninety days after the *rendition* of the judgment.

*"Third.* From an order made at a special term within sixty days after the order is made, and entered in the minutes of the clerk."

The first and second subdivisions above quoted were reproduced in all the amendments of the section, the changes being confined to the third subdivision. These changes are as follows:

In 1854,<sup>2</sup> the section was amended so that the third subdivision read as follows:

*"Third.* From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding after a motion is made therefor in the cases provided by law, or on the ground that the judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction, and from any special order made after final judgment within sixty days after the order is made and entered in the minutes."

In 1859<sup>3</sup> the section was amended so that the third subdivision read as follows:

*"Third.* From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding, after a motion is made therefor in the cases provided by law, or on the ground that the judge is disqualified from hearing and trying the same; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes."

In 1863<sup>4</sup> the section was amended so that the third subdivision read as follows:

*"Third.* From an order granting or refusing a new trial; from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction, and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the court."

<sup>2</sup> Laws of 1854, p. 64.

<sup>3</sup> Laws of 1859, p. 140.

<sup>4</sup> Laws of 1863, p. 756.

In 1866<sup>s</sup> the section was amended so that the third subdivision read as follows:

"*Third.* From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court."

The section as amended in 1866 stood until the adoption of the Code of Civil Procedure. The corresponding section of the code as first enacted was as follows:

"Sec. 939. An appeal may be taken,—

"1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the *entry* of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the *rendition* of the judgment.

"2. From a judgment rendered on an appeal from an inferior court within ninety days after the *entry* of such judgment.

"3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk."

This section was not amended until 1880.<sup>5a</sup> The amendment of that year reproduced the first and second subdivisions above quoted, but changed the third subdivision. It was again amended in 1897,<sup>5b</sup> in 1899,<sup>5c</sup> in 1901,<sup>5d</sup> and in 1907.<sup>5e</sup> The first two of these amendments, like that of 1880, were merely in the direction of ex-

<sup>s</sup> Laws of 1865-66, p. 706.

<sup>5a</sup> Code Amendments 1880, p. 61.

<sup>5b</sup> Stats. and Amendments 1897, p.

55.

<sup>5c</sup> Stats. and Amendments 1899, p.

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<sup>5d</sup> Stats. and Amendments 1900-01,

p. 172.

<sup>5e</sup> Stats. and Amendments 1907, c.

42.

tending the list of appealable orders to correspond with similar changes in section 963 of the same code. The amendment of 1901 was held unconstitutional, along with a large number of other changes in the Code of Civil Procedure made that year.<sup>51</sup> The

<sup>51</sup> See *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. 478, 55 L. R. A. 833.

Corresponding provisions in other codes are, as follows:

*Arizona*: Section 1496, Revised Statutes, is as follows: "An appeal may, in cases where an appeal is allowed, be taken during the term of the court at which the final judgment or order is rendered, by the appellants giving notice of appeal in open court, which shall be noted on the docket and entered of record, and by filing with the clerk an appeal bond or affidavit in lieu thereof, as hereinafter provided, during the term, or within twenty days after the expiration of the term."

*Colorado*: Section 388, Mills' Annotated Code: "Such appeal must be prayed for within five days after the time of rendering the judgment or decree; and, provided, the party . . . shall, by himself, or agent, or attorney, give bond. . . ."

*Idaho*: Section 4807, Revised Codes, is drawn closely after the California section, except that it does not specify so many interlocutory orders, and the time is fixed at one year, instead of six months, within which to take appeals from final judgments. Other differences are as follows: The word "entry" in the last line of subdivision 1 is "rendition" in the Idaho section, and a fourth subdivision is added, providing for appeals from decisions of the board of county commissioners within ninety days after entry thereof.

*Montana*: Section 7099, Revised Codes. This section is substantially the same as the California section, except that it omits the provision of the first subdivision as to review of the sufficiency of the evidence, and fixes one year instead of six months as the time within which appeals from final judgments are to be taken. Also, subdivision 4 is added, fixing the time within which appeals from the interlocutory orders set forth in subdivision 3 are to be taken (sixty

days), although a similar provision is set out in that subdivision itself.

*Nevada*: Section 3425, Cutting's Compiled Laws, is the same as the Idaho section, above described, except that instead of the fourth subdivision of that section, the Nevada section contains the following: "Fourth—From an interlocutory judgment or order in cases of partition which determines the right of several parties, and directs partition sale, or division to be made, within sixty days after the rendition of the same."

*New Mexico*: Section 2685, subsection 161, Compiled Laws, authorizes appeals and writs of error in civil cases within twelve months, and section 3136, authorizes appeals in equity and writs of error in common-law cases within one year.

*North Dakota*: Section 7204, Revised Codes, provides for appeals from judgments within a year and from orders in sixty days.

*Oklahoma*: The proceedings are by petition in error (section 6069, Compiled Laws) although denominated an appeal (section 6067). The summons in error, if issued in vacation, must be ten days before the commencement of the term; if in term time, within ten days of the first day of the term (section 6069, Compiled Laws).

*Oregon*: Section 550, Lord's Oregon Laws, provides that, if not taken at the time of the rendition of the judgment, order or decree, it shall be taken within six months after entry, if to the supreme court, or thirty days, if to the circuit court.

*South Dakota*: Section 442, Code of Civil Procedure, provides for appeals from orders within sixty days after notice thereof. Other appeals must be within two years after filing judgment-roll (perfecting the judgment).

*Utah*: Section 3301, Compiled Laws, requires appeals to be taken within six months from entry of judgment or order appealed from.

*Washington*: Section 1718, Rem. & Bal. Code (section 6502, Bal. Code),



most important change, though not the only one, as will appear from a comparison, made by the amendment of 1907, was that of the word "rendition," in the last line of subdivision 1, to "entry." In its present form the section is as follows:

"Sec. 939. An appeal may be taken:

"1. From a final judgment in an action, or special proceeding, commenced in the court in which the same is rendered, within six months after the entry of judgment;

"2. From a judgment rendered on appeal from an inferior court, within ninety days after the entry of such judgment;

"3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order appointing a receiver; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after a final judgment; from an interlocutory judgment, order, or decree, hereafter made or entered in any action for divorce or to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and ordering an accounting; from an interlocutory judgment in actions for partition of real property; and from an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for the partition of real property in the cases mentioned in section seven hundred and sixty-three of this code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk."

The sections above quoted, section 336 of the old Practice Act, and section 939 of the code, were intended to be correlatives respectively of section 347 of the old Practice Act, and 963 of the code.

authorizes appeals from final judgment within ninety days after entry; orders, fifteen days after entry, if made at hearing, in other cases, within fifteen days after notice, or service of a copy of the order, and criminal judgments, ninety days after entry. See section 9261, Rem. & Bal. Code (section 1757, Bal. Code), as to appeals from judgments in proceedings for foreclosure under tax assessments.

*Wyoming*: Section 5122, Compiled Statutes, provides that "no proceeding to reverse, vacate, or modify a judgment or final order shall be com-

menced unless within one year after the rendition of the judgment, or the making of the final order complained of." To this two provisions are added: One excludes the period of disability from the computation of time where the appellant is subjected to the legal disability of nonage, coverture, insanity, or incarceration in prison; and the other authorizes the court rendering the judgment or order to extend the time for taking an appeal or writ of error not exceeding eighteen months.

The latter sections determined the orders which were appealable, and the former, the time in which the appeals must be taken. But the legislature has not always kept this in mind. Thus, for example, the provision of the amendment of 1880, fixing the time for an appeal from orders in relation to the report of referees in partition was inserted in section 939, but not in section 963.

The provision in relation to appeals in probate proceedings is to be found in section 1715, California Code of Civil Procedure, which is as follows: \*

"Sec. 1715. The appeal must be taken within sixty days after the order, decree, or judgment is entered."

From the above statutory provisions it is to be noted that the time to take an appeal from a judgment begins to run from the actual entry thereof in the judgment-book,<sup>6</sup> and from orders, from

\* Corresponding provisions of other codes are as follows: Section 1946, Revised Statutes of Arizona, provides that an appellant in a probate appeal shall "within twenty days after such decision, order, judgment or decree shall have been rendered, file with the clerk of the probate court a bond," etc. This is assumed to be the method of taking an appeal in that jurisdiction. Review of probate matters by the supreme court in Colorado is solely by writ of error.

Section 5666, Revised Codes of Idaho, is identical with the California section quoted in the text. So, also, is section 7713, Revised Codes of Montana. Section 3041, Cutting's Compiled Laws of Nevada (section 255, Civil Practice), provides that appeals in probate matters shall "be governed in all respects as an appeal from a final decision and judgment in an action at law." No specific provisions are made in the practice acts of New Mexico, Oregon, Washington, North Dakota, and the time for taking appeals in probate matters from the district to the supreme court is governed by the general provisions. See note 5f, *supra*. Appeals in probate proceedings in Oklahoma are governed by the provisions as to appeals in general. See section 16a, note 200, *ante*. The same may be said of the South Dakota and Utah practice. *Id*.

Section 5467, Compiled Statutes of Wyoming, makes the general pro-

visions of the Practice Act as to appeals applicable to probate matters.

See *Estate of Tuohy*, 23 Mont. 305, 58 Pac. 722, as to appeals in probate matters.

<sup>6</sup> See section 183, *ante*. See *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189; *Schroder v. Schmidt*, 71 Cal. 399, 12 Pac. 302; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384; *Home v. Kaplan*, 84 Cal. 486, 24 Pac. 119; *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2; *Wood v. Etiwanda etc. Co.*, 122 Cal. 152, 54 Pac. 726; *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937; *McGorray v. Stockton etc. Soc.*, 131 Cal. 321, 63 Pac. 479; *McDonald v. Lee*, 132 Cal. 252, 64 Pac. 250; *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868.

If, however, it is desired to review the sufficiency of the evidence to sustain the verdict or decision, the appeal from the judgment must be taken within sixty days. See *Weyl v. S. V. R. R. Co.*, 69 Cal. 202, 10 Pac. 510; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773; *Mogk v. Peterson*, 75 Cal. 496, 17 Pac. 446; *McDonald v. Swett*, 76 Cal. 257, 18 Pac. 324; *Thompson v. White*, 76 Cal. 381, 18 Pac. 399; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134; *McGrath v. Hyde*, 81 Cal. 38, 22 Pac. 293; *Turner v. Reynolds*, 81 Cal. 214, 22 Pac. 546; *Tillman v. Averett*, 82

Cal. 576, 23 Pac. 875; Curran v. Kennedy, 89 Cal. 98, 26 Pac. 641; Scott v. Glenn, 98 Cal. 168, 32 Pac. 983; Forni v. Yoell, 99 Cal. 173, 33 Pac. 887; Secord v. Quigley, 106 Cal. 149, 39 Pac. 623; Brooks v. S. F. & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570; Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225; Painter v. Painter, 113 Cal. 371, 45 Pac. 689; California Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018; Wood v. Etiwanda etc. Co., 122 Cal. 152, 54 Pac. 726; Swafford v. Board of Education, 127 Cal. 484, 59 Pac. 900; Beed v. Johnson, 127 Cal. 538, 59 Pac. 986; Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Wise v. Ballou, 129 Cal. 45, 61 Pac. 574; Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940; Ryland v. Heney, 130 Cal. 426, 62 Pac. 616; McDonald v. Hayes, 132 Cal. 490, 64 Pac. 850; Gilbert v. Kelly, 138 Cal. 689, 72 Pac. 344; Estate of Gordon, 142 Cal. 125, 75 Pac. 672; Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Crandall v. Parks, 152 Cal. 772, 93 Pac. 1018; Long v. Cramer, 155 Cal. 402, 101 Pac. 297; Estate of Dellow, 1 Cal. App. 529, 82 Pac. 558; California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507, 92 Pac. 509; Los Angeles Brewing Co. v. Klinge, 7 Cal. App. 550, 95 Pac. 44. See note 12, section 204, *supra*.

Some difficulty has arisen from time to time in the construction of this provision, more particularly with respect to the review of rulings upon nonsuit. It was contended that inasmuch as the review of such a ruling necessitated a review of the sufficiency of the evidence, it could not be made on an appeal taken more than sixty days after entry of judgment, notwithstanding the settled rule that such an error was an error of law, reviewable on appeal from both judgment and new trial order. This view was at one time entertained by some of the members of the supreme bench, though, it is believed, never by a majority of the court; but it unquestionably gained a degree of credit it had never previously enjoyed by reason of the support it received at the hands of the learned justice who wrote the opinion of the court in *Miller v. Wade*, 87 Cal. 410, 25 Pac. 487. It was soon afterward thor-

oughly discredited, however, upon a direct presentation of the question, in the case of *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737, where it was held that such a ruling might be reviewed on an appeal from the judgment, although not taken within sixty days. This doctrine was reiterated in the later opinion of *Fogel v. Schmalz*, 92 Cal. 412, 28 Pac. 444, and is the settled rule of practice upon the point. And see *Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303.

The requirement applies in election contests, but errors in the admission or rejection of ballots excepted to at the trial are merely errors of law in the admission or rejection of evidence, and do not involve the sufficiency of the evidence to sustain the decision, and hence may be reviewed even though the appeal may not have been taken within sixty days. *McCarthy v. Wilson*, 146 Cal. 323, 82 Pac. 243.

So the requirement does not apply to a review of the question as to whether a proposed amended complaint was sufficient to state a cause of action, in a case where the rejection of the amendment was solely upon the ground that even if allowed the amended pleading would not be sufficient. *Campbell etc. v. Campbell*, 152 Cal. 201, 92 Pac. 184.

The exclusion of evidence tending to establish the extent of the owner's liability under section 1200, Code of Civil Procedure, is an error of law, reviewable as other errors of law on appeal from both judgment and new trial order, and its review is not dependent upon the taking of the appeal within sixty days. *McDonald v. Hayes*, 132 Cal. 490, 64 Pac. 850.

Prior to the amendment of 1907 which changed the word "rendition" in the last line of subdivision 1 of section 939 to "entry," it was possible for the respondent, by delaying entry of judgment for sixty days, to prevent the review of the sufficiency of the evidence on appeal from the judgment. The appeal could not be taken prior to entry, and yet must have been taken within sixty days after rendition, as the provision formerly stood, in order to have a review of the sufficiency of the evidence. This condition of the law was

thoroughly elucidated in the opinion of the supreme court in the case of *Wood v. Etiwanda etc. Co.*, 122 Cal. 152, 54 Pac. 726, and it was there suggested that it was a proper case for the legislature. The change was made, no doubt, in response to this suggestion.

An apparent exception to this rule is to be found in the case of appeals from judgments of dismissal under section 581, California Code of Civil Procedure, in which the time to appeal begins to run from the date of the entry in the minutes instead of the entry in the judgment-book. See *Matthai v. Kennedy*, 148 Cal. 699, 84 Pac. 37. The exception is merely apparent, the appeal being from the order and not the judgment. The supreme court, by Angellotti, J., drew the distinction very clearly between orders of dismissal under section 581, and judgments of dismissal in general, in the case of *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868, in the following language:

"The judgment before us, however, does not show a dismissal of the character referred to by these decisions as covered by the special provision of section 581 of the Code of Civil Procedure, a mere order of dismissal made by the court because of the failure of the plaintiff to appear at the trial, or prosecute his cause with reasonable diligence, or to take the necessary steps therein within the time prescribed by statute, or to comply with some requirement as to the giving of security (Code Civ. Proc., sec. 1037), or because of his abandonment of the case, or because of other similar failure or neglect by reason of which he is held to have lost his right to be heard at all in the further prosecution of his action. With the single exception of the nonsuit on the trial provided for by subdivision 5 of section 581 of the Code of Civil Procedure, this is the character of cases in which orders of dismissal may be made by the court under our practice, and this is the kind of dismissal referred to by the decisions cited. Such an order is not a judgment at all in the strict sense, but it is treated as such for all the purposes of taking an appeal because it finally disposes of the particular action as

effectually as would any formal judgment based on ruling on demurrer or on findings or verdict on the facts. While the judgment in the case at bar provides in terms 'that the action be dismissed,' it shows on its face that it is a final judgment in favor of the defendants, given upon sustaining their demurrer to plaintiff's complaint, because of the insufficiency of such complaint in some respect designated by the statute as ground for demurrer and specified in the demurrers filed, the plaintiff electing not to amend, but standing on its complaint as filed. Plaintiff is treating it as such a judgment, its only contention on this appeal being as to the correctness of the order striking out portions of its complaint, and the order sustaining the demurrers, matters that can only be considered on an appeal from such a final judgment, and that would not be the legitimate subject of inquiry on an appeal from any mere order of dismissal. When a demurrer to a complaint is sustained on any ground for which a demurrer will lie under our statute, and the complaint is not amended, the plaintiff electing to stand on the complaint as filed, the defendant is entitled to judgment in his favor. It is immaterial in this regard upon what statutory ground the demurrer is sustained. That would be a question of concern in determining to what extent the judgment so given operates as an estoppel, but it is not material to the present inquiry. It is also immaterial on this inquiry what particular relief the judgment gives to the defendant. Whether it declares that plaintiff shall take nothing, or that the action shall abate, or 'that the action be dismissed and the defendant recover their costs,' as in the case at bar, it is in the strictest sense a final judgment, a final determination upon the pleadings of the relative rights of the parties so far as the particular action is concerned, and it is essentially different from the order of dismissal of an action made without regard to the relative rights of the parties to the action as shown by the pleadings. It would be an unwarranted assumption of the legislative power on the part of the

the date of entry in the minutes, if made in open court; otherwise, from the date of the actual filing of the signed order.<sup>7</sup> It has been held that this rule is unaffected by the character of the judgment or order, or by the question as to whether the entry or filing is as of the date of the record, or *nunc pro tunc*, as of an earlier date.<sup>8</sup> When a judgment has been entered *nunc pro tunc* as of a prior date, the time to appeal begins to run from the date of the actual entry.<sup>9</sup>

courts to hold that the special provision of section 581 of the Code of Civil Procedure as to the manner of making certain dismissals is applicable to such a judgment simply because of the nature of the relief granted thereby. It has never been so held, and there is nothing in any of the cases cited that can reasonably be construed as supporting such a view.

"We are satisfied that the place designated by law for the entry of this judgment was the judgment-book provided by section 668, Code of Civil Procedure."

The rule in other jurisdictions is outlined in the following decisions: An appeal taken prior to entry of judgment is premature in certain cases. *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 Pac. 757; and see *South Dakota* cases cited in note 2, section 204, *ante*. An appeal must be taken within six months from the date of the entry of the judgment on the merits, and not from the time of the settlement of the cost bill. *Wadhams v. Allen*, 45 Or. 485, 78 Pac. 362. An appeal must be taken within six months from the date of the *rendition* of a judgment against a defendant who declines to plead after demurrer overruled. *Hendy Machine Works v. Portland etc. Bank*, 24 Or. 60, 32 Pac. 1036. (Note: This is doubtless an inadvertence—*rendition* used instead of *entry*.) The time within which a writ of error must be sued out begins to run from the time of rendition, and not from the last day of the next regular term, where the decree is entered in vacation, and contains no recital that it is to become final at a future term of court. *United States v. Gwyn*, 64 N. M. 635, 42 Pac. 167.

In those states where judgments are deemed to be suspended in effect by

the making of a new trial motion, so that the finality thereof is postponed until the disposition of the motion, it has been held that the time to appeal from the judgment begins to run from the date of the denial of the motion, instead of the date of the entry of the judgment. *Wittler-Corbin etc. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629; *Chilcott v. Globe etc. Co.*, 49 Wash. 302, 95 Pac. 264; *Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525; *Rice etc. Co. v. Pacific etc. Co.*, 35 Wash. 535, 77 Pac. 839; *O'Brien v. Casualty Co.*, 57 Wash. 598, 107 Pac. 519; *Conrad v. Lepper*, 13 Wyo. 99, 78 Pac. 1; *Riordan v. Horton*, 16 Wyo. 263, 94 Pac. 448; *Pearce v. Strickler*, 9 N. M. 46, 49 Pac. 727.

<sup>7</sup> See section 187, *ante*; *In re Rose*, 72 Cal. 577, 14 Pac. 369; *Estate of Heldt*, 98 Cal. 553, 33 Pac. 549; *Estate of Pearsons*, 119 Cal. 27, 50 Pac. 929; *Estate of Sheid*, 122 Cal. 525, 55 Pac. 328; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Estate of Devincenzi*, 131 Cal. 452, 63 Pac. 723; *McDonald v. Lee*, 132 Cal. 252, 64 Pac. 250; *Estate of Turner*, 139 Cal. 85, 72 Pac. 718; *Estate of Fay*, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340; and see *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, 92 Pac. 868.

<sup>8</sup> See *Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384; and see cases cited in note 9, below.

The time to take an appeal from a final decree corrected by a *nunc pro tunc* entry begins to run from the latter and not from the date of the entry of the original decree. *Lee v. Imbrie*, 13 Or. 510, 11 Pac. 270.

<sup>9</sup> In the *Matter of Fifteenth Avenue Extension*, 54 Cal. 179; *McGarrahan v. Maxwell*, 28 Cal. 75; *Rubber Co. v. Goodyear*, 6 Wall. (U. S.) 153, 18 L. ed. 762; *Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac.

Appeals in probate proceedings must be taken within sixty days, from the entry in the minute-book,<sup>10</sup> whether designated as orders, judgments, or decrees.<sup>11</sup> So an appeal from a decree in the special proceeding prescribed by section 1664 of the Code of Civil Procedure, for the purpose of determining heirship, must be taken within sixty days.<sup>12</sup>

Appeals in criminal cases must be taken, under the provisions of section 1239, Penal Code, in the case of judgments, within one year, and in the case of orders, within sixty days "after it is made."<sup>13</sup> What is said above as to the necessity of taking the appeal within the statutory time applies to civil and criminal cases alike. In *People v. Varnum*<sup>14</sup> the supreme court held that an appeal taken from an order in a criminal case more than sixty days after it was made must be dismissed; and, for the same reason, an appeal from a judgment, taken more than a year after its rendition, must also be dismissed. And in *People v. Walker*,<sup>15</sup> it was held that the time fixed by statute for taking appeals in criminal cases is jurisdictional,

384; *Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083; *De Leonis v. Walsh*, 140 Cal. 175, 73 Pac. 813; *Estate of Potter*, 141 Cal. 350, 74 Pac. 986; *S. C.*, 141 Cal. 424, 75 Pac. 850.

See, also, *Agassiz v. Kelleher*, 11 Wash. 88, 39 Pac. 228, where it was held that where an appeal is dismissed to allow the judgment of the trial court to be corrected, the time to appeal on the second review begins to run from the original entry and not from the date of the correction.

<sup>10</sup> See *Estate of Burns*, 54 Cal. 223; *Estate of Harland*, 64 Cal. 379, 1 Pac. 159; *Estate of Burton*, 64 Cal. 428, 1 Pac. 702; *Estate of Crowey*, 71 Cal. 300, 12 Pac. 230; *Estate of Fisher*, 75 Cal. 523, 17 Pac. 640; *Estate of Grider*, 81 Cal. 571, 22 Pac. 908; *Gruwell v. Seybolt*, 82 Cal. 7, 22 Pac. 938; *In re Wiard*, 83 Cal. 619, 24 Pac. 45; *Estate of Backus*, 95 Cal. 671, 30 Pac. 796; *Estate of Westerfield*, 96 Cal. 113, 30 Pac. 1104; *In re Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman*, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Turner*, 139 Cal. 85, 72 Pac. 718; *Estate of Campbell*, 141 Cal. 72, 74 Pac. 550; *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486. Nor is the

minute entry affected by any signed memorial purporting to be an order. In such a case the time begins to run from the minute entry and not from the filing of the purported orders. See *Tracy v. Coffey*, 153 Cal. 356, 95 Pac. 150.

And this provision (section 1715, Code of Civil Procedure) is not affected by the sections of the code which provide the new and alternative method of appeal. *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486.

<sup>11</sup> See the probate cases in note 7, *supra*.

<sup>12</sup> *Smith v. Westerfield*, 88 Cal. 374 (381), 26 Pac. 206; *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328. The time is fixed by the section itself.

<sup>13</sup> It is to be noted that this time was not changed from one year to six months, as in the case of appeals in civil cases, and that the time runs from the rendition instead of from the entry of the judgment, as in other cases.

<sup>14</sup> 53 Cal. 630. See, also, *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Walker*, 132 Cal. 137, 64 Pac. 133.

<sup>15</sup> 132 Cal. 137, 64 Pac. 133. Also see *People v. Daniels*, 105 Cal. 262, 38 Pac. 720.

as in civil cases; and therefore, that the provisions of section 1248, Penal Code, as to the notice required in the case of motions to dismiss appeals in criminal cases, is without application where the ground of the motion is the failure of the appellant to take the appeal in time.

The statute in operation at the date of the entry of the judgment or order appealed from,<sup>16</sup> and not that in operation at the date the appeal is taken, governs both the question of appealability and that of the time of taking. Thus in *Estate of Hughston*,<sup>17</sup> the order, which was one refusing to revoke the probate of a will, was entered in January, 1901. Such an order was not then appealable.<sup>18</sup> In February, however, the amendment of 1901 to subdivision 3 of section 963, Code of Civil Procedure, was adopted, making such an order appealable. Thereafter, and within sixty days from the date of the entry of the order, an appeal therefrom was attempted; but it was dismissed on the ground that when entered it was not appealable, and, as the date of entry rather than the date of taking the appeal determines the question of appealability, to permit an appeal under the circumstances would be to make the amendment referred to retroactive. So, as to the time for taking appeals, in *Pignaz v. Burnett*,<sup>19</sup> it was held that the amendment of 1897, changing the time of appeals from judgments from one year to six months, was not retroactive; and, in effect, that the time of entry determined the question as to when an appeal therefrom might be taken.

As heretofore stated,<sup>20</sup> the necessity for a clear distinction between the two acts of *rendition* and *entry* of judgment, so far as the time to appeal is concerned, no longer exists, except in criminal cases. The entry of the judgment in the judgment-book and of the order in the minutes, if made in open court, or the filing of the signed order, if made in chambers, is now the universal point of departure in computing the time within which appeals must be taken. Nor is the question of notice any longer important. The time begins to run from actual entry, as above stated, and not from notice thereof.<sup>21</sup>

<sup>16</sup> It is presumed that in criminal appeals the date of the *rendition* would be determinative. This surmise is based upon principle, but no judicial expression is found upon the point, and hence it must be regarded as an open question, although the probabilities are all one way.

<sup>17</sup> 133 Cal. 321, 65 Pac. 742, 1039.

<sup>18</sup> See *Estate of Winslow*, 128 Cal. 311, 60 Pac. 931.

<sup>19</sup> 119 Cal. 157, 51 Pac. 48; also *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Boin v. Spreckels*, 155 Cal. 612, 102 Pac. 937.

<sup>20</sup> See section 204, *ante*.

<sup>21</sup> See *Fatjo v. Swasey*, 111 Cal. 628, 14 Pac. 225. Notice of entry of

The above rules are limited, however, to the method of appeal prescribed in sections 939, 940 and 941, Code of Civil Procedure. Sections 941a, 941b, and 941c of the same code provide a "new and alternative method of appeal," and sections 953a, 953b, and 953c provide for the preparation of the record thereunder. These various sections are considered later in connection with the subject of notices and undertakings on appeals, and the preparation of records on appeal from judgments and orders. It is sufficient here to refer to the time alone within which such appeals may be taken.

Simplicity is the keynote of the new method, and it is to be noted that no distinction is made, so far as relates to the time for taking appeals, between judgments, orders and decrees. The appeal may be taken at any time after rendition from either judgment, order or decree; but the notice of appeal *must* be filed<sup>22</sup> within sixty days after notice of entry thereof; and, in the event no such notice is given, the notice of appeal *must* be filed, in any event, within six months after such entry.<sup>23</sup>

The scope of the new sections above noted, as constituting a new and alternative method of appeal, is not unlimited, however. The effect of the amendment which added these new sections to the provisions of the code relating to appeals in general was merely to expand the practice in this respect, and the new provisions were not carried over or imported into probate or other special proceedings, except in so far as the general provisions referred to were consistent with the same. In consequence of which, it was held in *Estate of Brewer*,<sup>24</sup> as above noted, that the time to take appeals in probate proceedings, as prescribed by section 1715, Code of Civil Procedure, was not changed by the new provisions. The same or similar principles would no doubt govern in other cases, where special provisions are made for taking appeals. But the point has not been expressly decided.

judgment is required to start the time running against the moving party in the case of a motion for new trial. This is the provision in lieu of that which required notice of the verdict or decision, as prescribed by the amendment of 1907 to section 659, California Code of Civil Procedure.

But notice of entry of the order is not a prerequisite for the purpose stated.

<sup>22</sup> See sections 941a, 941b, and 941c, California Code of Civil Procedure.

<sup>23</sup> See sections 941a, 941b, and 941c, California Code of Civil Procedure.

<sup>24</sup> 156 Cal. 89, 103 Pac. 486.



## CHAPTER XXXIII.

## APPEAL, HOW TAKEN.

- § 206. Appeals, how taken—Statutory provisions.
- § 207. Contents of the notice of appeal.
- § 208. Signature of the notice of appeal.
- § 209. Filing the notice of appeal.
- § 210. Service of the notice of appeal.

§ 206. Appeals, How Taken—Provisions of the Statute.—An appeal is “taken” by serving and filing the notice of appeal.<sup>1</sup> It is perfected by filing the undertaking.<sup>2</sup> The filing of the undertaking has never been (except under the code as first enacted) a part of the process by which the appeal is “taken.” By an extraordinary confusion of ideas it was supposed to be so under the amendment of 1874 in at least one reported case.<sup>3</sup> But this was taken back on rehearing, and the contrary maintained.<sup>4</sup> The pro-

<sup>1</sup> San Francisco etc. Co. v. State of California, 141 Cal. 354, 74 Pac. 1047. It was said in this case: “So long as the notice of appeal remains unfiled, the appeal has not been taken.” Under the old system of appeals service is equally essential. Both filing and service are necessary. In Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711, the court seems to have held that its jurisdiction was acquired by the filing of the notice of appeal. This is believed to be an inadvertent statement, however, service being deemed equally essential to confer jurisdiction upon the appellate court. See section 210, *post*.

In Arthur v. Mounsee, 4 Idaho, 487, 42 Pac. 509, it was held that an appeal from an order after judgment must be taken within sixty days after entry, and that this contemplated both service and filing of the notice within that time. So in Threlkeld v. O’Neal, 26 Mont. 209, 66 Pac. 940, both service and filing within the time were held to be essential to validate an appeal from a new trial order.

Under the new alternative method of appeal, service of the notice of appeal is not provided for. Hence the

filing alone confers appellate jurisdiction. See section 941b, Code of Civil Procedure. Also see Mitchell v. California etc. Co., 154 Cal. 731, 99 Pac. 202; Ford & Sanborn Co. v. Braslan etc. Co., 10 Cal. App. 762, 103 Pac. 946.

<sup>2</sup> Under the new and alternative method of appeal no undertaking, as is understood under the provisions of sections 940 and 941, California Code of Civil Procedure, is required. If the appellant wishes to perfect his appeal under the new and alternative method, he must give a cost bond (see section 953b, Code of Civil Procedure), the purpose of which is to secure the clerk in the matter of the cost of preparing the record.

The statute sometimes provides that appeals are taken by giving the notice, and perfected by filing the bond. See sections 1508, and 1513, Revised Statutes of Arizona; section 3426, Cutting’s Compiled Laws of Nevada; section 7207, Revised Codes of North Dakota; section 1719, Rem. & Bal. Code of Washington (section 6503, Bal. Code).

<sup>3</sup> Holcomb v. Sawyer, 51 Cal. 417.

<sup>4</sup> Lowell v. Lowell, 55 Cal. 316.

visions in relation to the filing of the undertaking are considered in another place.<sup>5</sup> Here will be given the provisions in relation to the taking of the appeal.

The act of 1851 contained the following:<sup>6</sup>

"Sec. 337. The appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney."

This section stood until the adoption of the Code of Civil Procedure. As first enacted the provision of the code was as follows:

"Sec. 940. An appeal is taken by,—

"1. Filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same or some specific part thereof.

"2. Filing at the same time an undertaking on appeal; and

"3. Serving a copy of the notice of appeal upon the adverse party or his attorney."

In 1874 this section was amended so as to read as follows:

"Sec. 940. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."<sup>7</sup>

<sup>5</sup> See chapter 34, herein.

<sup>6</sup> Laws of 1851, p. 105.

<sup>7</sup> No change has been made since 1874. In Newmark's Code of Civil Procedure the section is given as amended in 1880. But the language given by the learned annotator in no respect differs from the amendment of 1874.

Corresponding provisions of other codes are as follows:

*Arizona*: Section 1496, Revised Statutes, is as follows: "An appeal may, in cases where an appeal is allowed, be taken . . . by the appellant giving notice of appeal in open court, which shall be noted on the docket and entered of record, and by filing with

the clerk an appeal bond or affidavit in lieu thereof, as hereinafter provided."

*Colorado*: Section 388, Mills' Annotated Code, provides for an appeal by petition and a bond, filed within five days after rendition of judgment or decree.

*Idaho*: Section 4808, Revised Codes. Same as section 940, Code of Civil Procedure of California.

*Montana*: Section 7100, Revised Codes; section 1724, Code of Civil Procedure. Same as section 940, Code of Civil Procedure of California.

*Nevada*: Section 3426, Cutting's Compiled Laws, section 331, Civil

**§ 207. Contents of the Notice of Appeal.**—The ordinary form of notice is one signed by the attorney of the losing party, ad-

Practice, is as follows: "The appeal shall be made by filing with the clerk of the court with whom the judgment or order is entered, a notice, stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney."

*New Mexico:* Section 3136, Compiled Laws, provides for the taking of appeals in equity cases and writs of error in common-law cases, "upon application to the district court in which the decree appealed from was rendered." This application may be made either in open court or by written notice; but if the former, the clerk of the court is required to "issue a citation to the opposite party to appear in the supreme court to answer such appeal." This provision also applies to appeals from interlocutory judgments in partition suits.

No specific notice is provided for in the case of appeals in code procedure, although provision is made for a notice to coparties for the purpose of securing their co-operation in a joint appeal. See section 2685, subsection 162. But section 2685, subsection 161, authorizes the application of the above common-law procedure in the case of such appeals.

*North Dakota:* Section 7205, Revised Codes. "An appeal must be taken by serving a notice in writing signed by the appellant or his attorney on the adverse party and filing the same in the office of the clerk of the court in which the judgment or order appealed from is entered, stating the appeal from the same, and whether the appeal is from the whole or from a part thereof, and if from a part only, specifying the part appealed from. The appeal shall be deemed taken by the service of a notice of the appeal and perfected on service of the undertaking for costs, or the deposit of money instead, or the waiver thereof as hereinafter prescribed. When service of a notice of appeal and undertaking cannot in any case be made within this state the court may prescribe a mode for serving the same."

*Oklahoma:* Section 6069, Compiled Laws of 1909, provides for taking an appeal by a proceeding in the nature of a writ of error. A petition is required to be filed and a summons issued and served as in the commencement of an action. This summons is issued by the court in which the petition is filed, and may be served by the sheriff, and returned by mail. The defendant in error may waive in writing the issuance and service of summons. Section 6070, Compiled Laws of 1909.

*Oregon:* Section 550, Lord's Oregon Laws, is partly as follows:

"An appeal shall be taken and perfected in the manner prescribed in this section, and not otherwise,—

"1. A party to a judgment, decree, or final order in any action, suit, or proceeding, desiring to appeal therefrom, or some specific part thereof, may by himself or attorney give notice in open court, or before the judge if the order, judgment or decree be rendered or made at chambers, at the time said judgment, decree, or order is made, that he appeals from such decision, order, judgment, or decree, or from some specific part thereof, to the court to which the appeal is sought to be taken; and such notice shall thereupon, by order of the court or judge thereof, be entered in the journal of the court. If the appeal is not taken at the time the decision, order, judgment, or decree is rendered or given, then the party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state, and file the original with the proof of service indorsed thereon, with the clerk of the court in which the judgment, decree, or order is entered. Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment,

dressed to the successful party and his attorney,<sup>1</sup> stating that the losing party appeals to the supreme court of the state of California, from the judgment or order in question, which must be described with sufficient certainty.

In 1861 the legislature passed an act—not as an amendment to Practice Act, but as an independent statute—which contained the following provision:

*"3. No appeal shall be dismissed for insufficiency of the notice of appeal, or undertaking thereon; provided, that a good and sufficient undertaking on appeal, approved by a judge of the supreme court, be filed in the supreme court, before the hearing on motion*

order, or decree, or some specific part thereof; . . . ."

*South Dakota:* Section 441, Code of Civil Procedure, provides that an appeal may be taken "by serving a notice in writing, signed by the appellant or his attorney, on the adverse party and on the clerk of the court in which the judgment or order appealed from is entered, stating the appeal from same, and whether the appeal is from the whole or a part thereof, and if from a part only, specifying the part appealed from. The appeal shall be deemed taken by the service of the notice of appeal."

See, also, section 349, Probate Code.

*Utah:* Section 3305, Compiled Laws of 1898, provides that an appeal "is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney."

*Washington:* Section 1719, Rem. & Bal. Code (section 6503, Bal. Code), is as follows:

"A party desiring to appeal to the supreme court under the provisions of this title may, by himself or his attorney, give notice in open court or before the judge, if the judgment or order appealed from is rendered or made at chambers, at the time when such judgment or order is rendered or made, that he appeals from such judgment or order to the supreme court, and thereupon the court or judge shall direct the clerk to make an entry of such notice in the journal of the court. If the appeal be not taken at the time when the judgment or order ap-

pealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section 1718, serve written notice on the prevailing party or his attorney that he appeals from such judgment or order to the supreme court, and within five days after the service of such notice he shall file with the clerk of the superior court the original or a copy of such notice, with proof or the written admission of the service thereof, and thereupon the clerk shall enter such notice, with the proof or admission of service thereof, in the journal of the court. The giving or service of a notice of appeal as prescribed in this section shall effect the appeal, but the same shall become ineffectual if an appeal bond for costs and damages be not given as required by section 1721 of this title. Two or more appealable orders with or without the judgment may be embraced in one appeal. Provided, that the time allowed in this title for appealing from each of such orders has not expired. The appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken, and if from part of any judgment or order, from what particular part."

<sup>1</sup> The notice should be addressed to all the parties and attorneys who are to be served. Whether the address is absolutely necessary has not been decided. See *Westheimer v. Thompson*, 3 Idaho, 560, 32 Pac. 205, where it was held that it was not necessary to direct the notice to the clerk of the lower court.

to dismiss the appeal, and upon payment of such reasonable costs as the court may adjudge; *provided*, that the respondent shall not be delayed, but may move when the cause is regularly called, for the disposition, or dismissal of the same, if such undertaking be not given."<sup>1a</sup>

This statute applied only to cases where a notice of appeal, properly filed and served, was defective. It did not apply to cases where there was no notice of appeal at all, or where there was no service of the notice. In the case of *Buffendeau v. Edmonson*<sup>2</sup> there was no proper service of the notice, and upon that ground the appeal was dismissed. The appellant then moved, upon the strength of the act of 1861, above quoted, to have the order of dismissal vacated. This motion was denied, and Currey, J., delivering the opinion, said:

"It is insisted by defendant's counsel that this court has not the power to dismiss an appeal for insufficiency of the notice, and for that reason the judgment of dismissal should be vacated, and the cause restored to the calendar. The section of the act of 1861, above cited, presupposes the existence of a notice of appeal, to which the word '*insufficiency*' stands in a qualifying relation. The question of the insufficiency of the notice was not involved in the determination of the motion to dismiss the appeal; but the point made by the party moving, and which was considered by the court, was that the proceedings which the three hundred and thirty-seventh section of the Practice Act requires shall be taken in order to constitute an appeal, had not been taken. The construction which the counsel claims for the act of 1861 would give it the effect to abrogate the conditions on which the fact of a subsisting appeal must of necessity depend. In our view the act of 1861 was intended to relieve appellants from the results, which, without it, would be likely to happen in consequence of defects of form and deficiencies in substance apparent on the face of the notices of appeal; but we cannot find in this act any authority for excusing, in any case, performance of the acts necessary to effect an appeal in accordance with the provisions of the three hundred and thirty-seventh section of the Practice Act, viz., the filing and service of the notice, and without the performance of which acts the appellate court could not acquire jurisdiction."

The act of 1861, therefore, did not excuse anything except defects in the notice itself; but such defects were excused by it.

<sup>1a</sup> Laws of 1861, p. 589.

<sup>2</sup> 24 Cal. 94.

Thus in the case of *Flateau v. Lubeck*,<sup>3</sup> the judgment was rendered on the tenth day of November, 1863, and the order overruling the motion for new trial was made on the thirteenth day of that month. The notice of appeal described the judgment as rendered in the cause on the tenth day of September, 1860, and the order denying the motion for new trial as made on the fourteenth day of December, 1863. The motion, however, was held to be sufficient, the court saying: "There is enough upon the face of this notice to show that the judgment and order mentioned in the transcript of the record were the same referred to in the notice, and we think the act of 1861 was designed to relieve parties in such cases from injurious consequences because of such mistakes." So in the *Estate of Pacheco*,<sup>4</sup> a notice of appeal from "the order of the probate court, made September 3, 1864, denying the petition of Penniman and others for the removal of Emeric, and refusing to appoint Penniman, and from all orders and decisions made by the court in that behalf *on that day*," was held to be a valid notice of appeal from an order made on that day other than the one first described, the court saying: "The notice of appeal from the order revoking the one made on the 17th of August is quite general in its terms, but we must hold it sufficient under the act entitled 'an act to regulate appeals in this state.' (Stats. 1861, p. 589.)"

But there was some limit to the defects which were cured by the act of 1861. Thus where the notice stated that the appeal was "from all orders of the district court made and entered in the said two actions jointly and severally, either before or after judgment," it was held that the notice was too general.<sup>5</sup> So in *Day v. Callow*,<sup>6</sup> Rhodes, C. J., delivering the opinion, said: "An appeal from 'all orders and rulings occurring at the trial and excepted to by the defendant might *perhaps* be of some avail in certain cases; but counsel need not be told that such an appeal is not an appeal from an order granting or refusing a new trial."

It seems to be an open question whether the act of 1861, above quoted, is now in force. The act was not incorporated into the old Practice Act, but was an independent statute. The Code of Civil Procedure contains the following:

"Sec. 954. If the appellant fails to furnish the requisite papers the appeal may be dismissed; but no appeal can be dismissed for

<sup>3</sup> 24 Cal. 364.

<sup>4</sup> 29 Cal. 224.

<sup>5</sup> *Genella v. Relyea*, 32 Cal. 159.

See, also, *Gates v. Walker*, 35 Cal. 289.

<sup>6</sup> 39 Cal. 593.

insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal."

It will be observed of this section that it reproduces a part only of section 3 of the act of 1861. Many practitioners thought that under the rule in *Whittaker v. Haynes*,<sup>7</sup> the provision of the act of 1861 was kept in force, while others were of opinion that the legislature having reproduced a part of section 3 and omitted the rest, must be held to have intended not to continue in force the omitted portion. If the act be no longer in force, it might be plausibly argued that the rule of the common law requiring a high degree of certainty in the description of matters of record is restored. However this may be, the courts, without expressly passing upon the question, have leaned toward a rule more in consonance with the act, as though it were really in force. In all cases where the judgment or order appealed from is identified with such clearness as to leave the respondent free from doubt as to its real import, the courts have always shown a disposition to uphold it. Thus in the case of *Chase v. Evoy*,<sup>8</sup> where the appellant stated in her notice that she appealed "from the judgment rendered against her . . . on the seventeenth day of October, 1879, and from the judgment made and entered up in the said court on the *twentieth* day of December, 1879, in favor of the plaintiff and against her in said action, . . . and also from the order . . . made on the sixth day of February, 1880, dismissing defendant's motion for a new trial," it was held that the notice was notice of appeal "from a judgment entered December 26, 1879, and from an order made February 6, 1880." So in *Weyl v. Sonoma Valley R. R. Co.*,<sup>9a</sup> where the notice, otherwise correct, gave the date of the judgment and order appealed from incorrectly, the court said:

"The said notice ought not to be declared void, but the mistake of dates merely should be regarded in this case as a clerical misprision," being no other judgment or order in the case. So in the case of *Anderson v. Goff*,<sup>9b</sup> where the judgment was *rendered* on the 29th of March, 1884, and *entered* on the 30th of April in the same year, the notice of appeal referred to the judgment as having been *entered* on the 29th of March, 1884, having been filed

<sup>7</sup> 49 Cal. 596.

<sup>8</sup> 58 Cal. 348.

<sup>9a</sup> 69 Cal. 202, 10 Pac. 510.

<sup>9b</sup> 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

subsequent to both dates, the court denied a motion to dismiss the appeal, holding the notice sufficient. So in *Swasey v. Adair*,<sup>80</sup> where the notice referred to the date of the order denying the motion for a new trial correctly, but gave the date of the judgment wrong, the court refused to dismiss the appeal, saying:

"There was, however, but one judgment in the case, and it cannot be held that the slight mistake in the date of the entry had the effect of invalidating the notice of appeal."

So in *Butler v. Ashworth*,<sup>81</sup> where the notice of appeal was duly and correctly entitled as to the court and department, and referred correctly as to the number of the case and to the judgment and order denying a new trial, it was held not to have been invalidated by a mistake in the Christian name of the plaintiff. So in *Herrlich v. McDonald*,<sup>82</sup> it was held that where a notice of appeal clearly identified the order appealed from, and was properly served upon the attorneys for the respondent, and filed in the action to which it was intended to refer, a mistake in its title was immaterial. So in *Estate of Damke*,<sup>83</sup> an error in the title of the court, "Sacramento" instead of "San Joaquin" county, as it should have been, was said by the supreme court to have been an objection "too technical," a defect too "unsubstantial," to affect an appeal, and it was disregarded. So in other cases.<sup>84</sup>

<sup>80</sup> 83 Cal. 136, 23 Pac. 284.

<sup>81</sup> 100 Cal. 334, 34 Pac. 780.

<sup>82</sup> 72 Cal. 579, 14 Pac. 357.

Under the Oregon statute it was held in *Ferrari v. Beaver Hill Coal Co.*, 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016, a notice of appeal was valid, if it intelligibly referred to the action, although it was entitled in the circuit court of the United States for a certain county, instead of in the circuit court for such county. And see *Keady v. United Railways (Or.)*, 100 Pac. 658; *Ream v. Howard (Or.)*, 24 Pac. 913.

<sup>83</sup> 133 Cal. 433, 65 Pac. 888.

<sup>84</sup> See *Dyer v. Bradley*, 88 Cal. 590, 26 Pac. 511; *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135.

In *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239, where the notice stated that it was from a judgment in favor of plaintiffs, whereas it was in fact from a judgment in favor of some of the defendants, it was held to be defective, but not to affect the substantial rights of the respondents, and

the defect was disregarded. So in *Idaho etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975, a notice of appeal from a judgment and order denying a new trial was held sufficient, although entitled solely with the names of the original parties to the action and addressed only to the attorneys of the original adverse party, whereas other parties had been brought in by cross-complaint, and additional parties had appeared by the same attorney for such original adverse party. Where notice of appeal is addressed to the clerk of the court and the attorney for the defendants, the fact that the attorney designated in the notice did not represent all the defendants is not sufficient to vitiate the notice. See *Frost v. Alturas etc. Co.*, 11 Idaho, 294, 81 Pac. 996. In *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231, it was said that notices of appeal should be liberally construed, and that a notice given by defendants that they appeal "from the order of the court the motions of said defendants for a new



As in the rulings under the act, however, there is a clearly recognized limit beyond which the courts will not go. If the notice is so couched as to fail utterly to convey the meaning intended, its language will not be strained beyond its fair and legitimate import. Thus in *Meley v. Boulon*,<sup>sh</sup> where the notice was in the following terms: "... from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action, which said judgment was entered in the said superior court on the sixteenth day of December, 1891, in favor of the defendants in said action and against plaintiffs, and from the whole thereof," it was held wholly insufficient as a notice of appeal from the judgment.<sup>sk</sup>

trial" is sufficient, it being apparent that the omission of the word "denying" was simply a clerical error. In *Bryant v. Davis*, 22 Mont. 534, 57 Pac. 143, it was held that the recital of several nonappealable orders in the notice would not affect appellant's right of appeal from the judgment and the order denying a motion to vacate. In *Paul v. Cragnaz*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540, where the notice recited that the order appealed from was made and entered on the 11th of May, whereas it was in fact made and entered on the 10th, it was held that the notice was sufficient. So in the following cases, similar decisions were reached, upholding the same principle: *Mendenhall v. Elwert*, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; *In re Day*, 18 Wash. 359, 51 Pac. 474; *Roberts v. Shelton etc. Co.*, 21 Wash. 427, 58 Pac. 576; *Brown v. Calloway*, 34 Wash. 175, 75 Pac. 630; *James v. James*, 35 Wash. 655, 77 Pac. 1082; *MacGinniss v. Boston etc. Co.*, 29 Mont. 328, 75 Pac. 89; *O'Neill v. Ternes*, 32 Wash. 528, 73 Pac. 692; *Horrell v. California etc. Assn.*, 40 Wash. 531, 82 Pac. 889; *State v. Hanlon*, 32 Or. 95, 48 Pac. 353; *Shannon v. Consolidated etc. Co.*, 24 Wash. 119, 64 Pac. 169; *Catlin v. Jones (Or.)*, 108 Pac. 633; *Keady v. United Railways (Or.)*, 100 Pac. 658; *Price v. Western etc. Co.*, 35 Utah, 379, 100 Pac. 677.

A notice containing the name of the court and the parties, and reciting that the defeated party appeals from a judgment rendered and "entered

.... in the above-entitled court, wherein and whereby it was ordered and adjudged substantially as follows," followed by the judgment, is sufficient, under section 550, Lord's Oregon Laws, although there is a doubt as to whether the judgment was rendered in the case at bar, and although the use of the word "substantially" makes it uncertain as to whether the real judgment is described or not. *Summers v. Geer*, 50 Or. 249, 85 Pac. 513, 93 Pac. 133.

The notice should enable the court to determine, upon a fair construction, and without having to go outside the record, that the appeal taken is from the particular judgment in question. *Keady v. United Railways (Or.)*, 100 Pac. 658; *Anderson v. Phegley*, 54 Or. 102, 102 Pac. 603. The notice should describe the judgment or decree with reasonable certainty. *Christian v. Evans*, 5 Or. 253; *Luse v. Luse*, 9 Or. 149.

<sup>sh</sup> 104 Cal. 262, 37 Pac. 931.

<sup>sk</sup> The principle as to the sufficiency of the notice is illustrated in the following decisions, where it was held not to meet the essential requirements. A notice which contains no other description of the judgment appealed from than that it was rendered for costs and disbursements in an action between certain parties at a specified term of the circuit court, and does not state the nature of the action, or contain anything by which the particular judgment may be identified, is too indefinite and uncertain. *Crawford v. Wist*, 26 Or. 596, 39 Pac. 218.

Defects in the notice may undoubtedly be waived. In *McLeran v. Shartzler*,<sup>9</sup> it was held that defects in the notice of appeal to a county court were waived by arguing a motion for a continuance. The question of waiver is no doubt governed by the usual principles.

One notice may contain appeals from several orders in the same cause; or from the judgment and one or more orders; but in such case care must be taken to have the record upon each appeal complete and intelligible.<sup>10</sup> It is sufficient if the notice specifies who are the appellants, and what is appealed from.<sup>11</sup>

§ 208. **Signature of the Notice of Appeal.**—There is no express provision of the statute requiring the notice of appeal to be signed. But as a matter of course some signature is necessary; an unsigned paper could not be a notice. The only question to be considered in this connection is as to who may sign.

1. *Where the Party Had No Attorney in the Court Below.*—If the appellant appeared *in pro. per.* in the court below, there can be no doubt that he may sign the notice of appeal *in pro. per.* So, if there was no appearance at all in the court below, the appellant may sign the notice *in pro. per.*, or he may employ an attorney of

A judgment for two hundred and fifty dollars "and interest . . . amounting to the sum of ——— dollars," is insufficient to support an appeal from a judgment for two hundred and ninety-three dollars and interest thereon for a definite period at the rate of ten per cent. *Duffy v. McMahon*, 30 Or. 306, 47 Pac. 787. A notice is insufficient which describes the judgment no further than to state that it was entered against appellant in an action between certain parties in a certain court on a certain day. *Hamilton v. Butler*, 33 Or. 270, 54 Pac. 200. And see *Lawton v. Connor*, 25 Okl. 398, 106 Pac. 647; *Parks v. Ada*, 24 Okl. 168, 103 Pac. 607.

If the notice is too indefinite, the appeal will be dismissed. *Crawford v. Wist*, *supra*; *Duffy v. McMahon*, 30 Or. 306, 47 Pac. 787; *Hamilton v. Butler*, 33 Or. 370, 54 Pac. 200.

A notice which describes a judgment for a specific sum is not sufficient to bring into the appellate court a judgment for the recovery of specific per-

sonal property. *Ream v. Howard*, 19 Or. 491, 24 Pac. 913; *Allen v. Byerly*, 32 Or. 117, 48 Pac. 474.

As to the form and requisites of the notice, see the following additional decisions: *Vandever v. Flaherty*, 37 Wash. 218, 79 Pac. 794; *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933; *In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593; *Philadelphia etc. Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95; *Thompson v. Sines*, 18 Wash. 359, 51 Pac. 474; *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; *Norris v. Campbell*, 27 Wash. 654, 68 Pac. 339; *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835.

<sup>9</sup> 5 Cal. 70, 63 Am. Dec. 84; look at *Shay v. Superior Court*, 57 Cal. 541.

<sup>10</sup> *People v. Center*, 61 Cal. 191; *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187.

<sup>11</sup> *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407.

the court to sign it, and the authority of such attorney to sign is presumed,<sup>1</sup> in the absence of a showing to the contrary.

2. *Where the Party Had an Attorney in the Court Below.*—Where the party who appeals had an attorney of record in the court below, such attorney,<sup>2</sup> or any attorney substituted of record for him,<sup>3</sup> may sign the notice. If there are several attorneys of record in the court below, it would seem, on principle, that they should all sign, and this seems to have been the conclusion of the court in *Prescott v. Salthorse*,<sup>4</sup> where there was an order *associating* the attorney who subsequently signed the notice of appeal, with the original attorneys of record in the case, but no regular substitution was made. The attorney so associated thereafter appeared to act solely for the client, the original attorneys of record seemingly disappearing from the case. The court held that the act of *association* was not such a substitution as the law provides in section 284, Code of Civil Procedure, not having been made *with notice* as that section prescribes. But this was not the sole ground of the court's refusal to recognize the right of the *associated* attorney to sign the notice of appeal alone, the court saying:

"But, as seen already, it was, in its very terms, merely an association of Mr. Lee with the attorneys of record for the plaintiff. It did not, in any view, purport to authorize him to act solely for the plaintiff, but only in conjunction with the other attorneys for the plaintiff, who had not been superseded or removed."

This language is clearly based upon the principle that the notice of appeal must be signed by all the attorneys of record, otherwise it would be meaningless, the court having virtually recognized the right of Mr. Lee to act as *one* of the attorneys of record, but not alone, or to the exclusion of his associates. In the later case of *Cockrill v. Hall*,<sup>4a</sup> on the contrary, it was distinctly held that any one of the attorneys of record might sign the notice. The attorneys of record were Messrs. Whipple and Oates. Subsequently the first named disappeared from the case, and his place was taken by another without any formal substitution, the notice of appeal being signed by Henley and Oates. The court said:

<sup>1</sup> *Ricketson v. Torres*, 23 Cal. 636; and see *Woodbury v. Nevada etc. Ry. Co.*, 120 Cal. 367, 52 Pac. 650; and *S. C.*, 115 Cal. 85, 46 Pac. 862.

<sup>2</sup> *Damrell v. Supervisors*, 40 Cal. 154; and the attorney who signs the notice of appeal need not be entitled to practice in the appellate court, it

being sufficient if he is admitted to practice in the court in which the notice is filed. *Beardsley v. Frame*, 73 Cal. 634, 15 Pac. 310.

<sup>3</sup> *Withers v. Little*, 56 Cal. 370.

<sup>4</sup> 53 Cal. 221.

<sup>4a</sup> 76 Cal. 192, 18 Pac. 318.

"But we think that where a party has two attorneys of record in the court below, or a firm of attorneys, either one of the two, or either of the firm, may sign the notice of appeal. The records of the court show that such is the practice, and while there may be technical objections that can be made to it, a contrary rule would upset numerous appeals that have been taken in good faith."

The court thus seems to have founded its decision rather upon the rule of *stare decisis* than upon any well-understood principle of law. It is nevertheless much more in harmony with the later decisions of the court, as well as the rule that is upheld in other states with similar code provisions, than is the principle stated in *Prescott v. Salthorse*, and other similar cases.

Whether, where there is an attorney of record in the court below, the party may empower another attorney to sign the notice and prosecute the appeal, without the substitution prescribed in section 284 of the Code of Civil Procedure, or the notice prescribed by section 285 of the same code, or may sign the notice *in pro. per.*, has never been expressly or directly determined in this state. The rule in relation to notices of intention to move for a new trial<sup>4b</sup> is that where a party has an attorney of record, such attorney is to conduct the proceedings, and the signature of the party to the notice of intention is not good. But a distinction was early drawn between an appeal and such acts as are denominated "steps in an action or proceeding," which must be taken, if at all, by the attorney of record. An appeal was deemed an entirely new proceeding, as much so as the common-law writ of error, and it was suggested in the case of *McDonald v. McConkey*,<sup>5</sup> though not decided, that the party to the action had full power to constitute an attorney, other than the attorney of record in the trial court, his representative to take and prosecute the appeal. This *dictum* was approved in the subsequent case of *Buell v. Buell*,<sup>6</sup> which was a decision upon a notice of motion to withdraw a writ of execution. So, in other states, a similar conclusion has been reached upon similar grounds.<sup>7</sup>

<sup>4b</sup> See section 13, *ante*.

<sup>5</sup> 54 Cal. 143.

<sup>6</sup> 92 Cal. 393, 28 Pac. 443.

<sup>7</sup> See *Shirley v. Birch*, 16 Or. 1, 18 Pac. 344. In this case the court said:

" . . . Commencing an action or suit in a circuit court, and conducting it to a final termination there, and taking an appeal to review a judgment

or decree in this court are distinct proceedings. The first one is to recover a judgment or decree. The second one is to revise a judgment or decree. The latter proceeding combines the nature of both appeal and writ of error as heretofore known; but in its operation and effect is more in the nature of the latter than the former. . . . A writ of error was always

Whatever may have been the earlier view upon the subject, there is no longer any doubt as to the right of a litigant to change his attorneys, or to employ additional or associate counsel, or to discharge his attorneys without substituting others in their place, at any stage of the proceedings.<sup>6</sup> The duty imposed upon him by sections 284 and 285 of the code, above cited, is not the duty of an appellant, but the duty of a respondent, the duty of one who is to receive service of the notice of appeal, and not of one who is called upon to make such service. The sections in question were designed primarily for the protection of clients, not attorneys, appellants, not respondents—for the convenience, and security perhaps, of litigants who are required to make service of notice of appeal, instead of litigants upon whom such notices require to be served. They were intended to guard the former against the creation by the latter of a condition which might well prove to be an insurmountable difficulty, and so wholly prevent that service of notice without which the remedy by appeal is not available. The last line of section 285 amply illustrates this view, if it needed illustration, and it clearly appears from the entire section, as well as that which precedes it, that, aside from the attorney and client themselves, the interests of all, save the party who needs to serve the notice, are negligible.

regarded as a new proceeding. And it was held in chancery that another solicitor than the one who commenced the suit could be employed to take an appeal from the decree of the vice-chancellor to the chancellor without any order of substitution.”

In the same case, with reference to the contention so often made that if the attorney of record must, under section 940, Code of Civil Procedure, be served, why should he not also be required to give the notice, the following language in the same case is clearly *apropos*:

“ . . . . This reasoning is not at all satisfactory to my mind. The code, by authorizing the service of the notice of appeal upon the attorney of record, if it does authorize such service, does not necessarily authorize the attorney of record to give a notice of appeal. The code might have authorized the notice of appeal in such case to be served upon the clerk of the court (as was practically done in the new and

alternative method of appeal), but that would not have given the clerk authority to give a notice of appeal.”

This argument clearly disposes of *Whittle v. Renner*, 55 Cal. 395, as an authority in support of the doctrine requiring the notice to be signed by the attorney of record or by an attorney formally substituted therefor. The same rule has been adopted in New York. And see *Spelling on New Trial and Appellate Practice*, sec. 535.

<sup>6</sup> See *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581, and cases there cited.

The supreme court of Washington held in *Belle City etc. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580, that the sections of the code of that state relating to the manner of changing and substitution of attorneys (sections 4769 and 4770, Bal. Code), related to the procedure before judgment, and not to the procedure on appeal, and that it was not necessary for the attorney of record to sign the notice of appeal.

It is noticeable that this conclusion does not rest upon the narrow basis of the principle enunciated in *McDonald v. McConkey*, above referred to, that because of the separate and distinct character of the proceeding initiated by the notice the litigant may employ new counsel without question, at the outset thereof, but is placed upon the broad ground that the respondent has no possible interest in the matter, and cannot question the right of the appellant to employ whom he will, when he will, to represent him in a professional capacity, and that the appellate court is without jurisdiction to inquire into the authority of an attorney, unless it be questioned in an appropriate manner by the interested party. To hold otherwise would be to render the right of a client to change his attorney, or to appear without an attorney, if he choose, wholly nugatory.

The rule may therefore be stated, that the notice of appeal may be signed by the duly authorized attorney of the appellant, in whose interest the notice is given, whether such attorney is the attorney of record, or the attorney who conducted the case in the lower court, or not.<sup>88</sup> Whether authorized or not, the respondent cannot question his right to give the notice, or his want of authority to act for his adversary, and it is quite clear that the respondent cannot raise the question by motion to dismiss the appeal, supported by affidavits *dehors* the record.<sup>89</sup> The appellate court will always presume, in the absence of a contrary showing, that the attorney who signs the notice is authorized to do so, and will never allow the substitution of one attorney for another, unless there be a previous substitution in the lower court.<sup>90</sup>

So, as a corollary of the above conclusion, the notice of appeal may be signed by the appellant, *in pro. per.* If he has the right to dispense with the services of the attorney who conducted the cause in the lower court without substitution, he may certainly act without an attorney at all.

<sup>88</sup> An attorney for principals is not authorized to sign a notice of appeal for the sureties on an appeal from a judgment on an execution bond. *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933.

An attorney duly admitted to practice in the district court may sign notice of appeal from that court to the supreme court, and take all necessary steps to perfect such appeal; for, until such appeal is perfected, the case

remains in the district court. *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

See *Belle City etc. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580, where it was held that one not the attorney of record might sign the notice of appeal.

<sup>89</sup> See *Woodbury v. Nevada etc. Co.*, 115 Cal. 85, 46 Pac. 862; *S. C.*, 120 Cal. 463, 52 Pac. 730.

<sup>90</sup> See *Woodbury v. Nevada etc. Co.*, *supra*.

The notice may be signed by an attorney not authorized to practice in the appellate court, so long as he is authorized to appear in the trial court.<sup>9b</sup> This rule rests upon the fact that the notice is a step taken in the lower court.

Where the appellant is represented by more than one attorney, or by a firm of attorneys, a notice signed by one of a firm of attorneys is sufficient.<sup>9c</sup>

In criminal cases, and upon the theory that "the defendant must appear and plead in person," the notice of appeal may be signed by one not the attorney of record in the trial court.<sup>9d</sup> Which is no more than to say that the same rule applies in criminal that applies in civil cases, although upon a different ground.

*Waiver of Irregularities in the Signature to the Notice.*—As in the case of the notice itself, irregularities in the signature thereto may be waived. Thus in *McDonald v. McConkey*, above cited, it was held that where the notice was given by an attorney other than the attorney of record, the objection was waived by joining in a stipulation to the correctness of the transcript. So where a written substitution of attorney was filed in the court below, but no notice of the substitution was given, it was held that an admission of service of the notice of appeal given by the substituted attorney waived the objection of want of notice of the substitution.<sup>9e</sup> So where there was no substitution at all, and the respondent admitted service of a notice of appeal signed by an attorney other than the attorney of record, without reserving objections on that ground, it was held that the objection was waived, the court saying: "If the attorneys for Webb intended to rely upon the want of notice of substitution, they should have returned the notice, or refused to acknowledge the service of it."<sup>10</sup>

**4. Miscellaneous Matters.**—The attorney general may take an appeal in the name of the state in an action commenced and prosecuted to final judgment by a district attorney, and may control

<sup>9b</sup> *Beardsley v. Frame*, 73 Cal. 634, 15 Pac. 310.

<sup>9c</sup> See *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318; *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105.

<sup>9d</sup> *Ex parte Clarke*, 62 Cal. 490; *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247.

<sup>9e</sup> *Withers v. Little*, 56 Cal. 370. The admission of service in the case

was as follows: "Received a true copy of the within notice this 21st day of July, 1879," indorsed upon the notice of appeal and signed.

<sup>10</sup> *Livermore v. Webb*, 56 Cal. 489. The admission of the defendant Webb was as follows: "We have received this 11th day of March, 1880, a duplicate of the within notice," indorsed on the notice of appeal and signed.

the case and the district attorney.<sup>11</sup> Where the board of supervisors of the city and county of San Francisco ordered a judgment against the city to be paid, and did not authorize an appeal to be taken, an appeal taken by the city and county attorney in the name of the city and county, was treated as a nullity, and *mandamus* was awarded to compel the treasurer to pay the judgment notwithstanding the appeal.<sup>12</sup>

The death of a party terminates the authority of the attorney of record, and a notice of appeal signed by such attorney in the name of the deceased is invalid.<sup>13</sup>

**§ 209. Filing the Notice of Appeal.**—Filing the notice is one of the steps in the taking of an appeal, and is indispensable.<sup>1</sup> In *Bonds v. Hickman*,<sup>2</sup> it was objected that the transcript did not show that any notice of appeal had been filed, and the affidavits offered by the respective attorneys as to the fact of the filing were conflicting. The supreme court, per Rhodes, J., said: "The filing of the notice of appeal is indispensable in order to enable the appellate court to obtain jurisdiction of the cause. A waiver of the filing by the stipulation of the parties is not the equivalent of the filing of the notice, for consent, though it may waive error, cannot confer jurisdiction." But although the parties cannot waive the filing of the notice, a stipulation that the notice *has been filed* is sufficient evidence of the filing. In the case just cited the court held that the stipulation appended to the transcript showed that the notice had been filed, and that this stipulation could not be attacked by affidavits in the appellate court. So in *Carey v. Brown*,<sup>3</sup> where the parties stipulated "that the appeal was duly

<sup>11</sup> *Sacramento v. C. P. R. Co.*, 61 Cal. 250.

<sup>12</sup> *Bank of California v. Shaber*, 55 Cal. 322.

<sup>13</sup> *Sanchez v. Roach*, 5 Cal. 248. As to service of notice of appeal upon attorney for dead man, see section 210, and look at section 294. The new and alternative method of appeal makes express provision for an appeal in the name of a dead man by the attorney who represented the deceased in the trial court. See section 941b, California Code of Civil Procedure.

<sup>1</sup> See the statute quoted in section 206, *ante*. And see also cases referred to in note 2 of section 210, *post*.

<sup>2</sup> 29 Cal. 460. Notice of appeal

cannot be waived. See below, subdivision 4, section 210, *post*.

Also *Willoughby v. Brown*, 4 Colo. 120; *Peyton v. Gregory*, 4 Colo. 269; *Rodman v. Manning*, 50 Or. 506, 93 Pac. 366; *Briney v. Starr*, 6 Or. 207; *Hennes v. Wells*, 16 Or. 266, 19 Pac. 121; *Dowell v. Bolt*, 45 Or. 89, 75 Pac. 714; *Muckle v. Columbia Co. (Or.)*, 108 Pac. 120; *Sitz v. Swain (Or.)*, 109 Pac. 273.

<sup>3</sup> 58 Cal. 180.

In *Cody v. Filley*, 4 Colo. 342, where the notice was indorsed, "service of the within is hereby admitted," on a certain day, and signed by appellee's attorney, it was held that affidavits will not be received to impeach the service.



perfected, . . . and that the foregoing is full, true and correct transcript, and that this appeal may be heard thereon," it was held that the filing of the notice was sufficiently shown, the court saying: "It must be admitted, we think, that an appeal could not be duly perfected without filing a notice thereof within the time and the manner prescribed by law. This being admitted, it would seem to follow that a stipulation that an appeal had been duly perfected would comprehend the due filing of a notice of appeal. And as to all matters embraced in that stipulation it is conclusive in this court. It cannot be avoided here on the ground that it was entered into under a mistake of fact. (*Bonds v. Hickman*, 29 Cal. 460.)"<sup>4</sup>

The filing of the notice of appeal may be at any time within the period allowed for taking the appeal.<sup>5</sup> The order of filing and serving the notice is considered in the next section.

The clerk of the supreme court need not file the notice unless his fees are prepaid.<sup>6</sup>

**§ 210. Service of the Notice of Appeal.**—Service of the notice has always been one of the steps prescribed by the statute for the taking of an appeal.<sup>1</sup> It is therefore essential;<sup>2</sup> and it is the duty

<sup>4</sup> As to conclusiveness of record on appeal, see section 283, *post*; In *re* Fifteenth Avenue Extension, 54 Cal. 179; *Wormouth v. Gardner*, 35 Cal. 227. But relief against the stipulation could probably be obtained in the court upon a sufficient showing upon a motion. See *Richardson v. Musser*, 54 Cal. 196.

<sup>5</sup> In *Holcomb v. Sawyer*, 51 Cal. 417, it was held that both the filing of the notice and the filing of the undertaking must be within the time allowed for the taking of the appeal. But this was taken back on rehearing. See *Lowell v. Lowell*, 55 Cal. 316.

But it is sometimes held that filing must take place within a reasonable time, and in *Re Eyre's Estate*, 6 Wash. 132, 32 Pac. 1073, where the appellant retained the notice two months after service, it was held not to have been filed within a reasonable time.

Where the law requires the notice to be filed within a specified time as a matter of course, the provision must be complied with. *Taylor v. Lapham*, 41 Or. 479, 69 Pac. 439; and see cases cited in note 32, section 210, *post*, as to order of filing and service.

<sup>6</sup> *Boyd v. Burrell*, 60 Cal. 280.

<sup>1</sup> See the statute quoted in section 206, *ante*.

<sup>2</sup> The exercise of jurisdiction by an appellate court in a case where there has been no service of notice of appeal is ineffectual and void. *Matthews v. Superior Court*, 70 Cal. 527, 11 Pac. 665; also see *Coker v. Superior Court*, 58 Cal. 177, and *Troback v. Caro*, 60 Cal. 301.

If the notice has not been served within the time required for taking appeals, the appellate court has no jurisdiction of the appeal. *Dalzell v. Superior Court*, 67 Cal. 453, 7 Pac. 910. In order to vest jurisdiction in the appellate court the notice of appeal must be both served and filed within the required time. *San Francisco etc. Co. v. California*, 141 Cal. 354, 74 Pac. 1047. In order to vest jurisdiction in the appellate court the notice of appeal must be both served and filed within the time allowed for taking the appeal. If not so served and filed the appellate court is without jurisdiction. *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74.

See *Whipley v. Mills*, 9 Cal. 641; and see the cases cited in section 205, *ante*, in support of the general propo-

of the appellant to make the fact of service appear in the transcript.\* It will be convenient to consider:

First—The party on whom the notice must be served;

Second—The address of the notice, and the necessity therefor;

Third—The time in which the service must be made;

Fourth—The manner and proof of service; and

Fifth—The waiver of irregularities in the service, waiver of service, and waiver of notice.

1. *The Party on Whom the Notice is to be Served.*—The section in relation to the taking of appeals has always provided that the notice is to be served “on the adverse party or his attorney.”<sup>4</sup> Taken by itself, this provision might mean that the service could be either upon the party, or upon his attorney, as the appellant might choose. But the provision is limited by section 1015 of the code, which provides that “in all cases where a party has an attorney in the action or proceeding, the service of papers when required *must be upon the attorney* instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.” This provision was contained in section 524 of the old Practice Act. And under that section it was held that a notice of appeal served upon a party who had an attorney was “ineffectual and the appeal was dismissed, the court saying: Section 524 provides that ‘in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney, instead of the party, except of

sition that both service and filing is necessary to confer jurisdiction.

Inasmuch as service of the notice of appeal on all adverse parties goes to the jurisdiction of the appellate court, Rule XIII (XIV) of the supreme court, referring to objections to the notice of appeal, is held to have no application to an objection that service was incomplete, and that question may be raised at any time prior to the decision of the court. See *In re Castle Dome Mining Co.*, 79 Cal. 246, 21 Pac. 746, and *Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758.

Formerly, service of the notice of appeal in probate cases was not required. *Will of Bowen*, 34 Cal. 682. The rule is now otherwise.

Service is not required to perfect

an appeal under the new and alternative method of taking appeals as provided in sections 941a, 941b, and 941c, Code of Civil Procedure. See *Ford & Sanborn Co. v. Braslan etc. Co.*, 10 Cal. App. 762, 103 Pac. 946.

The rule which expresses the necessity for service is so closely interwoven with that which expresses the necessity of service upon *adverse* parties and parties interested that no attempt is made to separate the cases. See note 9g, below.

<sup>4</sup> *Franklin v. Reiner*, 7 Cal. 340; *Hildreth v. Guindon*, 10 Cal. 490.

Also *Salt Lake Brewing Co. v. Gillman*, 2 Idaho, 180 (195), 10 Pac. 32; *Tootle v. French*, 2 Idaho, 745, 3 Idaho, 1, 25 Pac. 1091.

<sup>4</sup> See the statute quoted in section 206, *ante*.

subpoenas,' etc. This provision controls the general provision of 337, and requires the service of the notice of appeal to be made upon the attorney of the adverse party when such party has an attorney."<sup>5</sup> The service, therefore, must be upon the attorney if there be one, and this means the attorney of record. Service upon an attorney other than the attorney of record is not sufficient. This was held in *Whittle v. Renner*.<sup>6</sup> In that case the notice of appeal was served upon an attorney other than the attorney of record. For this the appeal was dismissed, the court saying: "The section . . . requires service of the notice 'on the adverse party or his attorney.' The attorney here referred to is the attorney of record."

And by "attorney of record" is meant the attorney who first appeared in the case as the representative of the adverse party, unless such attorney has been displaced in the manner prescribed by the code, in the meantime, by substitution or by dismissal.<sup>6a</sup> If there be several attorneys of record for the party to be served, it would seem, upon principle, that each of them must be served, unless they

<sup>5</sup> *Grant v. White*, 6 Cal. 55; *Welton v. Garibaldi*, 6 Cal. 245; *Abrahms v. Stokes*, 39 Cal. 150; *Matthews v. Superior Court*, 70 Cal. 527, 11 Pac. 665; *Jones v. McGarvey (Cal.)*, 56 Pac. 896; *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772; *Linforth v. White*, 129 Cal. 188, 61 Pac. 910; *Mohr v. Byrne*, 131 Cal. 288, 63 Pac. 341.

The rule does not apply to the service of notices of appeal in justices' courts. See *P. C. Ry. Co. v. Superior Court*, 79 Cal. 103, 21 Pac. 609.

Also *Richmire v. Elevator Co.*, 11 N. D. 453, 92 N. W. 819.

As to service upon attorneys, and the necessity therefor, see *McKenzie v. Water Co.*, 6 N. D. 361, 71 N. W. 608; *McKittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23; *Hazeltine v. Browne*, 9 S. D. 351, 69 N. W. 579; *Houser v. Nolting*, 11 S. D. 483, 78 N. W. 955. <sup>6</sup> 55 Cal. 395.

<sup>6a</sup> See *Lacoste v. Eastland*, 117 Cal. 673, 49 Pac. 1046, where it was held that service upon the attorney who filed the original answer was sufficient, although an amended answer had been filed by another attorney, there being no formal substitution as provided by the code, and although

the defendant himself had died in the meantime, the case being one for partition. See section 763, California Code of Civil Procedure.

As to the appearance necessary to give authorization, see *In re Clarke*, 125 Cal. 388, 58 Pac. 22; *Security Co. v. Boston Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686.

It was held in *Belle City etc. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580, that sections 133 and 134, Rem. & Bal. Code (sections 4769 and 4770, Bal. Code), applied only to proceedings prior to appeal. In *Tacoma etc. Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977, where service was made upon the attorney of record, it not appearing that he had been changed by substitution, it was held sufficient.

Service is insufficient if the attorney is without authority to accept it. *Fisher v. Tomlinson*, 40 Or. 111, 60 Pac. 390, 66 Pac. 696. "The receipt of a copy of the within paper," indorsed upon a notice of appeal, admits nothing except service of the copy of the paper referred to of that date. *Brooks v. Nevada etc. Syndicate*, 24 Nev. 264, 52 Pac. 575.

are members of one firm;<sup>7</sup> but there is no decision upon the precise question. If the adverse party has appeared, and has no attorney of record, and he himself is absent from the state, service of the notice may be made by filing a copy with the clerk of the court.<sup>8</sup>

<sup>7</sup> In such case the admission of service, if there be one, should be taken in the firm name.

In *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, where service was made on one of the members of a law firm, the other member being deceased, it was held to be sufficient. In *Cornell University v. Denny etc. Co.*, 15 Wash. 433, 46 Pac. 654, where service of notice was made upon an attorney as attorney for one party, it was held insufficient as to another party, although the attorney represented him also; but, if the notice had been directed to the attorney as attorney for all, it would have been sufficient. *Hendricks v. Edmiston*, 15 Wash. 687, 47 Pac. 29.

See, also, *Home etc. Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940, where service upon an attorney as the representative of an adverse party was held sufficient to bind him as administrator of an interested estate. Also *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Nelden etc. Co. v. Bank*, 31 Utah, 42, 86 Pac. 498.

<sup>8</sup> See *Silva v. Serpa*, 86 Cal. 241, 24 Pac. 1013. This decision rests upon the provisions of section 1015, Code of Civil Procedure (formerly section 524 of the Practice Act), which is as follows:

"Section 1015. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where the party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, or writs, or other process issued in the suit, and of papers to bring him into contempt. If the sole attorney for the party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his

sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place."

Section 1505, Revised Statutes of Arizona, provides for the service of the summons in error upon the attorney for the adverse party, but no specific provision of a similar character is made with respect to the service of the notice of appeal. Section 4893, Revised Codes of Idaho, is substantially the same as the California section, quoted above. It also requires service to be made upon the attorney for the adverse party, if he has such attorney, otherwise it may be made upon him in person. Section 7150, Revised Codes of Montana (section 1835, Code of Civil Procedure), is also substantially the same as the California section, omitting, however, the clause permitting personal service. So, also, section 3595, Cutting's Compiled Laws of Nevada (section 500, Civil Practice). Section 7339, Revised Codes of North Dakota, provides that "when a party shall have an attorney in the action, the service of papers shall be made on the attorney instead of the paper"; but the removal of the attorney from the state cancels his appearance, and terminates his relation as attorney in the action. Section 543, Lord's Oregon Laws, contains substantially the same provision as the California section. Section 248, Rem. & Bal. Code (section 4892, Bal. Code), also contains similar provisions.

In Oregon the rule was stated in *Butler v. Smith*, 20 Or. 126, 25 Pac. 381, to the effect that service may be made upon either party or attorney, where they reside in the county, but where the attorney resides out of the

If there are several parties, the notice must be served upon the attorney or attorneys of each party interested in maintaining the judgment or order appealed from. If one attorney represents more than one party, he may limit acceptance of service as to some of his clients, under certain conditions.<sup>8a</sup>

Service of the notice of appeal upon the attorney of a stockholder, in an action brought by the latter in behalf of the company against the directors for an accounting and recovery, necessarily brought the corporation defendant before the appellate court.<sup>8b</sup>

In many cases the failure to serve the notice of appeal upon any party has the effect of rendering the appeal invalid as to him alone. But there may be cases in which such a failure invalidates the whole appeal. The distinction clearly reflects the meaning of the phrase "adverse parties" as used in section 940 of the Code of Civil Procedure, and was early recognized. In *Williams v. Santa Clara Mining Association*,<sup>9</sup> the supreme court, by McKinstry, J., said:

county, the service must be upon the party. And see *Bennett v. Minott*, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; *Lindley v. Wallis*, 2 Or. 203; *Rees v. Rees*, 7 Or. 78; *Lewis & Dryden etc. Co. v. Reeves*, 26 Or. 445, 38 Pac. 622; *Wheeler v. Cragin*, 25 Or. 602, 38 Pac. 308; *Long Creek etc. Co. v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366; *Holt v. Idleman*, 34 Or. 114, 54 Pac. 297; *Neuberger v. Boyce*, 29 Or. 458, 45 Pac. 908.

In *Mantle v. Largey*, 15 Mont. 116, 41 Pac. 1077, in construing the statute above cited, it was held that the particular provision authorizing service upon either adverse party or attorney must prevail over the general provision that service must be upon the attorney, where the party had an attorney of record.

<sup>8a</sup> See *Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962; *Burnett v. Piercey*, 149 Cal. 178, 86 Pac. 603.

<sup>8b</sup> *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161.

<sup>9</sup> 66 Cal. 193, 5 Pac. 85. As to the meaning of the phrase "adverse party," in connection with the service of notices of intention, see section 15, *ante*. In *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457, the phrase as used in section 940 of the same

code was defined as referring to those who appear, by the record, to be interested in the judgment or order appealed from in such a manner that they would be adversely affected by its reversal, modification, or nullification. In *Estate of Bulard*, 114 Cal. 462, 46 Pac. 297, it was said that those whose interests were adverse to those of the appellant were adverse parties within the meaning of the code. In *Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962, it was said of certain parties that if the reversal of the judgment appealed from should result in depriving them of the whole or any part of the property given them thereby, they were adverse parties. In the recent case of *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983, the phrase was defined as a party whose interest in relation to the subject matter of the appeal is in conflict with the reversal of the judgment, order or decree thus appealed from, or whose interests are injuriously affected by such reversal.

See *Terry v. Superior Court*, 110 Cal. 85, 42 Pac. 464, as to meaning of phrase as used in section 974, Code of Civil Procedure, in connection with service of notice of appeal in justices' courts.

"This court has not jurisdiction to hear an appeal from a judgment, unless the appellant shall have served a notice of appeal on all the adverse parties: that is to say, upon all whose rights may be affected by a reversal of the judgment: or, where the appeal is from a part of the judgment, by the reversal of the part appealed from. And where the appeal is from the whole judgment, this court has no jurisdiction to modify the judgment in such a manner as shall affect the rights of the parties on whom notice of appeal has not been served, as such rights have been ascertained and finally determined by the judgment. But the mere fact that the appeal is from the whole judgment does not deprive this court of the power of modifying the judgment, provided such modification cannot affect the rights of the parties not served with notice.

"Neither the defendant, the Santa Clara Company, nor the defendant, the bank, has appealed from the judgment of the superior court. The first is satisfied with the decree providing for the sale of its lands (the proceeds to be distributed among the parties found to have liens thereon), and the bank is satisfied with the priority given to the other liens. It is apparent that a modification of the decree, by which the appellants may be given precedence to the plaintiff, cannot affect the parties not served, provided no additional costs are imposed as a lien upon the property; and the effect of the modification will not be to impose a lien for costs. For the purpose of determining whether such modification should be made, we are of opinion we have jurisdiction to entertain the appeal from the judgment.

"Nor do the cases cited by respondent uphold an opposite view. In *Senter v. De Bernal*, 38 Cal. 637, which was an appeal from a judgment of partition, it was said: 'Every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an adverse party within the meaning of the provisions of the code, irrespective of the question whether he appears from the face of the record in the attitude of plaintiff, or defendant, or intervener.' 'The *adverse* party . . . means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal.' (*Thompson v. Ellsworth*, 1 Barb. Ch. (N. Y.) 624.

"It has never been held here that, on an appeal from a judgment as an entirety, the power of this court is limited to an affirm-

ance or a reversal of the judgment as a whole. On the contrary, it has been the uniform practice, in such cases, to modify the judgment, when a modification is appropriate and necessary to a correct determination of the rights of the parties. When a party appeals from a judgment as a whole, *he seeks* not only the reversal, but also any proper modification of the judgment. Of course, he can never obtain, because this court has no power to grant, a modification which can affect those not parties to the appeal. The meaning of *Senter v. De Bernal* is very plain. The court there held that the appellant must notify all the parties who are interested in opposing the relief sought by the appeal, 'or his appeal, as to those not served, will prove ineffectual; and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter, without being granted as to the former also.' (38 Cal. 637.)

"In *In re Medbury*, 48 Cal. 83, it was said that, on an appeal from an order of the probate court removing a guardian of an estate, and appointing another in his stead, the newly appointed guardian is a necessary party, because, if the order should be reversed, the last appointed would be displaced. *Reed v. Allison*, 61 Cal. 461, was an appeal from a judgment in a partition suit, where the adjudicated rights of all the parties would be affected by a reversal of the judgment of the lower court. The determination in *Wittenbrock v. Bellmer*, 62 Cal. 558, turned upon 'the law of the case,' and the existence or nonexistence of any judgment to be appealed from; and in *O'Kane v. Daly*, 63 Cal. 317, the court only held that the codefendants of appellant would be affected by the reversal of the judgment."

So in *Randall v. Hunter*,<sup>22</sup> which was a motion to dismiss appeals for failure of the appellant to serve his codefendant, the court, by Thornton, J., said:

"By the provisions of the statute, the notice required to take an appeal must be served on the 'adverse party.' (Code Civ. Proc., sec. 940.) If the reversal or modification of the judgment or order appealed from will affect the interest of Gill in the subject matter of the appeal, he would be an adverse party within the meaning of the section above cited. (*Senter v. De Bernal*, 38 Cal. 637; *Thompson v. Ellsworth*, 1 Barb. Ch. (N. Y.) 624; *Williams v. Santa Clara M. Co. etc.*, 66 Cal. 193, 5 Pac. 85.) Now, it appears here

<sup>22</sup> 69 Cal. 80, 10 Pac. 130.

that Gill has not appealed, and the judgment appealed from was rendered against him by default. If the judgment as to Hunter is reversed, it would still stand unreversed as to Gill, and therefore he would not be affected by a reversal. If the judgment is affirmed, the judgment appealed from would remain unchanged, and manifestly Gill's interest would not be affected by the judgment of affirmance. Whatever modification might be made of the judgment rendered by the court below, or whatever judgment might be here rendered, the judgment by default would still remain against Gill.

"It is said that if the judgment is reversed, another trial might result in a several judgment against Gill, whereas the judgment against him is now a joint judgment,—one against him and Hunter,—and that he is interested in preserving the joint judgment against him and preventing a several judgment as to him. But his default admits that he is bound severally as well as jointly. If on the trial which has taken place a verdict had passed in Hunter's favor, a judgment by default might have been entered against him (Gill) severally. A reversal of the judgment appealed from would not do away with this default. It would only affect the judgment as to Hunter. As long as the default stands, whatever judgment is rendered here would not affect the judgment against Gill. In this view we do not think Gill was an adverse party upon whom the notice of appeal should have been served."

So in *Millikin v. Houghton*,<sup>9b</sup> which was an appeal from an order quashing a writ of execution, on a motion of two of the defendants, S. O. Houghton and the Hibernia Savings and Loan Society, to dismiss the appeal for want of jurisdiction, defendants Burke, Kelly, Higgins, and Hannigan, not having been served with a notice of appeal, the court said:

"Turning to the decree, we find that it is against all of the defendants above named. The Hibernia Savings and Loan Society alone appealed to this court, and the judgment, as against it, was reversed. Upon the return of the case to the court below, plaintiff dismissed the action as to the said last-named defendant, and thereupon procured an execution with a copy of the decree attached, which was and is in all respects such as might have been issued upon the decree as originally entered, except that it recites the appeal. reversal and dismissal as to the defendant, the Hibernia Savings

<sup>9b</sup> 75 Cal. 539. 17 Pac. 641.



and Loan Society. This writ was quashed by the court, on motion of the defendants, as hereinbefore mentioned, and the notice of appeal therefrom is addressed to and served upon them only.

"The notice of appeal must be served upon the *adverse party* or his attorney. (Code Civ. Proc., sec. 940.) The term 'adverse party' has been held to include all the parties to the action having an interest to be affected by a reversal, and in *O'Kane v. Daly*, 63 Cal. 317, it was held that the notice of appeal by one of several codefendants should be served, not only on the plaintiff, but also on the nonappealing codefendants, they having an interest in the judgment to be affected by the reversal. (Citing cases.)

"The defendants not served with the notice of appeal in this case are as directly interested in the affirmance or reversal of the order appealed from as are the two defendants who were served. . . .

"They are, therefore, all interested, and should have been served as respondents in the appeal."

In the case of *Gutierrez v. Hebbard*,<sup>90</sup> the question was considered in connection with the requirement of section 650, Code of Civil Procedure, as to the service of a bill of exceptions,<sup>91</sup> and the same principle was there enunciated as appears to control in the above cases, the court, by Harrison, J., saying:

" . . . . It is easy to conceive of many cases in which the contest upon an appeal from a final decree in partition would affect only a portion of the parties to the action, and in such cases only those parties that might be affected by a modification of the decree would be the 'adverse party' upon whom a proposed bill of exceptions should be served. (See *Miller v. Thomas*, 71 Cal. 406, 12 Pac. 432.) If by the interlocutory decree a specific portion of the land is awarded to one of the parties, and upon the final decree this portion is allotted to another, none of the other parties to the action would *necessarily* be interested in the controversy over this parcel of land, although it might be that the circumstances connected with such allotment would be such as to render their presence necessary to an adjustment of the respective rights of the contestants."

<sup>90</sup> 106 Cal. 167, 39 Pac. 529, 935. See, also, *Miller v. Thomas*, 71 Cal. 406, 12 Pac. 432.

<sup>91</sup> The section referred to (section 650, California Code of Civil Procedure) requires service of the proposed

bill of exceptions upon the "adverse party," and the phrase as here used is said to be similar in scope to the same as used in section 940. See section 257, *post*.

Clearly, it is to the character of the appeal and the particular relief sought thereby that recourse must be had for a determination of the question as to whether failure to serve all adverse parties shall be held to invalidate the appeal in whole, or in part only, as to all parties in interest, or merely as to those not served with the notice. The test may be fairly said to be, that if the reversal or modification of the judgment or order appealed from, as contended for by the appellant, cannot be accomplished without adversely affecting the interest of the party not served with notice, failure to make such service must be held fatal to the entire appeal. On the other hand, if a reversal or modification can be made, in accordance with the contention of the appellant, and the judgment or order stand unreversed and unaffected as to the party not served, failure to serve will be held to result in invalidating the appeal as to the latter alone. This is in accord with the above decisions, and with the bulk of all others upon the point. In *Hinkel v. Donohue*,<sup>88</sup> which was a motion to dismiss appeals on the ground that necessary parties were not served with notice, the court said:

" . . . . If, on this appeal, the judgment of dismissal should be reversed as to the defendants who appeal, 'it would still stand unreversed as to' either of the other defendants, 'and therefore they would not be affected by a reversal.' " (Citing *Randall v. Hunter*, and *Williams v. S. C. M. A. supra*.)

So, in *Jackson v. Brown*,<sup>89</sup> where the motion to dismiss was upon a similar ground, the court said:

"How *Brown* and *Alexander* are adverse parties to *Samuels* herein, we cannot perceive. The judgment against them will stand, though it is reversed as to *Samuels*. What recourse *Brown* and *Alexander* will have against *Samuels*, or *Samuels* against them, on a reversal of the judgment, we cannot perceive; nor would there be any if the judgment should be affirmed. The same is true of the order. This case comes within the rule laid down in *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130, and must be decided the same way."

It may therefore be said to be well-settled doctrine that if the contentions of those who have been served as adverse parties can be disposed of without detriment to the rights of those adverse parties who were not served with notice, the appeal will be retained. In such case points that cannot be determined in favor of the appel-

<sup>88</sup> 88 Cal. 597, 28 Pac. 374.

<sup>89</sup> 82 Cal. 275, 23 Pac. 142.

lant without injury to the interests of those who were not served with notice of appeal will be disregarded.\*

\* See *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225; also *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603; and see generally the following:

In *Re Castle Dome Mining Co.*, 79 Cal. 246, 21 Pac. 746, which was an appeal from an order dismissing a petition in insolvency against a foreign corporation on the ground of want of jurisdiction, the contest being between attaching and nonattaching creditors, the corporation itself not appearing, it was held that the corporation must be served with notice of appeal, notwithstanding its attitude of apparent indifference, since the reversal of the order would adversely affect its interests by depriving it of the right to hold and control its property, subject alone to the rights of the attaching creditors, thereby converting a judgment in its favor into one against it.

Also *Miller v. Richards*, 83 Cal. 563, 23 Pac. 936, which was an appeal by the defendant from an order vacating a decree of foreclosure on plaintiff's motion, the mortgagor's grantee not having been made a party, where it was held that the assignee of the certificate of purchase at the foreclosure sale, who had intervened on the motion, was an adverse party who should have been served with notice.

So in *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103, which was an action against copartners and others, and partnership assets and other property was involved, and there was a dismissal of the action as to the other defendants, and as to the other property, on appeal from the dismissal order it was held that the copartners were adverse, and that they must be served with the notice of appeal.

So in *Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758, which was a foreclosure suit with the mortgagor, the corporation grantee and certain mechanic's lien claimants as defendants, on an appeal from a priority decree in favor of the claimants, it was held that they were neces-

sarily adverse parties, and must be served with notice. It was otherwise, however, as to the corporation grantee, since the reversal of the judgment would necessarily be in its interest rather than otherwise. The same ruling was made in *Warren v. Ferguson*, 108 Cal. 636, 41 Pac. 417, with respect to a street improvement lien, where on an appeal from a decree enforcing the lien a defendant-appellant was held to be free from the necessity of serving his co-defendants with the appeal notice. The latter would be benefited and not injured by a reversal of the decree, and were therefore not within the definition of *adverse parties* as intended by the code.

So in *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457, which was an appeal from a nonsuit in favor of some of the defendants and against a codefendant, the action being for breach of contract by such codefendant, and the judgment being against him alone, it was held that a reversal or modification would affect the other defendant adversely, and that therefore they must be served with the notice of appeal.

So, in *Re Choze*, 112 Cal. 630, 44 Pac. 1066, which was an appeal by a creditor from an order of insolvency, it was held that the debtor was necessarily an adverse party, and must have notice. It was otherwise, however, as to the receiver and other creditors, the latter of whom would, of course, be benefited by a reversal of the order. The receiver is interested as an officer of the court and not otherwise. See section 203, *ante*.

So in *Vincent v. Collins*, 122 Cal. 387, 55 Pac. 129, which was an appeal by an insolvent mortgagor from a decree of foreclosure of the mortgaged premises, and from an order refusing to set aside a sale in bulk and direct a sale in parcels, the assignee in insolvency was held to be an adverse party requiring to be served with the notice of appeal.

So in *Estate of Bell*, 125 Cal. 539, 58 Pac. 153, on an appeal from an order of confirmation of sale of real

It goes without saying that parties who will not be adversely affected by the reversal or modification of an order or judgment are not "adverse parties" within the meaning of the code, or the

estate, by an heir, the purchaser at the sale is an adverse party, and must be served with notice of appeal, since his interests would be affected by a reversal of the order. So likewise would the purchaser at a sale under a partition decree, although this has not been expressly decided. See *Hammond v. Calleaud*, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. So, doubtless, on an appeal from an order refusing confirmation, the heir, in the first instance, and the cotenants, in the second, would be adverse parties, requiring to be served with the notice. But neither has this been expressly decided.

So in *Bair v. Watkins*, 130 Cal. 540, 62 Pac. 929, upon an appeal by claimants of an undivided interest in the mortgaged premises from a foreclosure judgment against the entire property in which a clause requiring the deficiency to be docketed against the mortgagor, the latter would be aggrieved by a reversal of the judgment, and is therefore a necessary party to the appeal, and failure to serve him with notice of appeal will incur dismissal for want of jurisdiction. So in *Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962, which was an appeal by the state of California from a decree of distribution of an estate, a part of which was claimed to have escheated, as being the part distributed to aliens who had not made their claim within the five years prescribed by statute, it was held that such alien distributees were necessary parties to the appeal, and must be served with notice, even though it did not appear otherwise than by recitals in the decree itself that they appeared in the court below.

See, also, the following: *Senter v. De Bernal*, 38 Cal. 637; *In re Medbury*, 48 Cal. 83; *Reed v. Allison*, 61 Cal. 461; *Wittenbrock v. Bellmer*, 62 Cal. 558; *O'Kane v. Daly*, 63 Cal. 317; *Butte Co. v. Boydston*, 68 Cal. 189, 8 Pac. 835; *Toy v. San Francisco etc. Co.*, 75 Cal. 542, 17 Pac.

700; *Lancaster v. Maxwell*, 103 Cal. 67, 36 Pac. 951; *Green v. Berge*, 105 Cal. 52, 45 Am. St. Rep. 25, 38 Pac. 539; *Kenney v. Parks*, 120 Cal. 22, 52 Pac. 40; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Lamb v. Hall*, 147 Cal. 37, 81 Pac. 286; *S. C.*, 147 Cal. 44, 81 Pac. 288; *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225.

All parties against whom a joint judgment has been rendered are adverse parties, and a notice of appeal must be served upon each of them in order to give the appellate court jurisdiction: *Jones v. Quantrell*, 2 Idaho, 153 (141), 9 Pac. 418; *Coffin v. Edgington*, 2 Idaho, 627, (595), 23 Pac. 80; *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459; *Lewiston National Bank v. Tefft*, 6 Idaho, 104, 53 Pac. 271; *Titiman v. Alamance etc. Co.*, 9 Idaho, 240, 74 Pac. 529; *Baker v. Drews*, 9 Idaho, 276, 74 Pac. 1130; *Nelson Bennett v. Twin Falls etc. Co.*, 13 Idaho, 767, 92 Pac. 980, 13 Ann. Cas. 172; *Doust v. Telephone Co.*, 14 Idaho, 677, 95 Pac. 209.

The general rule requiring service of the notice upon all adverse parties, as well as the distinction between such parties as are adverse and those that are otherwise, is substantially uniform. The following decisions of other jurisdictions sustain the general principle: *Coffin v. Edgington*, 2 Idaho, 627 (595), 23 Pac. 80; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Bellingham etc. Bank v. Hotel Co.*, 4 Wash. 642, 30 Pac. 671; *Moody v. Miller*, 24 Or. 179, 33 Pac. 402; *Stephens v. Stevens*, 27 Utah, 261, 75 Pac. 619; *Kramer v. Marsh*, 49 Or. 417, 90 Pac. 583; *Nelden etc. Co. v. Bank*, 31 Utah, 42, 86 Pac. 498; *Hughes v. Rhodes*, 25 Okl. 172, 105 Pac. 650; *Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064; *First National Bank v. Jacobs*, 26 Okl. 840, 111 Pac. 303; *Vermillion v. Bevis*, 26 Okl. 203, 109 Pac. 69; *John v. Paullin*, 24 Okl. 636, 104 Pac. 365; *Siebert v. Bank*, 25 Okl. 778, 108 Pac. 628; *Beckman v. Brommer*,

rule outlined in the above decisions, and need not, therefore, be served with notice of appeal. This rule is amply illustrated by a brief reference to the cases collected in the note.<sup>2a</sup>

57 Wash. 436, 107 Pac. 190; Beebe v. N. W. Co., 61 Wash. 294, 112 Pac. 365; Beckman v. Brommer, 57 Wash. 436, 107 Pac. 190.

The phrase "adverse party" held to mean any party who would be prejudicially affected by a reversal of the judgment, and anyone who has an interest in conflict with such reversal. *Nelson Bennett Co. v. Twin Falls Co.*, 13 Idaho, 767, 92 Pac. 980, 13 Ann. Cas. 172. An adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal. *Anderson v. Metal Co.*, 36 Mont. 312, 93 Pac. 44.

The rule as to service of summons in error is subject to the same application of principle. See *Coleman v. Eaton*, 26 Okl. 858, 110 Pac. 672; *Vermillion v. Bevis*, 26 Okl. 203, 109 Pac. 69; *Lawton v. Connor*, 25 Okl. 398, 106 Pac. 647; *Court of Honor v. Wallace*, 23 Okl. 734, 102 Pac. 111; *Faulter v. Manuel*, 25 Okl. 59, 108 Pac. 749.

The rule requiring coparties to be served with notice where they are interested and do not participate therein as appellants is sustained in the following decisions: *Cadwell v. Bank*, 3 Wash. 188, 28 Pac. 365; *Scott v. Burns*, 3 Wash. 430, 30 Pac. 494; *Jones v. Quantrell*, 2 Idaho, 141 (153), 9 Pac. 418; *Johnson v. Light-house*, 8 Wash. 32, 35 Pac. 403; *Jones v. Sander*, 2 Wash. 329, 26 Pac. 224; *Traders' Bank v. Bokien*, 5 Wash. 777, 32 Pac. 744; *First National Bank v. Gordon etc. Co.*, 31 Wash. 682, 72 Pac. 464; *Wax v. Northern Pacific Co.*, 32 Wash. 210, 73 Pac. 380; *Doust v. Telephone Co.*, 14 Idaho, 677, 95 Pac. 209; *Diamond Bank v. Van Meter*, 18 Idaho, 243, 108 Pac. 1042; *Robertson etc. Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795; *Cummings v. Reins etc. Co.*, 40 Mont. 599, 107 Pac. 904.

<sup>2a</sup> In *Miller v. Rea*, 71 Cal. 405, 12 Pac. 431, it was held that on an appeal from such specific parts of an interlocutory decree as relate to a particular undivided interest in the land in controversy, the notice of

appeal need be served only on the parties interested adversely to appellant in the undivided interest involved in the appeal. See, also, *Gutierrez v. Hebbard*, 106 Cal. 167, 39 Pac. 529, 935. In *Foley v. Bullard*, 97 Cal. 516, 32 Pac. 574, which was an action to foreclose a street improvement lien on an appeal from an adverse judgment by a part only of the defendants, it was held that only those who took the appeal would be affected thereby, that the defendants who did not appeal would be benefited rather than injured by a reversal, and that therefore such non-appealing defendants were not adverse parties to the appeal, and need not be served with notice thereof. And see to same effect *Pacific Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758 (cited above in note 9g); *Warren v. Ferguson*, 108 Cal. 535, 41 Pac. 417. In *Green v. Berge*, 105 Cal. 52, 45 Am. St. Rep. 25, 38 Pac. 539, which was an appeal from a judgment against one of two defendants, and in favor of the other, by the plaintiff, who claimed that the judgment should have been against both defendants, the defendant against whom judgment went would only be benefited by a reversal thereof, and hence was held not to be an adverse party within the rule, and it was not necessary, therefore, to serve an appeal notice upon him.

In *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117, which was a foreclosure suit, in which it was averred that the interests of the codefendants, as well as that of the mortgagor, were subject to the mortgage lien, and the codefendants defaulted, on an appeal by the mortgagor-defendant, it was held that only the plaintiffs were adverse parties, requiring to be served with notice of appeal, and that the interests of the other defendants would not be affected by a reversal or modification of the judgment otherwise than beneficially.

In *Terry v. Superior Court*, 110 Cal. 85, 42 Pac. 464 (an appeal from a justice's court under section 974,

Parties who were never served with summons, or who never appeared in the trial court, are not adverse parties, since they would, in any event, be wholly unaffected by the judgment.<sup>5k</sup>

Code of Civil Procedure), which was an action in *assumpsit* against two married women, and affecting their separate property, it was held that their husbands were not adverse parties.

In *Suman v. Archibald*, 116 Cal. 41, 47 Pac. 865, it was held that the assignee of a mortgagor was not a proper party to be substituted for the mortgagor, that is, were not adverse parties, on an appeal from a judgment on a counterclaim in favor of the same, since a personal judgment would have to be entered against his assignor in the event of a reversal.

And see the following: *Miller v. Thomas*, 71 Cal. 406, 12 Pac. 432; *Hinkel v. Donahue*, 88 Cal. 597, 26 Pac. 374; *Guardianship of Sullivan*, 143 Cal. 462, 77 Pac. 153; *Southside Imp. Co. v. Burson*, 147 Cal. 401, 81 Pac. 1107; *Quist v. Sandman*, 154 Cal. 748, 99 Pac. 204.

Also *Shirley v. Burch*, 16 Or. 1, 18 Pac. 344; *Lillienthal v. Caravita*, 15 Or. 339, 15 Pac. 280; *Doyle v. McLeod*, 4 Wash. 732, 31 Pac. 96; *Smith v. Oregon etc. Co.*, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040; *Ranney etc. Co. v. Hanes*, 9 Okl. 471, 60 Pac. 284; *Schroeder v. Pratt*, 21 Utah, 176, 60 Pac. 512; *Hopkins v. Satsop etc. Co.*, 18 Wash. 679, 52 Pac. 349; *Idaho etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975; *Merk v. Bowery etc. Co.*, 31 Mont. 298, 78 Pac. 519; *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736; *Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064; *McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 104 Pac. 1015, 25 L. R. A., N. S., 691; *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130.

An unnecessary party to a suit need not be served with notice of appeal. *Hand etc. Co. v. Marks*, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549.

Where there are only two interested parties, there ought not to be any question as to the "adverse" character of either the one or the other. See *Exposition etc. Co. v. Raeco etc. Co.*, 55 Wash. 314, 104 Pac. 509; *Me-*

*Intyre v. Montana etc. Co.*, 41 Mont. 87, 137 Am. St. Rep. 701, 108 Pac. 353.

<sup>5k</sup> See *Clarke v. Mohr*, 125 Cal. 540, 58 Pac. 176. See, also, *French v. McCarthy*, 110 Cal. 12, 42 Pac. 302, which was an action against two defendants, only one of whom answered. The issues were tried and a judgment rendered without mentioning the defendant who did not answer. On appeal the supreme court held that he was not an adverse party, and no notice of appeal was required to be served upon him. Also, *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732, which was a suit to declare a deed, absolute on its face, a mortgage to secure partnership debts, where only one of the copartners was served with summons, and a trial had and judgment entered without objection to such want of service, the court held that the copartner not served was no more interested in an appeal from such judgment than he was interested in the judgment itself, or than if he had not been mentioned in the suit at all; and was not, therefore, an adverse party within the meaning of the code, and need not be served with notice of appeal. See, also, *Peck v. Agnew*, 126 Cal. 607, 59 Pac. 125; *Estate of McDougald*, 143 Cal. 476, 77 Pac. 443; *Nason v. John*, 1 Cal. App. 538, 82 Pac. 566.

✓ In making application of this principle to appeals from new trial orders, it has been frequently held that only parties to the motion and parties who were *adverse* to the motion under the rule of *Senter v. De Bernal* and *Williams v. Santa Clara Assn.*, *supra*, that is, parties to the motion who would be adversely affected by a reversal of the order are "adverse parties" on the appeal. None who were not parties to the motion, and who were not adverse to the granting of the motion, are adverse parties on appeal from an order denying the motion. So, on an appeal from an order granting the motion, only those who were beneficially interested in the success of the motion in the trial court are adverse

On the same principle, if the case has been dismissed as to one of the parties thereto in the trial court, such party is not adverse on appeal, and need not be served with notice thereof.<sup>91</sup>

Fictitious parties are not interested, and cannot be regarded as adverse parties in any state of affairs.<sup>92</sup>

The question as to whether a party is "adverse" or not must be determined from his relative position on the record with reference to the appellant, and from the averments in the pleadings, rather than from the manner in which he manifests his wishes at the trial, or from any presumption to be drawn from such relation, or from the subject matter of the action in matters outside. If his position on the record makes him nominally adverse he must be considered so for purposes of appeal. In other words, the record itself is the final arbiter, and the determination of the question is not affected by matters *dehors* the record.<sup>93</sup> Thus it is well settled that in determining who are adverse parties on appeal from a new trial order (and, as above appears, adverse parties on appeal are the same as were adverse to the motion), only the record itself can be inspected, and affidavits *dehors* the record are inadmissible.<sup>94</sup>

parties. See *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88; *In re Ryer*, 110 Cal. 556, 48 Pac. 1082; *Barnhart v. Edwards*, 111 Cal. 428, 44 Pac. 160; *In re Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Bullard*, 114 Cal. 462, 46 Pac. 297; *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318; *Johnson v. Phenix etc. Co.*, 146 Cal. 571, 80 Pac. 719; *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; *S. C.*, 155 Cal. 359, 100 Pac. 1080; and also *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103.

In *Watson v. Sutro*, *supra*, it was said that the fact that the judgment or order may be used as evidence in some collateral proceeding, or that its reversal may have some remote or consequential effect to the prejudice of one who is not a party to the record, does not entitle such a one to be made a party to the appeal.

Parties who never answered the petition need not be served. *Seattle etc. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567; *United States Inv. Corps v. Portland Hospital*, 40 Or. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627; *Home etc. Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940.

It is not necessary to serve the

notice upon a nominal adverse party who in no way appeared in the action. *Eldridge v. Stenger*, 19 Wash. 697, 54 Pac. 541.

<sup>91</sup> *Brown v. Rouse*, 93 Cal. 237, 28 Pac. 1044. But the party as to whom an action is dismissed is adverse on appeal from the order of dismissal itself, since the reversal of such an order would affect him adversely. *Potrero etc. Co. v. All Persons*, 155 Cal. 371, 101 Pac. 12. It is only where the correctness of the order of dismissal is not called in question that such parties would be adverse.

Also *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231; *S. C.*, 25 Nev. 329, 59 Pac. 888.

<sup>92</sup> *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991.

<sup>93</sup> See *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Mohr v. Byrne*, 132 Cal. 250, 64 Pac. 257.

It is necessary to serve only those persons who appear from the record to be adverse. See note 9k, *supra*, and particularly *In re Ryer*, 110 Cal. 556, 48 Pac. 1082; *Potrero etc. Co. v. All Persons*, 155 Cal. 371, 101 Pac. 12.

<sup>94</sup> See *In re Ryer*, 110 Cal. 556, 48 Pac. 1082; *In re Bullard*, 114 Cal. 462, 46 Pac. 297; *Kenney v. Parks*, 120

The burden is on the party who seeks a dismissal of the appeal on the ground that all adverse parties have not been served with notice, to show the fact.<sup>99</sup> And if the question cannot be determined without a consideration of the merits, the motion will be denied.<sup>97</sup>

Inasmuch as the objection under consideration goes to the jurisdiction of the appellate court to hear and determine the appeal, any respondent is within his right in raising it, whether he is injured or not by the failure of the appellant to serve necessary parties with the notice of appeal.<sup>10</sup>

The rule as to administrators, executors, guardians, and other trustees, as parties to actions and appeals therein generally, is discussed elsewhere.<sup>10a</sup> The decisions with respect to such officials as "adverse parties" are in accord with the principles heretofore expressed where they are treated as "aggrieved parties." Thus in *Estate of Delaney*<sup>10b</sup> it was held that the administrator or executor was an adverse party requiring to be served with notice of appeal from a decree of distribution, or from a final settlement. And in *Barnhart v. Edwards*<sup>10c</sup> it was held that an administrator must be served in every instance where the property of his intestate is affected, as where the judgment appealed from is for the foreclosure of a lien against the property in his hands, on an appeal by the grantee of the deceased.

The death of a party revokes the authority of his attorney, and service upon the attorney after the death of the party is ineffectual for any purpose;<sup>11</sup> and acknowledgment of service of notice by

Cal. 22, 52 Pac. 40. In the last-cited case it was held that defaulting defendants are not adverse to other defendants when there is no joint relation alleged between them and the judgment against each is several.

<sup>99</sup> *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; *S. C.*, 155 Cal. 359, 100 Pac. 1080; *Potrero etc. Co. v. All Persons*, 155 Cal. 371, 101 Pac. 12.

<sup>97</sup> See *Latham v. Los Angeles*, 83 Cal. 564, 23 Pac. 1116.

<sup>10a</sup> See *Milliken v. Houghton*, 75 Cal. 539, 17 Pac. 641.

<sup>10b</sup> See section 203, *ante*.

<sup>10c</sup> 110 Cal. 563, 42 Pac. 981. But not necessarily the only adverse party. Whenever it appears from the record that there are others affected by the appeal, whose interests are adverse to those of the appellant, their presence

in the appellate court is necessary to give it jurisdiction to review the matter appealed from. In *re Bullard*, 114 Cal. 462 (463), 46 Pac. 297.

<sup>10c</sup> 111 Cal. 428, 44 Pac. 160.

<sup>11</sup> *Judson v. Love*, 35 Cal. 463; *Shartz v. Love*, 40 Cal. 93; *Sheldon v. Dalton*, 57 Cal. 19; *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371; *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; *Estate of Turner*, 139 Cal. 85, 72 Pac. 718. Also *Lacoste v. Eastland*, 117 Cal. 673, 49 Pac. 1046, where an exception to the rule was noted in the case of partition suits brought under section 763 et seq., Code of Civil Procedure, where statutory provision is made for service on the attorney of record of a party who dies pending the action. As to service of the notice in the name of a



such attorney cannot bind representatives of the deceased subsequently appointed; and if such representatives are substituted in the supreme court, the appeal will be dismissed as to them upon their motion.<sup>11a</sup>

Notwithstanding the fact that suits under the McEnerney Act are nominally against the whole world, service of notice of appeal from a judgment dismissing the complaint as to defendants who appeared is only required upon the defendants as to whom the complaint was dismissed.<sup>11b</sup>

As to appeals in justice's courts, see cases cited.<sup>11c</sup>

2. *The Address of the Notice, and the Necessity Therefor.*—A formal address on the face of the notice has been said to be non-essential. In *Estate of Pendergast*<sup>11d</sup> the court said:

"The principle appears to be, that while the address preceding the body of the notice of appeal is not essential to the validity of the notice, yet if an address is given, it serves as a limitation thereof, and shows the intention of the appellant to give notice only to those parties to whom it is addressed, and its effect is limited accordingly."

In that case the notice was addressed to certain of the parties interested in the decree of distribution appealed from, and service was accepted by the attorney for those parties, who was also the attorney for other interested parties. Upon the strength of the decisions of the court to the effect that where notice of appeal is directed to one party alone, its service upon another party would not have the effect of bringing such other party before the court;<sup>11e</sup> and that a notice directed to one party is not notice to another party, although delivered to the latter, who is therefore informed

dead man, see *Sanchez v. Roach*, 5 Cal. 248.

As to the question whether an administrator who has been convicted of embezzlement is so far *civilliter mortuus* as to prevent service of notice of appeal, etc., see *Brown v. Mann*, 68 Cal. 517, 9 Pac. 549.

See, also, *Holt v. Idleman*, 34 Or. 114, 54 Pac. 279, where it was held that a notice served on attorney for deceased party was held insufficient, the attorney not having been retained by the administrator, substituted as a party. And subsequent appointment will not validate a prior notice. *Deiter v. Kiser*, 158 Cal. 259, 110 Pac. 921.

<sup>11a</sup> See *Moyle v. Landers*, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; and see section 294, *post*.

<sup>11b</sup> *Potrero etc. Co. v. All Persons*, 155 Cal. 371, 101 Pac. 12.

<sup>11c</sup> See *Coker v. Superior Court*, 58 Cal. 177; *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509; *P. C. Ry. Co. v. Superior Court*, 79 Cal. 103, 21 Pac. 609; *Dutertre v. Superior Court*, 84 Cal. 535, 24 Pac. 284; *McKeen v. Naughton*, 88 Cal. 462, 26 Pac. 354.

<sup>11d</sup> 143 Cal. 135, 76 Pac. 962.

<sup>11e</sup> *Hibernia etc. Soc. v. Lewis*, 111 Cal. 519, 44 Pac. 175; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772.

of its contents,<sup>11</sup> the court held that while "if the address had been omitted, and service had been made upon the attorney who appeared for all the parties interested," the appellant might have sustained his appeal, yet, "having itself addressed the notice to certain of the parties, it cannot enlarge the same by showing actual knowledge received by the other interested parties, arising from the fact that the attorney who represented them also represented the petitioners to whom the notice was directed. Actual knowledge cannot take the place of the service of the notice of the appeal."

While a formal address does not, under the decisions, appear to be an essential feature of the notice, doubtless, as was suggested in *Estate of Nelson*,<sup>12</sup> where addressed to the attorney, instead of to the client himself, some kind of reference would be required to make it appear that service is thus made upon the attorney in his professional capacity rather than in his personal character, unless this fact is made to appear in the body of the notice. But this has not been directly passed upon; and, if a notice without an address is to be held effective for its purpose, reliance being had upon the substance of the notice for the information to be derived from an address, it would seem that the addition of a mere professional designation to the address would be unnecessary.

3. *The Time in Which the Service must be Made—Order of Service and Filing.*—The statute has always provided in substance that an appeal may be taken by filing the notice with the clerk of the court below, and serving a copy upon the adverse party.<sup>13</sup> There was no express provision that one of these acts should be done before the other, and the obvious intention was that they should be done at the same time; that is to say, on the same day, no notice being taken of fractions of a day. The construction adopted at an early period, however, was that the filing and service need not be at the same time; and this made it necessary to create some limit before and after which the service could not be made, which led to useless technicality. The subject has played so large a part in appellate practice that it merits a somewhat extended consideration.

The matter was first considered in *Hastings v. Halleck*.<sup>14</sup> In that case the notice was served *seventeen days* before it was filed.

<sup>11</sup> *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287; *In re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. 354.

<sup>12</sup> 128 Cal. 242, 60 Pac. 772.

<sup>13</sup> See statute quoted in section 206, ante.

<sup>14</sup> 10 Cal. 81.

Upon motion the appeal was dismissed, the court, per Burnett, J., saying: "The service should be made *after*, or at the time of the filing of the notice; and *before*, or at the time of the filing of the undertaking. The three hundred and forty-eighth section of the code requires the undertaking to be filed within five days after the notice of appeal is filed; and by section 355, the respondent must except to the sufficiency of the sureties within five days after the filing of the undertaking. The period of five days cannot be abridged by the error or negligence of the appellant; nor can the appellant, by serving a copy of the notice of appeal *before* the original is filed, keep the respondent continually watching the clerk's office to see when it is done. These provisions of the code are intended for the repose of parties, and must be strictly complied with."

The subject was again considered in *Buffendeau v. Edmonson*.<sup>14</sup> In that case the notice was served two days before it was filed. For this the appeal was dismissed, the court, per Currey, J., saying: "By this section of the statute the filing of the notice of appeal is made a constituent element of its character as a notice, and consequently must precede or be contemporaneous with the service of a copy of the notice upon the adverse party, otherwise that which may purport to be a copy of a notice, or a duplicate thereof, fails to be such for the want of an original or counterpart. This section of the act does not provide, in terms, within what time the copy of the notice must be served; but considered in connection with sections 348, 349, 350 and 352 of the act, requiring an undertaking to be executed and filed, or a deposit made as therein specified, to render the appeal effectual, and also in connection with section three hundred and fifty-five which gives to the respondent five days after the filing of the undertaking within which to except to the sufficiency of the sureties therein named, it follows that the copy of the notice filed must be served upon the proper party before or at the time of filing the undertaking. This construction is rendered imperative in order to secure to the respondent the full five days from the filing of the undertaking within which to except to the sufficiency of the sureties."

It will be observed that the service in the first of the foregoing cases was seventeen days, and in the second case, two days, before the filing of the notice. The decisions could therefore have been

<sup>14</sup> 24 Cal. 94.

arrived at upon the simple principle above stated, viz., that since the statute did not provide that the service should precede the filing, or the filing precede the service, the intention was that both acts should be done at the same time, that is on the same day. The rules laid down in the opinions quoted, however, were adhered to in subsequent cases, and it became well settled,—

1. That the service of the notice could not precede its filing;<sup>15</sup>
2. That the service of the notice could not be after the filing of the undertaking;<sup>16</sup>
3. That the service of the notice could be either at the time of its filing,<sup>17</sup> or at any time between its filing and the filing of the undertaking.<sup>17a</sup>

The reasoning upon which these rules were arrived at turned upon the provision requiring the respondent to exercise his right of exception to the sureties within five days after the filing of the undertaking.<sup>18</sup> Since such was the provision, it was important to the respondent to know when the undertaking was filed. No express notice of its filing was provided, but it had to be filed within five days after the *filing* of the notice of appeal; and hence it was considered that the service of the notice was intended to operate as an indirect notice of the filing of the undertaking. And it was said that the service of the notice could not operate in that way unless made in the manner stated; for if the service of the notice could precede its filing, the respondent would be kept for an indefinite period “continually watching the clerk’s office to see when it [the filing] was done; and if the service of the notice could be after the filing of the undertaking, it would operate to abridge or destroy the period of five days allowed to the respondent for exception to the sureties.”

It will be observed that every purpose suggested by the foregoing reasoning would have been subserved by simply requiring the notice

<sup>15</sup> Moulton v. Ellmaker, 30 Cal. 528; Boston v. Haynes, 31 Cal. 107; Foy v. Domec, 33 Cal. 317; Lynch v. Dunn, 34 Cal. 518. In all of these cases the notice was served at least one day before the filing.

<sup>16</sup> Carpentier v. Williamson, 24 Cal. 609; and look at Buckholder v. Byers, 10 Cal. 481; Dooling v. Moore, 19 Cal. 81.

<sup>17</sup> Wright v. Ross, 26 Cal. 262. In this case the notice was served “not to exceed five minutes” before it was

filed. This was held to be “at the same time.”

<sup>17a</sup> Sweeny v. Reilly, 42 Cal. 402.

<sup>18</sup> This is illustrated by M. H. C. & M. Co. v. Woodbury, 10 Cal. 185. In that case the notice was served one day after the filing of the undertaking. The court held that since the respondent had in fact excepted to the sureties within five days after the filing of the undertaking, he “was not injured by a failure of appellant to serve the notice of appeal on the day the undertaking was filed.”

to be served and filed on the same day. Nevertheless there was plausibility in the reasoning as the statute stood before 1866.<sup>18a</sup> Under the statute, as enacted in 1851, and as amended in 1854,<sup>19</sup> the failure of the sureties upon the three hundred dollar bond to justify went to the validity of the appeal; for the statute provided that in case of such failure to justify the appeal should be "regarded as if no such undertaking had been given." But the amendment of 1866 took away the right of exception to the sureties on the three hundred dollar bond and confined it to the sureties upon the stay bonds.<sup>20</sup> This being the case, it was no longer of importance to the respondent to know when the three hundred dollar bond was filed; and so the whole point of the reasoning of the previous cases was destroyed.<sup>21</sup> This change in the statute, however, appears to have been overlooked, and the rules above stated were enforced as before.<sup>22</sup>

The Code of Civil Procedure as first enacted changed the previous provision by requiring the undertaking to be filed at the same time as the notice of appeal.<sup>23</sup> Under this provision what is believed to be the true rule was arrived at by a wrong application of the reasoning of the previous cases. The matter was considered in *Columbet v. Pacheco*.<sup>24</sup> The court held that the notice must be filed and served on the same day, saying: "We think that under section 940, Code of Civil Procedure, the filing of the notice of appeal, filing the undertaking, and service of the notice must be effected 'at the same time,'—that is to say, on the same day,—for we will not regard fractions of a single day for this purpose. The service of the notice may be personal in the usual mode, or it may be effected in any of the other modes provided in the code. (Secs.

<sup>18a</sup> See Laws of 1851, p. 108, sec. 355.

<sup>19</sup> Laws of 1854, p. 65, sec. 355.

<sup>20</sup> See Laws of 1865-66, p. 708, sec. 355; and see, also, section 228 of this treatise. The provision of the Code of Civil Procedure in this regard is somewhat different from that of the amendment of 1866, above referred to. By the code the right of exception to the sureties on the three hundred dollar bond is given. Section 948, Code of Civil Procedure. But the failure to justify does not go to the validity of the appeal. *Schacht v. Odell*, 52 Cal. 447; *Hill v. Finnigan*, 54 Cal. 311. Its only consequence is that ex-

ecution of the judgment is no longer stayed. *Hill v. Finnigan*, 54 Cal. 311. The reason of giving a right of exception to the sureties upon this bond is seen in the fact that in certain cases it operates as a stay bond. Section 949, Code of Civil Procedure.

<sup>21</sup> The service of the notice of appeal could not operate as notice of the filing of the stay bonds for the reason stated below.

<sup>22</sup> *Lynch v. Dunn*, 34 Cal. 518.

<sup>23</sup> Section 940, Code of Civil Procedure, quoted in section 206.

<sup>24</sup> 46 Cal. 650; followed in *Dinan v. Stewart*, 48 Cal. 567; and look at *People v. Ah Yute*, 56 Cal. 119.

1011, 1012 et seq.) That the notice of appeal must be served actually or constructively at the same time that the undertaking on appeal is filed is apparent, in view of the provisions of section 948, by which the time to except to the sufficiency of the sureties upon the undertaking on appeal is limited to 'thirty days after the filing of such undertaking.' It would be unreasonable to hold that this period of time may run against the respondent without his having had notice in some mode that the undertaking had been actually filed in the clerk's office, and the code having failed to provide for a special notice of that fact, we think it was intended that the service of the notice of appeal should itself operate as such notice."

The result in the foregoing case was reached by applying the old reasoning to the new statute. The old rule required the notice of appeal to be served at some time between its filing and the filing of the undertaking. And it is evident that since the statute reduced this period to nothing, the notice (upon the old reasoning) would have to be served and filed at the same time. As above explained, the old rule rested upon the idea that it was important to the respondent to know when the undertaking was filed in order that he might except to the sureties thereon, and that since no other notice of the filing of the undertaking was provided, it must have been intended that the service of the notice of appeal should operate as such notice. But this reason had no application when the failure of the sureties to justify did not affect the validity of the appeal. What undertaking is referred to when it is said that the service of the notice of appeal was intended to give notice of the filing of the undertaking? Not the three hundred dollar undertaking. For since the failure to justify on this undertaking no longer affects the validity of the appeal, it is no longer important to the respondent to know the date of the filing of this undertaking;<sup>25</sup> nor can the other undertakings on appeal be referred to, for there is no specified time in which they must be filed. They

<sup>25</sup> The failure to justify on the three hundred dollar bond does not affect the validity of the appeal. *Schacht v. Odell*, 52 Cal. 447; *Hill v. Finnigan*, 54 Cal. 311. The only use of excepting to the sureties on this bond is to prevent its operating as a stay. Where no other stay bond is provided, it operates as a stay. Section 949, Code of Civil Procedure. But this is an unusual case. And it

cannot be that the service of the notice of appeal was intended to operate as notice of the filing of the undertaking in this isolated case, it not operating as such notice in any other case. But if we assume that it was, the principle would determine the time of the service of the notice in but a few instances, and leave the great majority of cases unprovided for.

may be filed at any time before execution has been satisfied.<sup>26</sup> And this time being indefinite, it is impossible that service of the notice of appeal could give any information concerning it. It is believed, therefore, that although the result reached in the case was right, viz., that the service and filing of the notice of appeal must be on the same day, yet that the principle laid down was incorrect.

The provision of section 940, as amended in 1874,<sup>26a</sup> was unlike that of the code as first enacted, in that the undertaking is not required to be filed at the same time as the notice of appeal, but within five days thereafter. It is unlike any of the provisions of the old Practice Act, in that the period of five days allowed for the filing of the undertaking runs from the *service* of the notice of appeal, and not from its filing. And it is unlike all previous provisions in that it contains the words "the order of service is immaterial." The provision came under consideration in *Hewes v. Carville Mfg. Co.*<sup>27</sup> In that case the facts were that the notice was served on August 30th, the undertaking filed on September 4th, and the notice of appeal filed on September 18th. The notice of appeal, therefore, was filed nineteen days after it was served. The appeal was held to have been properly taken, however, and Morrison, C. J., delivering the opinion of the department, said:

"It is claimed on behalf of the respondent that the appeal was not taken in the manner required by law, and in support of this proposition the court is referred to the case of *Buckholder v. Byers*, 10 Cal. 481, which holds that the filing of a notice of appeal must precede the filing of the undertaking, because until an appeal is taken there is nothing to give effect to the undertaking. That decision was made when section 337 of the Practice Act was in force, which provided that 'the appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney,' and under that section it was held that the filing of the notice of appeal must precede or be contemporaneous with the service of a copy thereof on the adverse party. (*Buffendeau v. Edmonson*, 24 Cal. 94; *Boston v. Haynes*, 31 Cal. 107.) But the foregoing section of the

<sup>26</sup> *Hill v. Finnigan*, 54 Cal. 493.

<sup>26a</sup> See section 206, *ante*, where the section referred to is quoted at length

so as to show its provisions both prior and subsequent to amendment.

<sup>27</sup> 62 Cal. 516.

Practice Act has been materially changed by the Code of Civil Procedure. The law in force at the time the proceedings were had was section 940, Code of Civil Procedure, which provides that 'an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice, stating the appeal from the same or some specific part thereof, and serving a similar notice upon the adverse party or his attorney. The *order of service* is immaterial, but the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal an undertaking be filed or a deposit of money be made with the clerk as hereinafter provided,' etc. It will be observed that the new section has changed the rule previously in force respecting appeals, and has rendered inapplicable the decisions above referred to. As the law now stands, the notice of appeal may be filed with the clerk on a day subsequent to that upon which service is made upon the respondent or his attorney, and the undertaking may be filed before the notice of appeal is filed with the clerk. It must be filed, however, within five days after service of the notice of appeal, and that was done in this case."

The subject again came under consideration in *Galloway v. Rouse*.<sup>28</sup> In that case the notice of appeal was served two days before it was filed. The transcript was not filed within the forty days, and the respondent moved to dismiss the appeal for failure to file the transcript. In answer to this motion, and in order to avoid the bar of a dismissal, the appellant contended that no appeal had been taken. But department one of the supreme court held otherwise, and dismissed the appeal, saying: "This statute differs materially from the section of the former Practice Act regulating the mode of taking appeals, and, as a consequence, the decisions of this court based on the latter are no longer applicable. As the statute now is the notice of appeal may be filed with the clerk on a day subsequent to that upon which the service is made. In the language of the statute 'the order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made' with the clerk, etc. In the case at bar it appears from the certificate of the clerk that notice of appeal was served on the 20th of November, 1882, and on the 23d of the same month was filed with the clerk, together with an

<sup>28</sup> 63 Cal. 280.



undertaking on appeal. From what has been said it follows that these steps constituted an effectual appeal. No transcript on appeal having been filed within the time prescribed by the rules, and no extension of time having been obtained for that purpose, the motion to dismiss must prevail."

These two cases lay down the principle that the notice of appeal may be served an indefinite number of days before it is filed. In the first case it was served nineteen days before, and in the last, two days before it was filed. But the opinions do not indicate that there is any limit to the time in which the service must be made; and there can be no more reason to fix the limit at nineteen days before than at any other number of days before, provided it be kept within the time allowed by law for taking the appeal. And since "the order of service is immaterial," it may be after as well as before the filing, and every reason which can be alleged to show that it can be an indefinite number of days before the filing goes equally to show that it can be an indefinite number of days after the filing. But if the service can be an indefinite number of days before or after the filing, it is evident that it gives the respondent no more information concerning the taking of the appeal than he derives from the statute. For it simply informs him that, if the appellant sees fit, he will at some time within the period allowed by law, complete the taking of the appeal. In other words, the construction deprives the act of its character of a notice, and renders it a perfectly idle ceremony. It would seem that the reasons leading to such a construction should be very strong. But it will be observed that beyond referring to the statute the court does not specify any reason. The decisions seem to rest on the words "the order of service is immaterial." It is submitted with deference, however, that these words will not bear such a construction. Standing by themselves they mean nothing. Two or more things can be done in a given order; but it is meaningless to speak of the order in which a single thing is to be done. Considered in connection with the previous rule, however, it is apparent that what is meant is that the order of the service and the filing is immaterial.<sup>29</sup> This, however, is very different from saying that an indefinite time between the service and the filing is immaterial. And it seems a much more

<sup>29</sup> In *Boyd v. Burrill*, 60 Cal. 280 (deciding a different point) it was said that the words were equivalent

to "whether the service precede or follow the filing of the notice is immaterial."

reasonable construction that the intention was that the acts should be done about the same time (i. e., on the same day), but that it is immaterial which precedes the other. It will be observed that the amendment of 1874 changes the provision of the code as first enacted, and is very like the provision of the act of 1866. And the words mentioned were probably put in through abundance of caution to prevent its being supposed that it was the intention to revive the notion, held by many practitioners, that the service could not precede the filing by the fraction of a day.<sup>30</sup> If this be the office of these words, it would seem to follow that the true construction of the statute is that the notice must be served and filed on the same day, fractions of a day not being regarded. It is believed that there must be some limit of time in which it must be served. The old limit of five days after the filing cannot apply, because, as above explained, the failure of the sureties to justify no longer goes to the validity of the appeal.<sup>31</sup> Leaving this limit out of the question, there remains only a choice between the period presented by the statute for the taking of the appeal, and the limit of one day above mentioned. It is believed that the latter is the true limit. But it is to be borne in mind that the cases last referred to are the other way.

And the same may be said of the later cases; and, whatever may have been the ambiguities of the earlier cases, it is now well settled that there is no foundation in the code for the doctrine that the notice must be filed within any specified number of days after service. The filing of the notice is a necessary element of a valid appeal, without which no advantage that results from the taking and perfecting of an appeal can be enjoyed by the appellant, so that the perils that were at one time believed to be the concomitant of the principle enunciated in *Hewes v. Carville etc. Co.*, above cited, are to be regarded as wholly imaginary.

In this connection, the supreme court, in *San Francisco etc. Co. v. State of California*,<sup>31a</sup> said:

<sup>30</sup> Most practitioners will remember how widespread was the notion that the service could not precede the filing by the fraction of a day. This notion was doubtless erroneous. See *Wright v. Ross*, 26 Cal. 262. But it obtained considerable currency.

<sup>31</sup> It might possibly be suggested that a limit of five days would be convenient where the attorneys reside in different parts of the state. And in some cases it would be convenient.

But why fix a limit, for this reason, at five days? There is nothing in the statute to warrant this limit, and for attorneys residing in very remote places, some other limit would be more convenient.

<sup>31a</sup> 141 Cal. 354, 74 Pac. 1047. See also, *Little v. Jacks*, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128; *Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 98; *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998.

"We have not found that the doctrine of *Hewes v. Carville Mfg. Co.*, 62 Cal. 516, has been overruled so far as the question here involved is concerned. The cases relied upon by plaintiff as overruling it are cases relating entirely to the undertaking on appeal, which, to be valid, must be filed within five days after the *service* of the notice of appeal. When it is once conceded, as it must be under the decisions, that the filing of the notice may be on a day subsequent to the service, and that the code does not prescribe any particular time after service within which such filing must be had, it logically follows that the notice may be filed any time before the expiration of the time for appeal. The appeal is not perfected until all the things required by the statute to be done have been done. The notice of appeal must be served, the undertaking must be filed within five days after the *service* of the notice, and the notice must be filed. So long as the notice of appeal remains unfiled the appeal has not been taken, and the prevailing party is at liberty to proceed, notwithstanding the service of notice and the filing of undertaking, to enforce his judgment, so that the claim of plaintiff that the losing party may, by failing to file his notice of appeal after notice, 'tie up the judgment for six months without ever appealing,' is not well founded. The notice of appeal must undoubtedly be both served and filed within the time allowed for taking an appeal, but we find no warrant in the statute for holding that the notice must be filed within any specified number of days after service."

There has been no amendment of the section since 1874, barring the code commissioners' amendment of 1901, declared unconstitutional along with all others adopted at that time.<sup>32</sup>

<sup>32</sup> In Newmark's Code of Procedure, section 940 is given as amended in 1880. But the language given by the learned annotator is precisely the same as that of the amendment of 1874.

The rule as to the order of service and filing as outlined in other jurisdictions does not vary widely from the California rule. In *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, it was held that a notice of appeal is required to be filed and then served, and that the statute is not complied with by serving and then filing. A notice first served and five minutes later filed in the office of the clerk is sufficient, because practically contemporaneous. *Willoughby v. Brown*, 4 Colo. 120. Where service and filing take place

on the same day, they will be presumed to have been contemporaneous. *Bacon v. Lamb*, 4 Colo. 474. In which event, it will be presumed that filing preceded service. *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868. But in Washington the statute provides (see note 5, section 207, *ante*) for filing to be within five days after service, and the cases require filing to be in accordance with the statute. See *Littlejohn v. Miller*, 5 Wash. 399, 31 Pac. 758; *Watson v. Pugh*, 9 Wash. 665, 38 Pac. 163; *Ward v. Insurance Co. (Wash.)*, 38 Pac. 998; *Puckett v. Moody*, 17 Wash. 609, 50 Pac. 494.

The requirement as to filing the notice within five days after service is jurisdictional. *Hibbard v. De Lanty*,

Under the rules of the supreme court, objections to the service of the notice of appeal must be taken before argument on the merits, as provided in rule 15.

4. *The Manner and Proof of Service of Notice of Appeal.*—Under the old Practice Act and under the code as first enacted, a "copy" of the notice was required to be served upon the adverse party. The amendment of 1874 required a "similar notice" to be served.<sup>33</sup> It might possibly be argued that this change in the language indicated an intention that the paper left with the adverse party should be signed as an original as well as the one filed with the clerk. But no reason is perceived for requiring two originals, and it is believed that the words "similar notice" mean a copy of the notice.

The service is to be made in the same way as other papers are served.<sup>34</sup> The ordinary way is to make personal service, and take the written admission of the attorney served.<sup>35</sup> Such written admission is usually given as a matter of course, unless there are peculiar circumstances in the case. If the service be not personal, but be by leaving a copy in the office of the attorney, or if the attorney refuse to give an admission, the proof of service may be made by affidavit.<sup>36</sup> An affidavit of service should show all the facts required by section 1011 of the code.<sup>37</sup> Thus, where the notice was refused by the attorney for the respondent, a showing that the notice was handed to such attorney on the day it was

20 Wash. 539, 56 Pac. 34; Van Dusen v. Kelleher, 20 Wash. 716, 56 Pac. 35; Best v. Best, 22 Wash. 695, 60 Pac. 58; State v. Butler, 19 Wash. 110, 52 Pac. 521; Collins v. Kinnear, 37 Wash. 453, 79 Pac. 995.

Where the notice was served, and the original, with the return of service or acceptance indorsed thereon, filed with the clerk, the statute is fully complied with. Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030; Catlin v. Jones (Or.), 108 Pac. 633.

In Nevada, on the other hand, filing must precede service, as in Colorado. Brooks v. Nevada etc. Co., 24 Nev. 264, 52 Pac. 575; National etc. Co. v. Nevada etc. Co., 24 Nev. 264, 52 Pac. 575.

The Oregon rule is substantially the same as that of Washington. See Barde v. Wilson, 54 Or. 68, 102 Pac. 301; Catlin v. Jones (Or.), 108 Pac. 633; Sitz v. Swain (Or.), 109 Pac. 273.

In Arizona, the notice must be filed during the term, and the appeal bond within twenty days after the adjournment. Ruff v. Hand (Ariz.), 24 Pac. 257.

<sup>33</sup> See the statute quoted in section 206, *ante*.

<sup>34</sup> See, generally, *Columbet v. Pacheco*, 46 Cal. 650.

<sup>35</sup> For an instance of the construction of an admission, see *People v. Ah Yute*, 56 Cal. 119.

<sup>36</sup> *Moore v. Bessee*, 35 Cal. 184; and look at *Mendioca v. Orr*, 16 Cal. 368.

<sup>37</sup> *Doll v. Smith*, 32 Cal. 475; and see cases cited in notes 37a, 37b, 37c, 37d, 37e, and 38, below. *Dalzell v. Superior Court*, 67 Cal. 453, 7 Pac. 910; *Nathan v. Sutphen*, 68 Cal. 267, 9 Pac. 110; *Mohr v. Byrne*, 131 Cal. 288, 63 Pac. 341; *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. 381.

filed, and subsequent to the filing, by a person competent to make the service, and that, after such refusal, the copy of the notice was deposited on the table in front of and in the presence of such attorney, was held to be sufficient.<sup>37a</sup> And, where the attorney was absent, a showing that the copy of the notice was left on the desk of such attorney, in his office, in the presence of the person in charge of the office at the time, and that the attention of said last-named person was called to the notice, was held to be a sufficient service and proof of service within the meaning of section 1011, Code of Civil Procedure.<sup>37b</sup>

On the other hand, an affidavit showing merely that "there was no person in said front room" where the notice was left, was held insufficient. It was suggested that there might have been someone in the rear or other room of the office of the attorney sought to be served, authorized to receive the notice.<sup>37c</sup> So where the affidavit failed to show whether the attorneys for the respondent were absent from their office, or whether any clerk was present, or anyone in charge of the office, or at what time of the day the notice was left, or whether the office was open or closed, was held wholly insufficient. The affidavit merely averred that the notice was left at the office of the attorneys, and it was suggested that the office may have been closed, and the notice left on the outside; or that the office might have been open, in which event the affidavit should have stated that the notice was left in a conspicuous place as well as all the other facts which must exist to make such service sufficient.<sup>37d</sup>

The affidavit of service must also show affirmatively that it was made by a person over eighteen years of age at the time of

<sup>37a</sup> Nathan v. Sutphen, 68 Cal. 267, 9 Pac. 110. This was obviously made at the time it was believed to be essential that service should be subsequent to the filing of the notice.

<sup>37b</sup> People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

<sup>37c</sup> Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910.

<sup>37d</sup> Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341.

In Elder v. Frevert, 18 Nev. 278, 3 Pac. 237, it was held that where service was by leaving a copy in a conspicuous place in the attorney's office, the facts should be set out touching the actual place where the notice was left. The court should be able to see

for itself that the place was a conspicuous one.

In Herman v. Hutcheson, 33 Or. 239, 53 Pac. 489, it was held that where the constable's return stated that he served the notice "within the county of Coos and state of Washington," it was held insufficient in not stating that it was served in the constable's own precinct.

In Fairfield v. Binnian, 13 Wash. 1, 42 Pac. 632, it was held that proof of service which did not state that it was served within the hours or in the manner prescribed, but merely that service consisted in delivering and leaving a copy at the office of the attorneys, was insufficient.

the service;<sup>37a</sup> and if the service be by mail, the affidavit should show all the facts required by sections 1012 and 1013 of the code,<sup>38</sup> a strict compliance with the statute being required. For example, it must appear that the residences of the attorneys, as given, were the residences on the day the notice was served,<sup>38a</sup> and it must appear that the attorneys reside in different places.<sup>38b</sup>

It is to be borne in mind that the rules which govern the application of section 1011 et seq., Code of Civil Procedure, are limited

<sup>37a</sup> *Maynard v. McCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 10; *Weil v. Bent*, 60 Cal. 803; *Doerfler v. Schmidt*, 64 Cal. 265, 30 Pac. 816; *Horton v. Gallardo*, 88 Cal. 581, 26 Pac. 375.

In Oregon it has been held that an appellant cannot serve his own notice of appeal from a justice's court. *Williams v. Schmidt*, 14 Or. 470, 13 Pac. 305.

In Washington it has been held in effect that plaintiffs in error could not serve a coparty in the court below. *Nelson v. Territory*, 1 Wash. 125, 23 Pac. 1013. But an attorney may, not being an interested party within the statute. *Horr v. Aberdeen etc. Co.*, 7 Wash. 354, 35 Pac. 125.

<sup>38</sup> *People v. Alameda T. Co.*, 30 Cal. 182; *Moore v. Besse*, 35 Cal. 184; *Reed v. Allison*, 61 Cal. 461; *Steele v. Supervisors*, 62 Cal. 6; *Hogs Back Co. v. New Basil Co.*, 63 Cal. 121; *Cunningham v. Warneky*, 61 Cal. 507; *Insurance Co. v. Shephardson*, 76 Cal. 376, 18 Pac. 398; *Linforth v. White*, 129 Cal. 188, 61 Pac. 910.

<sup>38a</sup> *Perri v. Beaumont*, 88 Cal. 108, 25 Pac. 1109.

The parties must reside in different places. *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795.

If nothing appears in the record it will be presumed that all parties, the person required to serve and the person upon whom service is required, resided in the same county. *Bennett v. Minott*, 28 Or. 339, 39 Pac. 997, 44 Pac. 288.

It is not necessary that service should be made in the county of the party's residence. He may be served wherever found. *Long Creek etc. Co. v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366. Thus it is not necessary in the case of an admission of service that

the proof failed to state where the service was made. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819.

A nonresident defaulting defendant may be served by mail. *Titiman v. Alamance Co.*, 9 Idaho, 240, 74 Pac. 529.

<sup>38b</sup> *Reed v. Allison*, 61 Cal. 461; *Murdock v. Clarke*, 73 Cal. 25, 14 Pac. 385; *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783; *Luck v. Luck*, 83 Cal. 574, 23 Pac. 1035; *Selfridge v. Paxton*, 135 Cal. 281, 67 Pac. 138.

In the first two cases here cited it was held that not only must it appear that the attorneys reside in different places, but the notice must be actually deposited in the postoffice at the residence of the appellant's attorney, and that unless so deposited, or if it were deposited elsewhere, it was in effect no service at all, unless there was an additional showing that the attorney to whom it was addressed actually received it. To this extent, however, the decision was wrong, and was so held in *Luck v. Luck*. If service by mail is relied upon, the conditions under which it is permitted must be made to appear without question, but when so made to appear, it matters not where the notice is posted.

In *Prefumo v. Russell*, 148 Cal. 451, 83 Pac. 810, it was held that service by mail two hundred and fifty miles gives ten days extra under section 1013, Code of Civil Procedure, and that this fact is not affected by an acknowledgment of receipt, although such acknowledgment might, under the rule stated in *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8, and *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863, be proof of personal service by mail.

See, also, *Bowen v. Cain*, 7 Wash. 469, 35 Pac. 369.

exclusively to constructive or substituted service. They do not apply where the service is actual. Jurisdiction does not depend upon proof of service, but upon service itself.<sup>33c</sup> So if actual service can be shown, no possible necessity for the application of any of the statutory provisions as to constructive or substituted service can arise. If respondent's attorney has been served with a sufficient notice, and the fact of such notice can be shown, it matters not how such service was accomplished. It is only when actual service is impossible or impracticable that the necessity for constructive substituted service arises, and it then becomes necessary to make strict application of the statutory rules governing such service. In such case it is incumbent upon him who seeks to dispense with the necessity for actual service, to make a clear and explicit showing upon the record, not only that a proper case exists, within the terms of the statute, to entitle him to the benefit of the same, but that the mode of service adapted to the particular case has been strictly followed.<sup>33d</sup>

The proof of service in the transcript cannot be contradicted by affidavit.<sup>39</sup> But a mistake in the record may be corrected on

<sup>33c</sup> See *In re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220; *Bank of Orland v. Dodson*, 127 Cal. 208, 78 Am. St. Rep. 42, 59 Pac. 584; *Estate of Eikerenkotter*, 126 Cal. 54, 58 Pac. 370; *Sutter Co. v. Tisdale*, 128 Cal. 180, 60 Pac. 757. See section 273, *post*.

It matters not, therefore, where service of notice was made by mail, that it was directed to the attorney for the respondent at a postoffice different from that where his office was located, if it can be shown that such attorney actually received the notice. *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8. See note 38b, *supra*.

<sup>33d</sup> In *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220, it was held that where there is an affirmative showing of the actual receipt by the proper person of a notice of appeal, the method of service is of no consequence. But if this showing of actual service is not obtainable, and constructive or substituted service must be relied upon, then there must be a showing, first, of a proper case, and second of a proper method. Thus, in *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8, it was

held that substituted service by mail is permissible only in the cases and in the manner provided by statute, and it is incumbent on one who serves the notice of appeal in that way to make a clear showing upon the record, not only of a proper case, but that the mode of service pointed out has been strictly followed. And in *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863, the supreme court held that so long as there was an adequate showing of the actual receipt of the notice, however the service may have been accomplished, whether by mail or by hand, the result would be a personal service, and not a substituted service, which is intended to take the place of a personal service where the latter is not possible.

<sup>39</sup> *Boston v. Haynes*, 31 Cal. 107; *In re Fifteenth Avenue Extension*, 54 Cal. 179. See, also, note 4 to section 209; and compare *Bonds v. Hickman*, 29 Cal. 460.

The return is the sole evidence of service, and cannot be aided by an affidavit *dehors*. *Cornell University v. Denny etc. Co.*, 15 Wash. 433, 46 Pac. 654.

motion as for diminution of record.<sup>40</sup> And a defective affidavit of service, or an objection to proof of service, may be obviated by filing a new and sufficient affidavit.<sup>40a</sup>

In some states provision is made for the giving of notice in open court, at the time of the rendition of the judgment,<sup>40b</sup> or upon the denial of the motion for new trial, where such motion suspends the judgment.<sup>40c</sup> The practice is simple, and readily outlined in the decision.<sup>40d</sup>

5. *Waiver of Irregularities in the Service, Waiver of Service, and Waiver of Notice.*—There seems to be no good reason why the parties should not be allowed to waive irregularities in the service of the notice, or even to waive service itself. Service of notice of appeal is no more jurisdictional in character than is service of the summons in an action, which can be waived.<sup>40e</sup> As to waiver of

<sup>40</sup> As to which, see section 271, *post*. And see *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8; *Sutter Co. v. Tisdale*, 128 Cal. 180, 60 Pac. 757; *Martin v. De Ornelas*, 139 Cal. 41, 72 Pac. 440.

The return of service may be amended so as to conform to the facts. *Dolph v. Nickum*, 2 Or. 202; *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378.

<sup>40a</sup> In *Perri v. Beaumont*, 88 Cal. 108, 25 Pac. 1109, the appellant was permitted to show by a new affidavit of service that respondent's attorney resided at a certain place on the 8th, the date of service, instead of *resides* there on the 10th, the date of the affidavit, the original affidavit of service making use of the present instead of the past tense. See cases cited in note 40, *supra*.

<sup>40b</sup> Or, in the case of a judgment of dismissal, where the court signs the judgment, and it is regularly entered by the clerk, at that time. *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315. And this would seem to be the case where the appeal is from an order, and the same is signed or entered. See *Northern etc. Co. v. Hender*, 12 Wash. 559, 41 Pac. 913. See *Cusick v. Beyers*, 5 Wash. 98, 31 Pac. 422.

<sup>40c</sup> See *Chilcott v. Globe etc. Co.*, 49 Wash. 302, 95 Pac. 264.

<sup>40d</sup> In *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773, it was held

that a notice that defendants "intended to appeal" given in open court was sufficient, the word "intended" being manifestly an inadvertence.

It is not necessary that the minutes should show that the clerk was directed to make an entry of oral notice of appeal. That will be presumed. *Ranahan v. Gibbons*, *supra*.

An oral notice, given in open court, at the time of the rendition of the judgment, is sufficient. *Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433; *Elma v. Carney*, 4 Wash. 418, 30 Pac. 732.

A subsequent written notice or any other notice is not necessary. *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199.

The presence of the respondent at the time the notice is given is not necessary, and if within the time required by law, it need not be given within the term or at the time the judgment was rendered. *McMillan v. Mau*, 1 Wash. 26, 23 Pac. 441.

See section 1496, Revised Statutes of Arizona; section 3136, Compiled Laws of New Mexico; section 550, Lord's Oregon Laws; section 1719, Rem. & Bal. Code of Washington (section 6503, Bal. Code).

<sup>40e</sup> See *Hibernia etc. Soc. v. Lewis*, 111 Cal. 519, 44 Pac. 175, quoted below; and see *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603.



the notice itself, the question is not free from doubt, although it is believed that such a waiver is not authorized.

In the case of *Hibernia etc. Soc. v. Lewis*,<sup>407</sup> the supreme court made use of the following language in this connection:

"The notice of appeal, by which the adverse party is brought under the jurisdiction of the court, corresponds to the summons by which he is brought before the superior court, although the service thereof, instead of being personal, may be made upon his attorney. The notice itself, like the issuance of the summons, may be waived. A voluntary appearance will be equivalent to a personal service of the notice, but the waiver of the service is insufficient. There must, in addition, be given a notice of appearance, either in person or by attorney."

Again: " . . . As it is only necessary that such adverse party be before the appellate court in such a manner that he will be bound by its judgment, it is immaterial whether his presence is by a voluntary appearance, or whether he has been brought here by a hostile notice from the appellant. A respondent who is properly before the court, and who claims that another party to the action is an adverse party who should also be before the court, cannot object to the manner by which the court obtains jurisdiction of such party, whether it is by voluntary appearance, or upon the service of a notice of the appeal."

In this case, which was a motion to dismiss for failure to serve all the adverse parties, the appellant sought to cure the defect by filing an express waiver of service of the notice of appeal, signed by the attorneys for the party who had not been served. In the language above quoted, the court plainly intimated that service of notice might be waived, but waiver in this instance was held ineffectual for two reasons: First, because the act of waiver was not followed by some act equivalent to appearance; and second, because the notice of appeal *had not been directed to the*

<sup>407</sup> 111 Cal. 519, 44 Pac. 175. From the second ground upon which this appeal was dismissed, it is apparent that so far as the Santa Cruz Rock Pavement Co., which was not served, was concerned, its waiver of notice was regarded as ineffectual, because as to it there was no notice of appeal. Had its name been included in the notice, there is no question but that the attempted waiver on

its part would have been held effective for the purpose. For this reason this case, which is more often relied upon as authority for the doctrine of waiver of notice, does not support the doctrine at all, but, on the contrary, practically holds that notice cannot be dispensed with, although service may, by any act that may be fairly regarded as an appearance.

*party at all.* The language of the learned justice, as above quoted, in so far as it expresses an opinion that the notice itself might be waived, is clearly an inadvertence. Nevertheless, it is fair to state that the language in question was quoted with unqualified approval in a later case,<sup>40g</sup> and the court has made use of similar language on more than one occasion since the opinion was delivered.<sup>40h</sup> In no decision, however, has the doctrine received an unqualified indorsement upon a fair presentation of the question.

There is a wide difference between waiver of service of notice and waiver of the notice itself. Waiver implies consent, and consent may excuse error or omission, but cannot confer jurisdiction. Yet, to say that an appeal may be perfected by the mere appearance of a party in the appellate court, by attorney, without a notice of appeal at all, is to confer jurisdiction by consent, and is diametrically opposed to the well-settled doctrine, enunciated in numerous decisions, that appeals, being creatures of statute, must be perfected in the manner prescribed. By the code,<sup>40k</sup> the solitary instrument whereby each and every appeal authorized therein is initiated is the notice of appeal, and its filing and service constitutes the sole method, under the statute, of *taking* an appeal.<sup>40m</sup> But aside from such filing and service, the same section confers upon the notice certain characteristics which may be fairly said to give it an individuality of its own. For example, it is notice to the clerk and the court of the extent of the proposed appeal, as the filing is notice of the taking of the appeal. Without it, neither the court nor the clerk would have any record notice whatever as to whether the appeal was from the whole or merely a part of the judgment or order; or, if the latter, from what specific part. If called upon to issue an execution for the satisfaction of the part not appealed from, the sole source of information upon the subject would be the appearance of the respondent in the appellate court, and this would certainly not be available to the clerk of the superior court. Finally, having a jurisdictional function of its own, it is, by another section of the

<sup>40g</sup> See *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603.

<sup>40h</sup> See *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225; and look at *Niles v. Gonzalez*, 152

Cal. 90, 92 Pac. 74; and cases cited below.

<sup>40k</sup> See section 940, California Code of Civil Procedure.

<sup>40m</sup> See section 206, *ante*.

code,<sup>40a</sup> given a place in the record. To say that an appeal might be taken without a notice of appeal would be to assert that an appeal might be taken and perfected by means of an incomplete judgment-roll, which, in turn, would be to say that an appeal might be taken without any record at all, for if one essential part of the judgment-roll may be dispensed with by consent, every essential part may be dispensed with in the same way, and parties may, by some sort of consent presentation, take an appeal without complying with any part of the statute.

The reasons here given for the necessity of a notice of appeal, even though it may be irregular, in form or substance, or irregularly served, or even not served at all, if service is waived, have been described as technical, but so are the reasons which sustain most rules of practice. Whether technical or otherwise, they are the reasons usually offered, and seem to sustain the theory advanced.

As to the method of waiver, or what acts may be held to accomplish it, no clearly outlined rules have been framed, beyond the general requirement that those acts only which may be fairly regarded as entry of appearance in the higher court will be held to effect a waiver of service. Where service was required to be prior to filing, it seemed to have been held that argument upon the merits was a waiver of the objection of want of service,<sup>41</sup> and this seems to have been the foundation for the rule of court which in its present form is numbered XV.<sup>42</sup> But objections already reserved could not be waived by implication.<sup>43</sup>

In the later decisions waiver seems to be confined to stipulations. In *Valley etc. Co. v. Struck*,<sup>44</sup> where there was a stipulation that the parties abide the decision upon another appeal, it was held to be a sufficient appearance for the purpose. This was hardly waiver, but it has been cited as such. In *Burnett v. Piercy*,<sup>45</sup> there was a stipulation to the effect that the appeal had been duly taken and perfected, and the court held that this was in effect a waiver of service of notice. It is to be observed that in this case, which is

<sup>40a</sup> Sections 950, 951 and 952, California Code of Civil Procedure.

<sup>41</sup> See *Warner v. Holman*, as explained in *Buffendeau v. Edmonson*, 24 Cal. 94.

<sup>42</sup> See 144 Cal. xlvii.

<sup>43</sup> Look at *Moulton v. Elmaker*, 30 Cal. 527.

<sup>44</sup> 146 Cal. 266, 80 Pac. 405.

<sup>45</sup> 149 Cal. 178, 86 Pac. 603.

sometimes cited in support of the doctrine that the notice of appeal may be waived, the stipulation was to the effect that the notice had been actually served, not that it might be dispensed with.<sup>46</sup>

It is well settled that only such acts as may be said to constitute an appearance of the party not served will be regarded as waiver of service.<sup>47</sup> Also, it has been held that jurisdiction cannot be conferred by an act of waiver made after the time for taking the appeal has expired.<sup>48</sup>

The third paragraph of section 941b, Code of Civil Procedure, referring to the manner of taking an appeal under the new and alternative method, provides as follows:

"This notice need not be served upon any of the parties to the action or the proceeding, or their representatives or attorneys, but when filed within the time herein specified it shall, without further

<sup>46</sup> In *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225, the court said:

"It is no doubt true, as contended by the appellant Teresa Bell, that the appellate court may obtain jurisdiction of an appeal as well by voluntary entrance of appearance by an adverse party, as by the service of a notice of appeal upon him." Citing *Hibernia etc. Soc. v. Lewis*, *Valley Lumber Co. v. Struck*, and *Burnett v. Piercy*, *supra*.

It is to be observed, as stated in the text, that in all cases where a stipulation is relied upon, it is to the general effect that the appeals have been duly taken and perfected, following the general character of the stipulation in *Carey v. Brown*, 58 Cal. 180. In other words, the stipulation is that the thing required to be done has been done, not that it may be omitted. In this sense only has it ever been held that even service of notice might be dispensed with, to say nothing of notice itself.

Upon the subject of waiver in other jurisdictions, see *Robertson v. O'Riley*, 14 Colo. 441, 24 Pac. 560; *Coby v. Halthusen*, 16 Colo. 10, 26 Pac. 148.

In *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600, it was held that the statutory provision requiring the giving of notice must be followed. In *Brooks v. Nevada etc. Co.*, 24 Nev.

264, 52 Pac. 575, it was held that respondent did not waive any objection to the service or the filing of the notice of appeal by proposing amendments to the statement; nor by filing stipulations postponing oral arguments.

In *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101, it was held that the statutory provision for notice of appeal is jurisdictional, and that it could not be waived by stipulation of the parties.

The filing and service of the notice of appeal within the time prescribed is essential to clothe the supreme court with jurisdiction to adjudicate whatever questions are properly raised on appeal. *Anderson v. Halthusen*, 30 Utah, 31, 83 Pac. 560.

Service and filing of the notice of appeal is essential to give the supreme court jurisdiction, and cannot be waived by the parties. *Rodman v. Manning*, 50 Or. 506, 93 Pac. 366.

<sup>47</sup> See *Hibernia etc. Co. v. Lewis*, 111 Cal. 519, 44 Pac. 175; *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603; *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225.

<sup>48</sup> *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225; and see *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411.

action on the part of the appellant, transfer the cause for decision and determination to the higher court."

Under this provision the supreme court, in *Mitchell v. California etc. Co.*,<sup>49</sup> held that service of the notice of appeal upon adverse parties, as practiced under the old method as provided in section 940 of the same code, was not required under the new method. "No service of the notice of appeal is required. In fact, it is expressly dispensed with."

<sup>49</sup> 154 Cal. 731, 99 Pac. 202; and *Braslan Co.*, 10 Cal. App. 762, 103 Pac. 946.  
see, also, *Ford & Sanborn Co. v.*

## CHAPTER XXXIV.

## UNDERTAKING TO RENDER APPEAL EFFECTUAL.

§ 211. Necessity for an undertaking for costs and damages.

§ 212. Time within which the undertaking must be filed.

§ 212a. Waiver of undertaking.

§ 213. Contents of undertaking.

§ 214. Curing defective undertaking by filing a new one in the appellate court.

§ 214a. Undertakings by bonding companies.

§ 211. **An Appeal is not Effectual for Any Purpose Without an Undertaking for Costs and Damages.**—As will be shown in another place, certain undertakings are provided for the purpose of staying execution.<sup>1</sup> Those undertakings are distinct from that under consideration here, which (although in some cases it effects a stay) is mainly for the purpose of validating the appeal.

No undertaking is required where the appeal is by the state or the people thereof, or a state officer in his official capacity, or by a county, city and county, city or town.<sup>2</sup> Nor where the appellant

<sup>1</sup> See chapter 35, herein.

<sup>2</sup> Section 1058, California Code of Civil Procedure; Laws of 1856, pp. 26, 27; *People v. Clingan*, 5 Cal. 389; *People v. Supervisors Marin Co.*, 10 Cal. 344; *Warden v. Mendocino Co.*, 32 Cal. 655; *Morgan v. Menzies*, 60 Cal. 341; *Scheerer v. Edgar*, 67 Cal. 377, 7 Pac. 760; *Lamberson v. Jefferds*, 116 Cal. 492, 48 Pac. 485; *Meyer v. San Diego*, 130 Cal. 60, 62 Pac. 211; *Mitchell v. Board of Education*, 137 Cal. 372, 70 Pac. 180; *San Francisco etc. Co. v. State*, 141 Cal. 354, 74 Pac. 1047; also *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *San Luis Obispo v. Greenburg*, 120 Cal. 300, 52 Pac. 797.

It is to be noted that section 1058, Code of Civil Procedure, does not, in terms, include county officials. The supreme court, however, in *Lamberson v. Jefferds*, *supra*, held that it would be applied to such officials in all cases where it appeared that the county was really the party in interest. In this case the defendant was a county

auditor, defendant in a *mandamus* proceeding, and he sought to make application of the clause of section 946, Code of Civil Procedure, with reference to trustees, or other persons in another's right, but the court held that it was amply covered by the first-named section, and that there was no necessity for deciding the application of section 946.

It is also to be noted that the section applies alone to cases in which the governmental entity is party plaintiff. But the supreme court in *San Francisco etc. Co. v. State of California*, 141 Cal. 354, 74 Pac. 1047, held that it was the manifest intent that the exemption should extend to all cases in which the state or other governmental entity was the real party in interest, whether plaintiff or defendant, and it would be so construed.

Corresponding provisions are found in the following: Section 1514, Revised Statutes of Arizona (section 305, Civil Practice); section 395, *Mills' Annotated Code of Colorado*;

is an executor, administrator or guardian, if such executor, administrator, or guardian has given an official bond in that capacity.<sup>2a</sup>

section 4935, Revised Codes of Idaho; section 7196, Revised Codes of Montana (section 1902, Code of Civil Procedure); section 3436, Cutting's. Compiled Laws of Nevada (section 341, Civil Practice); section 7218, Revised Codes of North Dakota; section 445, Code of Civil Procedure of South Dakota; section 3495, Compiled Laws of Utah; section 1721, Rem. & Bal. Code of Washington (section 6505, Bal. Code).

The practice is illustrated by the following decisions: *Del Norte v. Weiss*, 38 Colo. 269, 88 Pac. 581; *Parish v. Collins*, 43 Wash. 392, 86 Pac. 557; *Corbett v. Civil Service Commission of Seattle*, 33 Wash. 190, 73 Pac. 1116; *State v. Blumberg*, 34 Wash. 640, 76 Pac. 272; *Maricopa Co. v. Osborn*, 4 Ariz. 331, 40 Pac. 313; *Maricopa Co. v. Rosson*, 4 Ariz. 335, 40 Pac. 314; *Townsend etc. Co. v. Hill*, 24 Wash. 469, 64 Pac. 778; *Elma v. Carney*, 4 Wash. 418, 30 Pac. 732; *Pueblo v. Jackson*, 3 Colo. App. 522, 34 Pac. 766; *Territory v. Woodbury*, 1 N. D. 85, 44 N. W. 1077; *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135; *Jordan v. Seattle*, 29 Wash. 581, 70 Pac. 54; *Campbell v. Hall*, 28 Wash. 626, 69 Pac. 12; *State v. Court*, 32 Wash. 143, 72 Pac. 1040.

The Montana and Washington provisions, *supra*, add school districts to the list of exempt appellants; and the Colorado section adds not only school districts, but "all charitable, educational, penal or reformatory institutions under the patronage and control of the state."

Section 7218 of the North Dakota code provides that the supreme court, after the case arrives there, may in its discretion require a bond as a condition of the further prosecution of the appeal.

<sup>2a</sup> This section was formerly 970, California Code of Civil Procedure. Section 970 was repealed, however, in 1880, and section 965 took its place. The two are practically identical, and the decisions construing the earlier section are applicable with equal force to the later.

There was at one time some confusion as to the application of this (965) and section 946. The latter also exempted appeals by executors, administrators and guardians from the requirement of section 940 as to undertakings, but subject to the exercise of the judicial discretion of the court. The impression prevailed that section 946 applied solely to undertakings to stay proceedings, and that section 965 applied to undertakings on appeals. This view seems to have been entertained by the author (*Mr. Hayne*). See section 220, *post*, and it was suggested that this construction would clear up the difficulty above referred to. Since the original text was prepared, however, the supreme court has held, in effect, that section 946 applies to actions in which executors, etc., are parties, while section 965 applies to appeals in probate proceedings. This construction obviously disposes of certain manifest difficulties which would result from the former view, and which obviously escaped the attention of *Mr. Hayne*; as, for example, the necessity for a different application of the provisions of section 946 as to trustees, and other persons acting in another's right, which is the immediate context, and necessarily suggests an identical construction. See *In re Skerrett*, 80 Cal. 62, 22 Pac. 85; *Ex parte Orford*, 102 Cal. 656, 36 Pac. 928; and *In re Danielson*, 88 Cal. 480, 26 Pac. 505.

Conceding, therefore, that section 965 applies solely to appeals in probate proceedings, no order of court dispensing with an undertaking, such as is required under section 946, seems to be necessary; though, in practice, such an order is usually obtained. In appeals under section 946 such an order is essential, and must be obtained within the time for filing the undertaking, and filed, otherwise an appeal taken without the usual undertaking will be unavailing.

The chief reason for the construction here suggested is to be found in the essential fact that an executor, administrator, or guardian is not always acting in another's right in the

Nor, in the discretion of the trial court, is a "trustee, or other person acting in another's right," required to give such an undertaking

management of the estate of his decedent. In probate matters, at least, he is not necessarily, and at all times, under all conditions wherein the estate is concerned, acting otherwise than in a personal and individual capacity. His liability, and that of his sureties, is a personal and individual liability, and includes a specific guaranty that the creditors, heirs, devisees and distributees of the estate shall receive what the law gives them at his hands, and no more. But when it becomes necessary to bring an action or to defend one, the conditions are essentially different. His own and his bondsman's liability ends, and that of the court begins. See *In re Danielson*, 88 Cal. 480, 26 Pac. 505; *In re Sharp*, 92 Cal. 577, 28 Pac. 783; *Ex parte Orford*, 102 Cal. 656, 36 Pac. 928.

If, therefore, the exemption is claimed under section 965, it must be an appeal in the probate of the estate, and must be by the executor, etc., *in esse*. *Estate of Corwin*, 61 Cal. 160. An administrator cannot claim the exemption on an appeal taken after he has been displaced and a special administrator appointed in his stead. *Estate of McDermott*, 127 Cal. 450, 59 Pac. 783.

If it is claimed under section 946, it must be in respect to a matter in which the estate is interested (*Kirsch v. Derby*, 93 Cal. 573, 29 Pac. 218); and the representative of the estate must take the appeal in his representative capacity, "in another's right" and not his own. Thus an administrator who appeals from an order revoking his letters of administration is acting for himself, and the undertaking cannot be dispensed with. In *re Danielson*, *supra*. And see *Estate of Wood*, 143 Cal. 522, 77 Pac. 481, where the appeal was dismissed on the ground that it was not taken by the administratrix in her representative capacity, but in her right as widow.

An order dispensing with an undertaking under these various sections, including section 1058, made by the judge in the courtroom, and filed with the clerk, is an order of the court

within the meaning of section 946, although not entered by the clerk in the minutes. *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.

Corresponding provisions are as follows: Section 1515, Revised Statutes of Arizona, provides that "executors, administrators and guardians appointed by the courts of this territory shall not be required to give bond in any appeal or writ of error taken by them in their fiduciary capacity." Section 1947 provides: "When an appeal is taken by an executor or administrator no bond shall be required unless such appeal personally concern him, in which case he must give the bond." The first section doubtless refers to appeals in general in which the executor, etc., is a party, as section 946 of the California code, and the last refers to appeals in probate proceedings, as section 965 of the same.

Section 395, Mills' Annotated Code of Colorado, contains a provision substantially the same as that of section 946, California Code of Civil Procedure.

Section 4814, Revised Codes of Idaho, contains the same exemption as to bonds by an "executor, administrator, trustee, or other person acting in another's right," as section 946 of the California code; and section 4832 is substantially identical with the old section 970 of the California code, which was displaced by section 965, when provision was made for appeals to the supreme court from the superior courts in probate matters, and probate courts, and appeals from the latter to the district courts were dispensed with.

Section 7106, Revised Codes of Montana (section 1730, Code of Civil Procedure), contains the same provision as to the exemption of executors, etc., in reference to appeal bonds, as section 946, California Code of Civil Procedure, and section 7110 (section 1734, Code of Civil Procedure) is identical with section 965 of the same code.

Section 3441, Cutting's Compiled Laws of Nevada (section 346, Civil



ing.<sup>2b</sup> These are statutory exemptions, however, in derogation of the policy of the law which protects respondents in an appeal proceeding attacking judgments and orders of court in their favor, and cannot be extended beyond the specified cases.<sup>2c</sup>

In all other cases there must be either an undertaking for costs and damages, or a deposit in lieu thereof, unless such undertaking

Practice), contains the same provision above referred to in section 946, California Code of Civil Procedure; and section 3043 (section 257) is as follows: "An appeal by an executor or administrator as herein provided, who has given an official bond, shall be complete and effectual without an undertaking on appeal."

Section 7968, Revised Codes of North Dakota, is as follows: "An executor, administrator or guardian may appeal without filing an undertaking from a decree made in any proceeding in a case in which he has given an official bond; and when he appeals in that manner the bond stands in the place of such undertaking. A special guardian may appeal without filing an undertaking although he has not given bond, but the appeal will not operate as a stay unless taken from an order which grants or refuses a transfer of the case."

Section 6103, Compiled Laws of Oklahoma of 1909, is as follows: "Executors, administrators and guardians who have given bond in this state with sureties, according to law, are not required to give an undertaking on appeal or proceedings in error." Stats. 1893, sec. 4473.

Section 364, Probate Code of South Dakota, provides that "when an executor or administrator who has given an official bond appeals from a judgment, decree or order of the county court or judge, made in the proceedings had upon the estate of which he is administrator or executor, his bond stands in the place of an appeal bond and the sureties therein are liable as on such appeal bond."

Section 3313, Compiled Laws of Utah, contains the same provision as section 946, California Code of Civil Procedure.

<sup>2b</sup> Section 946, California Code of Civil Procedure. Section 67 of the California Insolvent Act of 1880 ex-

empted assignees in insolvency from the necessity of filing undertakings in cases involving their trust funds or property. See *In re Sharp*, 92 Cal. 577, 28 Pac. 783.

<sup>2c</sup> This is not only for the benefit of the respondent but of the sureties on the official bonds involved. In *Estate of McDermott*, 127 Cal. 450, 59 Pac. 783, the court said:

"The covenants of an administrator's bond do not make it, on its face, an undertaking on appeal, and it becomes such, under certain circumstances, only by virtue of the provisions of section 965; and, as a surety always stands strictly on the terms of his contract, he cannot be charged by virtue of the section of the code relied on, unless he be within its strict terms."

In *Mitchell v. Board of Education*, 137 Cal. 372, 70 Pac. 180, it was held that the board of education of the city and county of San Francisco was not exempt under section 1058, from the necessity of filing an undertaking on appeal.

In *Meyer v. San Diego*, 130 Cal. 60, 62 Pac. 211, it was held that in an appeal by a municipality and a private individual as codefendants, the former was exempt from the statutory requirement as to filing an undertaking on appeal, but not the latter.

In some jurisdictions provision is made for the prosecution of appeals in *forma pauperis*. See section 1507, Revised Statutes of Arizona. But the statute allowing actions to be instituted in *forma pauperis* is not applicable to appeals. See *Ferrara v. Auric etc. Co.*, 20 Colo. App. 411, 79 Pac. 302. An express statutory provision is necessary. *Bokien v. State*, 14 Wash. 401, 44 Pac. 883.

See, also, *Benson v. Anderson*, 9 Utah, 154, 33 Pac. 691.

or deposit be waived.<sup>2d</sup> The provision of the old Practice Act in this regard was as follows:<sup>3</sup>

"Sec. 348. To render an appeal effectual for any purpose in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made with the clerk within five days after the notice of appeal is filed."

This section stood in its original form until the adoption of the Code of Civil Procedure in 1872, when, in the following form, it became section 941 of the code:

"Section 941. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal."

This section of the code has remained unchanged to the present date. In 1874 an amendment was added to section 940 of the same code, the effect of which was to re-enact the old provision of the Practice Act, omitted from section 941 of the code, with respect to the ineffective character of an appeal without the three hundred dollars undertaking here referred to. Its language is that " . . . the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."<sup>4</sup>

<sup>2d</sup> As will hereafter appear, no provision is made in sections 941a, 941b, or 941c, California Code of Civil Procedure, providing the new and alternative method of appeal, for the undertaking on appeal. The only undertaking therein provided for is the one designed as a guaranty for the payment of the costs of the transcript.

<sup>3</sup> Laws of 1851, p. 106.

<sup>4</sup> Section 940, California Code of Civil Procedure.

Statutory provisions as to undertakings on appeal and to stay proceedings in other Pacific coast states correspond, in the main, closely with those of California. With respect to the first named, provisions corresponding to those of sections 940 and 941, California code, as quoted in the text, are as follows:

Arizona: Section 1496, Revised Statutes (section 287, Civil Practice), provides for the filing of "an appeal

bond" by the appellant with the clerk of the court, "as hereinafter provided"; and section 1506 (section 297, Civil Practice), is as follows:

"The appellant or plaintiff in error, as the case may be, shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error, shall prosecute his appeal or writ of error with effect, and shall pay all costs which have accrued in the court below, or which may accrue in the appellate court."

Section 1507 (section 298) provides for an appeal without an undertaking "*in forma pauperis*," and the following section provides that when the bond or the affidavit, *in forma pauperis*, is filed, the appeal shall be deemed "perfected."

*Colorado*: Section 388, Mills' Annotated Code, provides as follows:

"Appeals to the supreme court from the district, county and superior courts shall be allowed in all cases where the judgment or decree appealed from be final. . . . And, provided, the party praying for such appeal shall, by himself, or agent, or attorney, give bond with a sufficient surety, to be approved by the court from which the appeal is taken (or the clerk thereof when the order granting such appeal may so direct), and file in the office of the clerk of the court from which the appeal is taken, within the time limited by the court or judge, which bond shall be in a reasonable sum, sufficient to cover the amount of the judgment appealed from, and costs, conditioned for the payment of the judgment, costs, interest and damages, in case the judgment shall be affirmed, and also for the due prosecution of the appeal; and the obligee in such bond may, at any time, on a breach of the condition thereof, have and maintain a civil action as on other bonds. The supreme court may, in its discretion, allow defective appeal bonds to be amended. The prayer for appeal may be made to, and the order therefor may be made by, the judge,

in vacation, in case the court is not in session during the whole of the five days allowed therefor."

*Idaho*: Section 4808, Revised Codes, is identical with section 940, California Code of Civil Procedure, quoted in the text. See section 206, *ante*. Section 4809 is also identical with section 941, California Code of Civil Procedure, with an added proviso allowing an appeal from the judgment and one or more appealable orders taken together to be perfected by a single bond, and making provision for filing exceptions to the undertaking within twenty days, under penalty of being deemed to have waived such defects as might be covered by exceptions.

*Montana*: Section 7100, Revised Codes (section 1724, Code of Civil Procedure), contains the same provision as to the necessity of an undertaking as section 940, California Code of Civil Procedure; and section 7101 (section 1725, Code of Civil Procedure) is identical with section 941 of the same code.

*Nevada*: Section 3436, Cutting's Compiled Laws (section 341, Civil Practice), is as follows:

"To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made with the clerk, within five days after the notice of appeal is filed; provided, however, that nothing in this section shall apply when the state of Nevada, or any county of the state of Nevada, is the appellant; nor shall such undertaking, as provided for in this section, be necessary to perfect such appeal, when the action or proceeding is brought for and in the name of this state, or for and in the name of any county in the state."

*New Mexico*: Section 3144, Compiled Laws, authorizes a writ of error to be issued out of the supreme court in any cause finally determined in the

district courts, "upon a *praecipe* therefor, . . . and giving security for costs to the satisfaction of the clerk." Provision is also made for *supersedeas* bonds in the same connection. Section 3136 provides for *supersedeas* bonds upon appeals in equity cases, and interlocutory judgments in partition. Section 2685, subsection 161, provides for taking appeals and writs of error in cases under code procedure in the same manner as is above set forth.

**North Dakota:** Section 7208, Revised Codes, is as follows:

"To render an appeal effectual for any purpose an undertaking must be executed on the part of the appellant by at least two sureties to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal not exceeding two hundred and fifty dollars."

Section 7207 provides for a money deposit equal in amount to the undertaking, and for a waiver in writing of the latter; and section 7205 provides that the "appeal shall be deemed taken by the service of the notice of the appeal and perfected on service of the undertaking. . . ."

**Oklahoma:** No provision for an undertaking corresponding with the undertaking on appeal is made. The proceeding in error does not, however, of itself, without a stay bond, as provided in section 6078, Compiled Laws of 1909, operate as a stay in any case. See section 6103, Compiled Laws, as to undertakings on appeal or proceedings in error by executors and administrators.

**Oregon:** Section 550, Lord's Oregon Laws, is partly as follows: "2. Within ten days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking as hereinafter provided, and within said ten days shall file the original of said undertaking, with proof of service indorsed thereon, with said clerk. . . ."

Section 551 provides that "the undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs, and disbursements which

may be awarded against him on appeal; . . ."

**South Dakota:** Section 441, Code of Civil Procedure, provides:

" . . . The appeal shall be deemed taken by the service of the notice of appeal, and perfected on service of the undertaking for costs, or the deposit of money instead, or the waiver thereof, as hereinafter prescribed. . . ."

Section 445 provides: "To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars."

Section 444 provides for a deposit in lieu of an undertaking, and for waiver of either in writing.

**Utah:** Section 3305, Compiled Laws, provides:

" . . . But within five days after service of the notice of appeal an undertaking shall be filed or a deposit of money made with the clerk, as hereinafter provided, or the undertaking be waived in writing by the adverse party."

Section 3306 prescribes the method of filing, execution, etc., and contents of such undertaking.

**Washington:** Section 1719, Rem. & Bal. Code (section 6503, Bal. Code), provides as follows:

" . . . The giving or service of a notice of appeal as prescribed in this section shall effect the appeal, but the same shall become ineffectual if an appeal bond for costs and damages be not given as required by section 1721 of this title. . . ."

Section 1721 (section 6505, Bal. Code) provides:

"An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party, conditioned for the payment of costs and damages, as prescribed in section 1722, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in

This provision has not been changed since 1874. The undertaking mentioned in the provisions above quoted is the one commonly referred to as the three hundred dollar bond.<sup>5</sup> Its main purpose is to render the appeal effectual, although it operates (with certain exceptions) as a stay of execution where no other stay bond is provided.<sup>6</sup> Unless it be given the statute declares that the appeal shall be "ineffectual for any purpose." The requirement that it be filed is therefore imperative.

There are some cases in the reports, in relation to appeals to county courts, which are to the effect that the want of an undertaking is waived by a failure to object to it, and that if there be an objection, the court should allow an undertaking to be filed. But as is explained in another place,<sup>7</sup> these cases arose under statutes which fixed no limitation of time for the filing of the undertaking, and therefore they do not apply to appeals to the supreme court. In an appeal to the supreme court an undertaking is essential, and the fact that one was filed must affirmatively appear from the transcript.<sup>8</sup> And not only must there be an undertaking, but it must comply with the requirements of the statute,<sup>9</sup> and must be filed within the time prescribed by the statute.<sup>10</sup>

Where there are more than one appeal in the same transcript there should be an undertaking for each appeal. Thus in *Horn v. Volcano Water Co.*,<sup>11</sup> where the notice of appeal was from several orders, only one of which was mentioned in the undertaking, the court said:

"The notice of appeal recites that the plaintiff will appeal from all these orders, but the undertaking only stipulates to answer for the consequences of an appeal from the order granting the writ of assistance. Of course we can only consider the error, if there be any, arising from or involved in this order."

So in *Bornheimer v. Baldwin*<sup>12</sup> the notice of appeal was from the judgment, and from the order refusing a new trial, but the undertaking mentioned the judgment only. The supreme court dismissed the appeal from the order, saying:

lieu thereof. But no bond or deposit shall be required when the appeal is taken by the state, or by a county, city, town or school district thereof, or by a defendant in a criminal action."

<sup>5</sup> *Hill v. Finnigan*, 54 Cal. 493.

<sup>6</sup> See section 223, *post*.

<sup>7</sup> See section 214, *post*.

<sup>8</sup> *Bryan v. Berry*, 8 Cal. 130; and see section 265, *post*.

<sup>9</sup> See section 213, *post*.

<sup>10</sup> See section 212, *post*.

<sup>11</sup> 18 Cal. 141.

<sup>12</sup> 38 Cal. 671.

"The undertaking recites the appeal from the judgment, but no mention is therein made of the appeal from the order. It does not secure the payment of the damages and costs which may be awarded against the appellants on the appeal from the order, but only on appeal from the judgment. There is, therefore, no undertaking on the appeal from the order."

In *People v. Center*<sup>12a</sup> it was held that a single undertaking was insufficient on appeals from parts of two judgments and a special order after final judgment. So in *Sharon v. Sharon*,<sup>12b</sup> it was held that where there were several appeals in the same transcript, each appeal must be accompanied by an undertaking in the sum of three hundred dollars, designating the particular appeal to which it was intended to apply. So in *Centerville etc. Co. v. Bachtold*,<sup>12c</sup> it was held that where an appeal was taken from two or more orders, or the judgment and an order, whether the notice is given by separate notices of appeal or by one instrument, there must be an undertaking in the sum of three hundred dollars for each order or judgment appealed from. So in *Estate of Kasson*,<sup>12d</sup> it was held that an undertaking on appeal must be given in connection with each and every appeal from order or judgment, otherwise the appeal would be unavailing for each and every order or judgment for which the undertaking was omitted. So in *McCormick v. Belvin*,<sup>12e</sup> where the appeal was attempted from the judgment, an order denying a motion to dismiss, and an order denying a motion to set aside the judgment by default, there was a single undertaking, which failed to refer specifically to either of the three appeals. The court held that there was no undertaking at all. So in *Pignaz v. Burnett*,<sup>12f</sup> where the attempted appeal was from the judgment and an order after judgment, the undertaking referred to the judgment alone, making no reference to the order, the appeal from the latter was dismissed. So in a large number of other cases.<sup>12g</sup>

<sup>12a</sup> 61 Cal. 191.

<sup>12b</sup> 68 Cal. 326, 9 Pac. 187.

<sup>12c</sup> 109 Cal. 111, 41 Pac. 813.

<sup>12d</sup> 135 Cal. 1, 66 Pac. 871.

<sup>12e</sup> 96 Cal. 182, 31 Pac. 16.

<sup>12f</sup> 121 Cal. 292, 53 Pac. 633.

<sup>12g</sup> See *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 813; *Home etc. Assn. v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *Berniaud v. Beecher*, 74 Cal. 617, 16 Pac. 510; *Wood v. Pendola*, 77 Cal. 82, 19 Pac. 183; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; *Crew v. Diller*,

86 Cal. 554, 25 Pac. 66; *Pacific Paying Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650; *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983; *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147; *Estate of Heydenfeldt*, 119 Cal. 346, 51 Pac. 543; *Dodge v. Kimple*, 121 Cal. 580, 54 Pac. 94; *Hibernia etc. Soc. v. Freese*, 127 Cal. 70, 59 Pac. 769; *Gardner v. California Guar. etc. Co.*, 129 Cal. 528, 62 Pac. 110; *Carter v. Butte Creek Co.*, 131 Cal. 350, 63 Pac. 667; *Wadleigh v. Phelps*, 147 Cal.

The cases referred to and cited above show that an undertaking cannot apply to several appeals unless each appeal is recited or referred to therein. If each appeal be so recited or referred to and the undertaking be of sufficient amount, all the appeals would be rendered effectual. For there can be no doubt but that several undertakings can be in the same instrument.<sup>12a</sup> But if the amount

135, 81 Pac. 418; *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486, 1027.

There is no difference in principle between the rule requiring an undertaking on appeal for every judgment or order appealed from, whether one or a score are included in the same proceeding, and the rule requiring such an undertaking for each judgment or order, without regard to whether the appeal is from one or from a number. The requirement is jurisdictional, and the statute must be obeyed literally. The cases in support of this principle might be multiplied indefinitely. It is sufficient to note only the leading ones. The supreme court has no jurisdiction of a case on appeal unless an appeal bond, in form as required by statute, or in lieu thereof, an affidavit of inability to give such a bond, be filed in the lower court within the time required by the statute. *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320. A sufficient appeal bond is necessary to give the supreme court jurisdiction. *Deal v. Territory (Ariz.)*, 108 Pac. 476. If the appellant disregards the requirement of the statute concerning an appeal bond, his appeal will be dismissed. *Clelland v. Tanner*, 8 Colo. 252, 7 Pac. 9. And see *Filley v. Cody*, 3 Colo. 221; *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316; *Andre v. Jones*, 1 Colo. 489. The giving of an appeal bond is essential to appellate jurisdiction. *Smithson v. Woodin*, 13 Wash. 709, 43 Pac. 638. Also see *Fuller v. Swan etc. Co.*, 5 Colo. 123. Where the appellant fails to file a proper undertaking on appeal, the supreme court has no jurisdiction. *Washoe etc. Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866. The statute requiring the filing of an undertaking on appeal to render it effectual is mandatory. *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600. The provision requiring the filing of an undertaking on appeal is jurisdictional. *Hibbard v. De*

*Lanty*, 20 Wash. 539, 56 Pac. 34; *Van Dusen v. Kelleher*, 20 Wash. 716, 56 Pac. 35. An undertaking on appeal is essential to the validity of an appeal. *Foresman v. Board of Commissioners*, 11 Idaho, 11, 80 Pac. 1131. Omission to file an undertaking on appeal, by express provision of statute, renders the appeal ineffectual for any purpose. *Johns v. Barnes*, 31 Mont. 426, 78 Pac. 703; *State v. Court*, 32 Wash. 143, 72 Pac. 1040. And see *Hines v. Carl*, 22 Mont. 501, 57 Pac. 88; *Hill v. Cassidy*, 24 Mont. 108, 60 Pac. 811; *Ramsey v. Burns*, 24 Mont. 234, 61 Pac. 129; *Thomas v. Boston etc. Co.*, 34 Mont. 370, 86 Pac. 499, 87 Pac. 972; *State v. Court*, 33 Mont. 119, 82 Pac. 663; *Peran v. Monroe*, 1 Nev. 484; *Gaudette v. Glissan*, 11 Nev. 184; *Spafford v. White River etc. Co.*, 24 Nev. 184, 51 Pac. 115; *Bonnell v. Van Cise*, 8 S. D. 592, 67 N. W. 685; *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001; *McConnell v. Spicker*, 13 S. D. 406, 83 N. W. 435.

<sup>12a</sup> See *People v. Center*, 61 Cal. 191; *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815; *Home etc. Assn. v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *Berniard v. Beecher*, 74 Cal. 617, 16 Pac. 510; *Wood v. Pendola*, 77 Cal. 82, 19 Pac. 183; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; *Williams v. Dennison*, 86 Cal. 430, 25 Pac. 244; *Crew v. Diller*, 86 Cal. 554, 25 Pac. 66; *Pacific Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650; *McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16; *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983; *Centerville etc. Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813; *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Granger v. Robinson*, 114 Cal. 631, 46 Pac. 604; *Estate of Heydenfeldt*, 119 Cal. 346, 51 Pac. 543; *Pignaz v. Burnett*, 121 Cal. 292, 53 Pac. 633; *Dodge v.*

be not sufficient—that is to say, if there be only three hundred dollars to cover the several appeals—it would seem, upon principle, that all of them would not be rendered effectual. But, so far as appeals from judgments and orders on motions for new trial are concerned, it has long been the practice, where the two appeals are in the same notice and in the same transcript, to file but one undertaking in the sum of three hundred dollars. And this practice was sanctioned originally in the case of *Chester v. Bakersfield Town Hall Assn.*<sup>13</sup> The facts in that case were that an appeal from the judgment and an appeal from an order denying a new trial were in the same notice and in the same transcript, and that there was but one undertaking in the sum of three hundred dollars. The court held that this was sufficient, and said: "The practice of filing but one undertaking where appeals are taken, as in this case, both from the judgment and order denying a new trial is about as well settled as any question of that kind can be, and we do not think that it should now be treated as an open one."

It will be observed of this case that it gives no reason in relation to the point, and refers to no previous decision. None has been found, and what the court probably meant was that the practice had prevailed too long to be disturbed.<sup>13a</sup> As above stated, it would seem that the statute intended that each appeal, whether in the same transcript or not, should be secured in the sum of three hundred dollars. But the rule laid down in the case quoted is a convenient one, and it has been followed unvaryingly.<sup>13b</sup> It is neces-

*Kimple*, 121 Cal. 580, 54 Pac. 94; *Hibernia etc. Soc. v. Freese*, 127 Cal. 70, 59 Pac. 769; *Gardner v. California Guar. etc. Co.*, 129 Cal. 528, 62 Pac. 110; *Carter v. Butte Creek Co.*, 131 Cal. 350, 63 Pac. 667; *Estate of Kasson*, 135 Cal. 1, 66 Pac. 871; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171; *White v. Stevenson*, 139 Cal. 531, 73 Pac. 421; *Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418; *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486, 1027.

<sup>13</sup> 64 Cal. 42, 27 Pac. 1104.

<sup>13a</sup> No other reason has ever been given.

<sup>13b</sup> See *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187; *Berniaud v. Beecher*, 74 Cal. 617, 16 Pac. 510; *Webb v. Treascony*, 76 Cal. 621, 18 Pac. 796;

*Wood v. Pendola*, 77 Cal. 82, 19 Pac. 183; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; *Williams v. Dennison*, 86 Cal. 430, 25 Pac. 244; *Crew v. Diller*, 86 Cal. 554, 25 Pac. 66; *Pacific Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650; *Granger v. Robinson*, 114 Cal. 631, 46 Pac. 604; *Dodge v. Kimple*, 121 Cal. 580, 54 Pac. 94; *Estate of Kasson*, 135 Cal. 1, 66 Pac. 871; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171; *White v. Stevenson*, 139 Cal. 531, 73 Pac. 421; *Martin v. De Ornelas*, 139 Cal. 41, 72 Pac. 440; *Buchner v. Malloy*, 152 Cal. 484, 92 Pac. 1029.

Also *Eddy v. Van Ness*, 2 Idaho, 93 (101), 6 Pac. 1115; *Cronin v. Bear Creek etc. Co.*, 2 Idaho, 1146; 3 Idaho, 438, 32 Pac. 53; *Vane v. Towle*, 5



sary, however, as above shown, that each appeal should be recited or referred to in the undertaking.<sup>13a</sup> As to whether the several appeals referred to should be included in one or a number of notices of appeal, or as to whether they should be incorporated in one or several transcripts, has not been specifically determined. It would seem, however, that the several appeals may be taken by a single notice, or a notice for each appeal, as desired, and it may be suggested that separate transcripts would increase the cost.

It is clear that the rule laid down in *Chester v. Bakersfield etc. Assn.*, above cited, applies solely to appeals from the judgment and the new trial order. If one undertaking be sufficient for an appeal from the judgment and an appeal from the order denying a new trial, it is not easy to see why it should not be sufficient for any other two appeals by the same party in the same case. But the practice has been confined to the cases mentioned, and has not been permitted to go beyond them.<sup>14</sup> In one case, indeed, it was not even allowed to extend to an appeal from the judgment and an order *dismissing* a motion for a new trial, notwithstanding the practical identity of such an order with one denying the motion.<sup>14a</sup>

An appellant will not be permitted to elect the appeal to which an undertaking which does not refer to any particular appeal shall be deemed to apply to, nor will he be permitted to file a new undertaking in the appellate court.<sup>15</sup>

Idaho, 471, 50 Pac. 1004; Idaho etc. Co. v. Lundstrum, 9 Idaho, 257, 74 Pac. 975; Watkins v. Morris, 14 Mont. 354, 36 Pac. 542; Ramsey v. Burns, 24 Mont. 234, 61 Pac. 129; Nolan v. Montana etc. Co., 24 Mont. 327, 61 Pac. 880; Robinson v. Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; Gassert v. Strong, 38 Mont. 18, 98 Pac. 497; Kaufman v. Cooper, 38 Mont. 6, 98 Pac. 504, 1135.

<sup>13a</sup> See *Berniand v. Beecher*, 74 Cal. 617, 16 Pac. 510; Wood v. Pendola, 77 Cal. 82, 19 Pac. 183; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94; Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029.

Also *Mathison v. Leland*, 1 Idaho, 712; *Motherwell v. Taylor*, 2 Idaho, 148 (139), 9 Pac. 417; *Hoskins v. Wooden*, 4 Idaho, 292, 38 Pac. 933; *Schiller v. Small*, 4 Idaho, 422, 40 Pac. 53; *Weil v. Sutter*, 4 Idaho, 748, 44 Pac. 555; *Kelly v. Leachman*, 5 Idaho, 521, 51 Pac. 407; *Wallace v. McKinlay*, 6 Idaho, 95, 53 Pac. 104; *Baker v. Oregon etc. Co.*, 8 Idaho, 36, 66 Pac. 806; *Thum v. Bailey*, 12 Idaho, 510, 86 Pac. 279; *McCoy v. Oldham*, 1 Idaho, 465; *Sebree v. Smith*, 2 Idaho, 357 (327), 16 Pac. 477; *Hurley v. O'Neill*, 24 Mont. 293, 61 Pac. 658; *Threlkeld v. O'Neal*, 26 Mont. 209, 66 Pac. 940; *Woelffen v. Lewiston etc. Co.*, 49 Wash. 405, 95 Pac. 493.

<sup>14</sup> See citations in 13b and 13c, *supra*.

<sup>14a</sup> *Biagi v. Howes*, 63 Cal. 384.

<sup>15</sup> As to which see section 214, *post*. And see below.

Undertakings designed to perfect appeals from two or more orders, or a judgment and one or more orders, must refer to the several appeals with sufficient clearness to escape ambiguity, and it is well settled that failure in this respect results in an ineffective appeal. The ambiguity most often observed in this connection is the use of phraseology of so general a character as to be applicable to any one of the several appeals, or to all together, in a three hundred dollar undertaking. Thus, where there was an attempted appeal from the judgment and from an order, and the three hundred dollar undertaking referred generally to "the appeal," without specifying which appeal was meant, conceding that it could not refer to both, it was held so ambiguous that it could not be deemed to refer to either, and since the amount was insufficient to perfect both appeals, both were dismissed.<sup>16</sup> So where there were several orders and the judgment noticed for appeal, and the undertaking was for three hundred dollars only, it was held that a reference generally to "such appeal" and "said appeal" was so ambiguous as to be ineffective as to either.<sup>17</sup> So in other cases.<sup>18</sup>

The rule here stated is not affected by the question of appealability or nonappealability of the orders themselves, or either of them. As above stated, the appellant will not be permitted to elect the particular order to which the undertaking may be applied. Nor will it be presumed that the undertaking applies to the appealable order, if there be one. Such presumption would depend upon the nonappealability of all the orders save one, and the question of the appealability of an order cannot be considered until the statutory appeal has been perfected. It cannot be considered without going into the record, and the appellate court is without authority to go into the record of an abortive appeal.<sup>19</sup>

<sup>16</sup> See *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815.

<sup>17</sup> See *People v. Center*, 61 Cal. 191.

<sup>18</sup> See *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187; *Home etc. Assn. v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16; *Estate of Heydenfeldt*, 119 Cal. 346, 51 Pac. 543; *Carter v. Butte Creek Co.*, 131 Cal. 350, 63 Pac. 667.

Also *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697; *Thum v. Bailey*, 12 Idaho, 510, 86 Pac. 279; *Wallace v. McKinlay*, 6 Idaho, 95, 53 Pac. 104; *Richter v. Eagle etc. Assn.*, 24 Mont. 346, 61 Pac. 878; *Murphy v. Northern*

*Pacific etc. Co.*, 22 Mont. 577, 57 Pac. 278; *Pirrie v. Moule*, 33 Mont. 1, 81 Pac. 390; *In re Kappler's Estate*, 38 Mont. 419, 100 Pac. 228; *Creek v. Bozeman etc. Co.*, 22 Mont. 327, 56 Pac. 362; *In re Barker's Estate*, 26 Mont. 279, 67 Pac. 941; *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533; *Sebree v. Smith*, 2 Idaho, 327 (357), 16 Pac. 477; *Washoe etc. Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866; *Grage v. Paulson*, 23 Mont. 337, 59 Pac. 1; *Faust v. Rustler etc. Co.*, 34 Mont. 368, 86 Pac. 421; *Deal v. Territory (Ariz.)*, 108 Pac. 476.

<sup>19</sup> See *Centerville etc. Co. v. Bach-told*, 109 Cal. 111, 41 Pac. 813; *Estate*

A single undertaking is sufficient in a single appeal, no matter how many appellants there are.<sup>20</sup> But it is essential that both the notice and the undertaking should specify that the appeal is taken by both or all the appellants, and the undertaking should follow the notice in referring to the appeal in this respect in order to avoid ambiguity. Thus in *Zane v. De Onativia*,<sup>21</sup> the notice of appeal from the judgment was signed by both appellants, but the undertaking perfected only one appeal. The appeal of the other coappellant was dismissed. The notice of appeal from the new trial order was signed by one appellant only, while the undertaking purported to perfect an appeal by both. The appeal was dismissed as to both. The court held that the sureties were not bound, inasmuch as the appeal had never been properly taken. For the same reason section 954 was held inapplicable.

An undertaking for another purpose, as to stay proceedings in the lower court, cannot take the place of the undertaking on appeal.<sup>22</sup>

For instances of sufficient undertakings under the above rules see the note.<sup>23</sup>

Both sections 940 and 941, Code of Civil Procedure, make provision for a money deposit in lieu of the undertaking on appeal.

of *Heydenfeldt*, 119 Cal. 346, 348, 51 Pac. 543.

See section 272, *post*, as to dismissal of abortive appeals. The statement here made relative to the consideration of the appealability or nonappealability of orders in connection with motions to dismiss for failure to perfect an appeal is apparently at variance with the rule of *Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418, and *Williams v. Dennison*, 86 Cal. 430, 25 Pac. 244. It was there held that an appeal from the judgment and from a number of separately specified orders, all of which were reviewable on the appeal from the judgment and not separately reviewable at all, and would be so reviewed on appeal from the judgment whether separately specified or not, was no more than an appeal from the judgment, and the noticing of the orders as the subject of separate appeals was mere surplusage; and, therefore, a single undertaking for three hundred dollars was sufficient to perfect the appeal. While it appears that the appealability of these

orders were under consideration, yet it is to be noted that there was in fact a motion to dismiss on the ground of nonappealability, and it was denied because the court declined to do the vain thing of dismissing an appeal from an order that would be reviewed by the court in any event, and without any change of record whatever.

<sup>20</sup> See section 17, California Code of Civil Procedure. Also see *Downing v. Rademacher*, 136 Cal. 673, 69 Pac. 415; *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486, 1027.

<sup>21</sup> 135 Cal. 440, 67 Pac. 685.

<sup>22</sup> *Duffy v. Greenebaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323. To same effect, see *Biagi v. Howes*, 63 Cal. 384, and *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815.

<sup>23</sup> *Moyle v. Landers*, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *McAuley v. Tahoe Ice Co.*, 3 Cal. App. 642, 86 Pac. 912; also *Martin v. De Ornelas*, 139 Cal. 41, 72 Pac. 440.

Section 940 provides for such deposit "to be made with the clerk, as hereinafter provided"; and section 941 makes the provision referred to in the following language: ". . . or that sum (three hundred dollars) must be deposited with the clerk with whom the judgment or order was entered to abide the event of the appeal." The deposit must be made within the time prescribed for filing the undertaking.<sup>24</sup> It cannot be withdrawn and an undertaking filed in its place after the time to file such undertaking in the first instance.<sup>25</sup>

The code also makes provision for money deposit in lieu of undertaking on appeal from justices' courts.<sup>26</sup>

**§ 212. Time in Which Undertaking must be Filed.**—The act of 1851 required the undertaking to perfect the appeal to be filed within five days after the *filing* of the notice of appeal.<sup>1</sup> This provision stood until the adoption of the Code of Civil Procedure. The code as first enacted required the undertaking to be filed *at the time* of the filing of the notice. In 1874 the code was amended so as to require the undertaking to be filed within five days after *the service* of the notice. Since that time there has been no change.<sup>2</sup>

<sup>24</sup> Stratton v. Graham, 68 Cal. 168, 8 Pac. 710.

On the subject of a money deposit, or its equivalent, in lieu of an undertaking on appeal, the following citations are of interest:

The clerk may accept a certificate of deposit: *Alt v. California etc. Co.*, 18 Nev. 423, 4 Pac. 743.

See the following: *In re McVay's Estate*, 14 Idaho, 56, 64, 93 Pac. 28; *In re Sullivan's Estate*, 25 Wash. 430, 65 Pac. 793.

<sup>25</sup> *Wiebold v. Rauer*, 95 Cal. 418, 30 Pac. 558. See, also, *Mullen v. Hunt*, 67 Cal. 69, 7 Pac. 121, which was an appeal from a justice's court. The superior court permitted the withdrawal of the money deposit and the filing of an undertaking in its place after the time prescribed; but the supreme court held that inasmuch as the court was without jurisdiction to make an order of this description, such withdrawal must be taken to have been voluntary, and an abandonment of the appeal.

<sup>26</sup> See sections 926 and 978, California Code of Civil Procedure. Also *Mullen v. Hunt*, 67 Cal. 69, 7 Pac. 121,

and *Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401. In this last-cited case the supreme court, in passing upon the contention that a money deposit was not authorized, did so on the merits of the proposition, aside from the doctrine stated in *Buckley v. Superior Court*, 96 Cal. 119, 1 Pac. 8, at least by inference. that the superior court has the power to determine for itself its appellate jurisdiction.

<sup>1</sup> Laws of 1851, p. 106, sec. 348.

<sup>2</sup> See the several provisions as quoted in section 206, *ante*.

In Arizona the notice must be given during the term, but the undertaking may be filed within twenty days after adjournment. *Hand v. Ruff*, 3 Ariz. 175, 24 Pac. 257.

In Colorado the undertaking must perforce follow the notice, inasmuch as the time for filing the former lies in the discretion of the court, and the exercise of this discretion must necessarily follow the allowance of the appeal, which, in turn, must follow notice.

The Idaho, Montana and Nevada statutes require the filing of the undertaking within five days after, in

In one reported case it was held that under the code as amended in 1874 it was necessary that the undertaking should be filed within the time in which an appeal might be "taken."<sup>3</sup> This, however, was taken back on rehearing and the contrary doctrine asserted.<sup>4</sup>

The requirement that the undertaking for costs and damages must be filed within the time prescribed by statute is imperative. If it be not so filed, the appeal will be dismissed.<sup>5</sup>

Before 1861 the time could not be extended,<sup>6</sup> but in that year "undertakings to be filed" were enumerated among the acts for the performance of which the time could be extended;<sup>7</sup> and this provision has been in the section ever since.<sup>8a</sup>

the two first named, the service, and in Nevada, the filing of the notice of appeal. In Washington the time for filing the undertaking is "at or before the time when the notice of appeal is given or served, or within five days thereafter."

In Oregon the time for serving the undertaking is fixed at ten days "from the giving of notice or service of notice of appeal," and thereupon, "within ten days shall file the original . . . with proof of service indorsed thereon with the clerk. . . ."

<sup>3</sup> *Holecomb v. Sawyer*, 51 Cal. 417.

<sup>4</sup> *Lowell v. Lowell*, 55 Cal. 316.

<sup>5</sup> *Boyd v. Burrell*, 60 Cal. 280; *Shaw v. Randall*, 15 Cal. 384; *Elliott v. Chapman*, 15 Cal. 383; *Lowell v. Lowell*, 55 Cal. 316; *Reed v. Kimball*, 52 Cal. 325; *Biagi v. Howes*, 63 Cal. 384; *Stratton v. Graham*, 68 Cal. 168, 8 Pac. 710 (money deposit); *Duffy v. Greenbaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323; *Wadsworth v. Wadsworth*, 74 Cal. 104, 15 Pac. 447; *Jennens v. Bowen*, 77 Cal. 310, 19 Pac. 522; *Bellegarde v. S. F. Bridge Co.*, 80 Cal. 61, 22 Pac. 57; *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411; *Woodside v. Hewel*, 107 Cal. 141, 40 Pac. 103; *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998; *Estate of Marshall*, 118 Cal. 379, 50 Pac. 540; *Springer v. Springer*, 126 Cal. 452, 58 Pac. 1060; *Hibernia etc. Soc. v. Freese*, 127 Cal. 70, 59 Pac. 769; *Stackpole v. Hermann*, 126 Cal. 465, 58 Pac. 935; *Hoyt v. Stark*, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; *Rose v. Mesmer*, 134 Cal. 459, 66 Pac. 594; *Schlosser v. Owen*, 134 Cal.

546, 66 Pac. 726; *San Francisco etc. Co. v. State of California*, 141 Cal. 354, 74 Pac. 1047; *Buhman v. Nickels*, 1 Cal. App. 266, 82 Pac. 85; *Rauer's etc. Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214; *Continental etc. Assn. v. Beaver*, 6 Cal. App. 116, 91 Pac. 666.

Also *Hunt v. Seattle etc. Co.*, 3 Wash. 787, 29 Pac. 763, where it was held that the failure to file the undertaking within the statutory time was fatal, even though such failure was due to the omission of the attorney's clerk. Also *Brown v. Hanley*, 2 Idaho, 950, 3 Idaho, 219, 28 Pac. 425; *Hines v. Carl*, 22 Mont. 501, 57 Pac. 88; *Spafford v. White River etc. Co.*, 24 Nev. 184, 51 Pac. 115; *Grunewald v. West Coast etc. Co.*, 10 Wash. 691, 38 Pac. 1011; *Laurendeau v. Fugeli*, 16 Wash. 367, 47 Pac. 759; *Cole v. Fox*, 13 Idaho, 123, 88 Pac. 561; *Main etc. Co. v. Olsen*, 43 Wash. 480, 86 Pac. 657; *Terminal Co. v. Lowenburg*, 11 Or. 286, 3 Pac. 683; *Hunt v. Seattle etc. Co.*, 3 Wash. 787, 29 Pac. 763; *Hand v. Ruff*, 3 Ariz. 175, 24 Pac. 257; *Haas v. Teters*, 17 Idaho, 550, 106 Pac. 305.

<sup>6</sup> *Elliott v. Chapman*, 15 Cal. 383. This case seems to overrule the case of *Bradley v. Hall*, 1 Cal. 199.

<sup>7</sup> *Laws of 1861*, p. 591.

<sup>8a</sup> Section 1054, California Code of Civil Procedure. See *Wadsworth v. Wadsworth*, 74 Cal. 104, 15 Pac. 447, where it was held that under section 1054 the time for filing the undertaking might be extended, and that if the undertaking should be filed within the time as extended, it would be sufficient.

Under the old Practice Act it was well settled that the undertaking could not be filed *before* the filing or service of the notice of appeal. That it could not be filed before the filing of the notice was held in *Buckholder v. Byers*.<sup>7b</sup> In that case the undertaking was filed more than a month before the filing of the notice. Upon motion the appeal was dismissed, and Field, J., delivering the opinion, said:

"Until an appeal is taken there is nothing to give effect to the undertaking. If an appeal could be rendered effectual by an undertaking filed one month previously, it might be by an undertaking filed at any time previously within a year. And the undertaking, if of sufficient amount, must operate, if at all, to stay proceedings, and it would thus often happen that a stay would be obtained for the entire period during which an appeal is allowed, and no appeal in fact ever be taken."

This case was approved and followed in *Dooling v. Moore*,<sup>8</sup> and in *Carpentier v. Williamson*.<sup>9</sup> It was held that the notice could not be served after the filing of the undertaking, which is equivalent to saying that the undertaking cannot be filed before the service of the notice. In *Hewes v. Carville Mfg. Co.*,<sup>10</sup> however, it was held that the doctrine of the above case did not apply under the code as amended in 1874. That case is to the effect that the only statutory requirement as to the filing of the undertaking is that it shall be within five days after the service of the notice of appeal, and that since the code permits the service of the notice to be an indefinite number of days before its filing, it may happen that the filing of the undertaking takes place before the filing of the notice of appeal. The proposition, however, upon which the case turns, that the notice of appeal may be served an indefinite number of days before it is filed is an impracticable premise, to say the least, since there can be no advantage, but rather the contrary, to the appellant to withhold his notice of appeal, after filing, a single day. Until the notice is both served and filed there can be no need for an undertaking, for whatever advantage may accrue from an appeal is postponed until the appeal is "taken."

See, also, *Schloesser v. Owen*, 134 Cal. 546, 66 Pac. 726.

The order extending the time is ineffectual unless filed in the clerk's office within the time limited. *Rauer's etc. Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214.

<sup>7b</sup> 10 Cal. 481.

<sup>8</sup> 19 Cal. 81.

<sup>9</sup> 24 Cal. 609.

<sup>10</sup> 62 Cal. 516. See section 210, *ante*.

However this may be, there is no question as to the correctness of the rule. In its present form section 940, by specific language, leaves no room for distinctions as to the time for filing the undertaking. Whenever the notice may be filed or served, or whatever order may have been followed in such filing and service, the undertaking, unless waived, or the time for filing extended, must be placed on file within five days after the notice is served. If filed after the expiration of this prescribed time the undertaking, as above stated, is ineffectual, and the appeal will be dismissed. It is equally ineffective if filed before the notice is served.<sup>11</sup> The adverse party is not called upon to watch the clerk's office before the notice is served upon him, any more than he is called upon to watch it after the expiration of the five day period thereafter.<sup>12</sup>

Inasmuch as the respondent is entitled to an undertaking sufficient both in form and in fact, whatever affects the validity of the undertaking filed may be set up as ground for dismissing the appeal. The undertaking must so far bind the sureties that the respondent will not be required to assert an estoppel *in pais* for the purpose of rendering the guaranty available. It is for this chief reason that an undertaking prematurely filed has been held to be unavailing. In *Clarke v. Mohr*,<sup>13</sup> the undertaking was prepared on an appeal from the judgment, and pending a motion for a new trial. The undertaking was, presumably on second thought, arranged to perfect an appeal from the new trial order, when the

<sup>11</sup> *Little v. Jacks*, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128; *Clarke v. Mohr*, 125 Cal. 540, 58 Pac. 176; *Stackpole v. Hermann*, 126 Cal. 465, 58 Pac. 935; *Hibernia etc. Soc. v. Freese*, 127 Cal. 70, 59 Pac. 769.

An undertaking on appeal filed two days before filing the notice of appeal is of no effect. *Alvord v. McGauhy*, 4 Colo. 97. In order to preserve the rights given him by the code, allowing thirty days to except to the sufficiency of the sureties, service of the notice of appeal must precede or be simultaneous with the filing of the undertaking. *Cody v. Filley*, 4 Colo. 342. Also *Wilson v. Bartlett*, 7 Idaho, 269, 62 Pac. 415.

The Washington statute, however, expressly authorizes the filing of the undertaking prior to notice of appeal. See note 2, *supra*; and *Runyan v. Russell*, 3 Wash. 665, 29 Pac. 348; *Laur-*

*endeau v. Fugelli*, 16 Wash. 367, 47 Pac. 759; *Ayars v. O'Connor*, 45 Wash. 132, 88 Pac. 119; and see *Shannon v. Consolidated etc. Co.*, 24 Wash. 119, 64 Pac. 169.

And see *Wores v. Preston*, 4 Ariz. 92, 77 Pac. 617.

<sup>12</sup> See *Hoyt v. Stark*, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223.

<sup>13</sup> 125 Cal. 540, 58 Pac. 176. The entire undertaking was not invalidated by the want of consideration and the interlineation, but only the liability with respect to the new trial order. The undertaking as to the appeal from the judgment was upheld. See, also, *Stackpole v. Hermann*, 126 Cal. 465, 58 Pac. 935, where an undertaking executed prior to the entry of the new trial order, to the appeal from which it purported to relate, was held to be without consideration and void.



latter should be rendered and entered, by interlineation, leaving only the date of the order blank. The instrument was thereupon executed in that form. After entry of the new trial order the date of the latter was incorporated in the undertaking. On a motion to dismiss, in which these facts were set up, the supreme court held that the undertaking was not only without consideration as to the new trial order, as not being based upon an existing order when executed, but because of the interlineation of the date in an executed instrument the liability of the sureties was avoided.

While the execution of the undertaking prior to the entry of the judgment or order appealed from results in an ineffectual appeal, the fact of execution prior to service of notice of appeal does not have a like result; provided, the filing takes place after and within five days after, such service.<sup>14</sup>

When the notice is served by mail, the service is complete when the copy thereof is deposited in the postoffice. The undertaking must therefore be filed within five days after such deposit.<sup>15</sup>

Section 12, Code of Civil Procedure, as to computation of time and the sections of the same code with respect to holidays, are applicable here as elsewhere. When the last day for filing an undertaking falls on Sunday, an undertaking filed on the following day is in time.<sup>16</sup>

The process of filing the undertaking consists in a delivery thereof to the clerk, or a deputy, at his office, during office hours, and

<sup>14</sup> *Stackpole v. Hermann*, 126 Cal. 465, 58 Pac. 935. If the undertaking is executed after service of one notice of appeal, and prior to the service of another notice, it will be deemed to refer to the appeal first noticed, even though, but for the discrepancy in the time of service, it might refer to either. In other words, an undertaking which definitely refers to an appeal already on file at the time it is executed will not be wrested from its plain meaning, perfecting an appeal to which it properly refers, and made to refer to another appeal which was not on file when it was executed, and so rendered ambiguous and ineffectual. See *Hibernia etc. Soc. v. Freese*, 127 Cal. 70, 59 Pac. 769. The date of the affidavit is presumptively the date of the execution of the instrument. *Stackpole v. Hermann*, *supra*.

And, as similar in principle, see *Byers v. Cook*, 13 Or. 297, 10 Pac.

417; *Zienke v. Northern Pacific Co.*, 7 Idaho, 746, 65 Pac. 431; *Paul v. Cragnaz*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.

<sup>15</sup> *Brown v. Green*, 65 Cal. 221, 3 Pac. 811. The provision of section 1013, Code of Civil Procedure, as to the extension of one day's time for each twenty-five miles intervening between the place of posting and that of delivery, for the doing of an act or the exercise of a right which relates to such notice, is without application here. The right to be exercised is the right to except to the sureties, and that relates to the undertaking and not to the notice, to the respondent and not to the appellant.

<sup>16</sup> *Jenness v. Bowen*, 77 Cal. 310, 19 Pac. 522. Also *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998.



within the five days after service of notice as prescribed by law. Filing cannot take place elsewhere than in the office of the clerk, nor before nor after the prescribed time. Any variation from this process which substantially affects the right of the respondent will result in an ineffectual appeal. In *Hoyt v. Stark*,<sup>17</sup> the appellant's attorney, after office hours on the last day for filing, handed the undertaking to a deputy clerk, not at the office but at his club, where the deputy was found after search, with an explanation of the facts. The deputy clerk took the undertaking, indorsed thereon the usual filing record as of that date, and put it in his pocket. He did not go to the office and deposit the instrument in the proper filing box or enter it in the appropriate register. At 9 o'clock on the following morning respondent's attorney went to the clerk's office and searched the files and examined the register for an undertaking, but without success, of course. Afterward, the deputy clerk arrived at the office, placed the undertaking in its proper file-box and another deputy entered it in the register kept for the purpose. The supreme court held the filing too late; that delivery to the deputy elsewhere than at the office, and after office hours, was not such a filing as the law contemplates; that the adverse party is not required to watch the clerk's office longer than the prescribed five days. The court further suggested that if the attorney for appellant had procured the deputy clerk to go with him to the office, and there file the undertaking, and make the formal registration, it would have been held sufficient, although after office hours, under the rule that fractions of a day are disregarded. Under such conditions, respondent's attorney would have found the undertaking on file when he visited the office, and of the date of the day before. Under the circumstances, having failed to find the undertaking at 9 o'clock on the sixth day, he was under no further obligation to keep further watch on the clerk's office. The time for excepting to the sureties might well have expired without his knowledge and, therefore, to hold an undertaking so filed sufficient would manifestly prejudice his rights.

On appeal from an order changing the place of trial the undertaking as well as the notice must be filed in the office of the clerk

<sup>17</sup> 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223. And see *Boyd v. Burrell*, 60 Cal. 280. Also *First National Bank v. Hatfield*, 20 Wash. 224, 54 Pac. 1135. where, owing to an inadvertence, the clerk's filing fee was

not paid, and the undertaking was not marked "filed" until after the lapse of the statutory time. The undertaking was held, notwithstanding the failure to mark the paper with the filing mark, to have been in time.

of the superior court where the order was made, and not of that to which the cause was transferred.<sup>18</sup>

§ 212a. **Waiver of Undertaking.**—" . . . In all cases the undertaking or deposit may be waived by the written consent of the respondent."<sup>1</sup> The legal effect of this provision of the code is that the undertaking cannot be waived otherwise than in writing. The only question that has ever arisen, in this connection, is as to the effect of stipulations which do not, in express terms, waive the undertaking, but which are claimed to have that effect—chiefly on the ground of estoppel. Thus in *Little v. Jacks*,<sup>2</sup> the question was whether the stipulation to advance the appeal on the calendar was such a waiver. The supreme court held that it was not. So, in *Forni v. Yoell*,<sup>3</sup> a stipulation in writing that the appellant had in due time given and filed a good and sufficient undertaking on appeal in the cause did amount to an affective waiver. So in *Estate of Marshall*,<sup>4</sup> a stipulation "that an undertaking in due form was properly made and filed on behalf of said legatees and devisees in said action within five days after service and filing of said notice of appeal," was held to be a waiver of a defective undertaking. So in *Gardner v. California etc. Co.*,<sup>5</sup> the supreme court held that

<sup>18</sup> *Mansfield v. O'Keefe*, 133 Cal. 362, 65 Pac. 825.

<sup>1</sup> Section 940, California Code of Civil Procedure, provides: " . . . the appeal is ineffectual for any purpose unless within five days after service of notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, *or the undertaking be waived by the adverse party in writing.*"

Section 948 of the same code provides that " . . . in all cases the *undertaking or deposit may be waived by the written consent of the respondent.*"

Similar provisions are to be found in sections 4808 and 4816, Revised Codes of Idaho; sections 7100 (section 1724, Code of Civil Procedure) and 7108 (section 1732, Code of Civil Procedure), Revised Codes of Montana; section 3443, Cutting's Compiled Laws of Nevada (section 348, Civil Practice); sections 7205 and 7207, Revised Codes of North Dakota; section 550, subdivision 2, Lord's Oregon Laws.

<sup>2</sup> 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

<sup>3</sup> 99 Cal. 173, 33 Pac. 887. Also *Bonds v. Hickman*, 29 Cal. 460, and *Carey v. Brown*, 58 Cal. 180.

<sup>4</sup> 118 Cal. 379, 50 Pac. 540. See, also, *Springer v. Springer*, 126 Cal. 453.

<sup>5</sup> 129 Cal. 528, 62 Pac. 110. But see *Mitchell v. Board of Education*, 137 Cal. 372, 70 Pac. 180, where the appellant board, relying upon the provisions of section 1058, Code of Civil Procedure, to relieve it of the necessity of giving the undertaking, did not give one. The court held that a stipulation extending the time to file points and authorities did not operate as a waiver of the undertaking, it being a case, not of a defective undertaking, but of none at all. See, also, the cases cited in this decision.

The following decisions illustrate the principles upon which the courts have dealt with the subject of waiver of undertakings: In *Seattle etc. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567, it was held that a failure to make the statutory motion to discharge a defective appeal bond was (in effect) a waiver of the objection. So in

an undertaking so defective as to justify dismissal of an appeal under the rule laid down in *Centerville etc. Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813, might be waived. In that case there were two separate appeals, which were attempted to be perfected by a single undertaking, but there was no reference to either appeal. The respondent stipulated for time to file points, and kept silent as to the objection above referred to until it was too late to take and perfect an appeal from the judgment, by which the errors complained of might have been reviewed, although it was not too late to take and perfect such appeal at the time the stipulation to extend the time to file points was entered into. The supreme court held that the respondent was estopped to raise the objection.

Aside from the question of estoppel, however, it is probable that stipulations to be effective must express or clearly imply the intent to waive the right to demand a good and sufficient undertaking.

Failure to file the undertaking as required by the statute cannot be cured by waiver of such undertaking after the time for taking the appeal has expired.\*

*McEachern v. Brackett*, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690, it was held that the failure to except to a defective affidavit attached to the undertaking, in the trial court, was waiver thereof. But this is no more than saying that the sufficiency of the affidavit of a surety cannot be questioned for the first time on appeal, but the statute makes express provision for raising such questions in the lower court. *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140. Or that justification of sureties must be in lower court. *Frew v. Clark*, 34 Wash. 561, 76 Pac. 85; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95.

It was contended in *Savage v. Graham*, 14 Wash. 323, 44 Pac. 540 (dissenting opinion), that the failure of the respondent to object to proceeding with the prosecution of an appeal after the appellant had allowed the time to pass without filing his undertaking on appeal was a waiver of such want of undertaking, but the majority of the court held that it was ground for dismissal, as being a jurisdictional prerequisite. A similar ground was taken by the court in *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600, in response to a similar contention.

See, also, the following: *Vowell v. Taylor*, 8 Okl. 625, 58 Pac. 944; *Roberts v. Shelton etc. Co.*, 21 Wash. 427, 58 Pac. 576; *Engel v. Atkinson*, 18 Colo. App. 267, 71 Pac. 683; *West v. Dygert*, 13 Idaho, 641, 92 Pac. 753.

The right of the respondent to waive the undertaking is unquestioned. *Hoagland v. Hoagland*, 18 Utah, 304, 54 Pac. 978. Hence, stipulations of waiver are always recognized. See, as to stipulations, *Pearson v. Ashley*, 5 Wash. 169, 31 Pac. 410; *Hoffman v. Owens*, 31 Nev. 481, 103 Pac. 414, 104 Pac. 241.

\* *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; and look at *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411.

The use of the phrase "taking the appeal" is perhaps somewhat a loose form of expression, though made use of in the report of the case cited. The same phraseology was used with respect to waiver of notice in the paragraph immediately preceding. Doubtless it was intended to refer to the time for perfecting the appeal, that is, waiver could not cure the want of an undertaking, or a defective undertaking, after the expiration of the five-day period after service of the notice.

**§ 213. Contents of Undertaking.**—The requirement of the old Practice Act was that the undertaking should be “to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal not exceeding three hundred dollars.”<sup>1</sup> The Code of Civil Procedure contains the same provision with the addition of the words “or on a dismissal thereof” after the words “on the appeal.”<sup>2</sup>

In one case it was said that the design of the statute was “to put an undertaking on the same footing as a bond.”<sup>3</sup> But it is not necessary that the principal should execute the undertaking;<sup>4</sup> and it is not customary to make the undertaking in the form of a bond with a condition, although in all probability such form would be held sufficient. The practice is to make the undertaking in the form of a contract, by which the sureties “undertake and promise” to the effect required by the statute. The statute seems to contemplate a joint promise. The instrument need not be sealed.<sup>5</sup> The undertaking to perfect the appeal may be in the same instrument with the other undertakings.<sup>6</sup> And if the instrument contain the required condition, and is for three hundred dollars or upward, it will render the appeal effectual, although it was intended also to effect a stay of execution but is insufficient for that

<sup>1</sup> Laws of 1851, p. 106, sec. 348.

<sup>2</sup> Section 941, California Code of Civil Procedure.

<sup>3</sup> Canfield v. Bates, 13 Cal. 606.

<sup>4</sup> Curtis v. Richards, 9 Cal. 33; Tissot v. Darling, 9 Cal. 285; City of Sacramento v. Dunlap, 14 Cal. 421; Murdock v. Brooks, 38 Cal. 596.

Also Drouilhat v. Rottner, 13 Or. 493, 11 Pac. 221 (but see Drouilhat v. Schmidt (Or.), 9 Pac. 67); Dahl v. Tibbals, 5 Wash. 259, 31 Pac. 868; Cody v. Filley, 4 Colo. 342; Byers v. Gilmore, 10 Colo. App. 79, 50 Pac. 370; Russell v. Chicago etc. Co., 37 Mont. 1, 94 Pac. 488, 501; Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94. Signature of surety alone is sufficient. Fidelity etc. Co. v. Seattle etc. Co., 50 Wash. 391, 97 Pac. 453.

An attorney may affix the names of the appellants to the undertaking

on appeal. Pennsylvania etc. Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246; Hill Estate Co. v. Whittlesey, 21 Wash. 142, 57 Pac. 345; De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795; and see, as deciding the same principle, Spokane etc. Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; Cook v. Tibbals, 12 Wash. 207, 40 Pac. 935.

But the sureties must sign, or, at least, their names as sureties must appear in the body of the bond, and their signatures appear in the affidavits attached thereto. Yakima etc. Co. v. Yakima National Bank, 18 Wash. 377, 51 Pac. 471; Wenatchee etc. Co. v. Thompson, 60 Wash. 643, 111 Pac. 874.

<sup>5</sup> Section 1629, California Civil Code.

<sup>6</sup> Section 947, California Code of Civil Procedure; old Practice Act, sec. 354.

purpose.<sup>7</sup> It may be good for one purpose and bad as to the other.<sup>8</sup> But an undertaking filed for another purpose, as to stay proceedings, cannot take the place of the undertaking on appeal.<sup>9a</sup>

Mere defects of form, not going to the substance of the undertaking, are usually disregarded. At the most, such defects but render the instrument "insufficient" within the meaning of section 954, Code of Civil Procedure. Thus an undertaking is not ineffectual because of a mistaken indorsement of the title of the cause, if it is otherwise in due form.<sup>9b</sup> Nor because of an obvious mistake in the date of the judgment, if it is otherwise sufficiently described so as to bind the sureties.<sup>9c</sup> Nor because of a mistake in appellant's Christian name, where the case was properly entitled by number, court and department, and the judgment and order were properly and correctly described.<sup>9d</sup> Nor because of the omission of a payee in the undertaking.<sup>9e</sup> Nor because the undertaking states that appellant "is about to appeal" instead of that he "has appealed."<sup>9f</sup> Nor because the undertaking specified the appeal as being from the

<sup>7</sup> Zoller v. McDonald, 23 Cal. 136; look at Ward v. Supr. Ct., 58 Cal. 519.

A single instrument may embrace both appeal and *supersedeas* or stay undertakings or bonds. This is the inevitable conclusion from the form and effect of most statutes upon the subject. The phrase with reference to undertakings on appeal, "it does not stay the execution," or "shall not stay proceedings" unless a written undertaking, etc., is found in most statutes, and means, clearly, that the two forms of undertakings may be appropriately combined; and such is the almost universal practice. See Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426.

That an undertaking intended for both purposes sometimes fails of one or the other, and, if so, will be accepted as effective for the purpose accomplished, was held in the following decisions: Sumner v. Rogers, 21 Wash. 361, 58 Pac. 214; State v. Pendergast, 39 Wash. 132, 81 Pac. 324; Douglas v. Badger etc. Mine, 41 Wash. 266, 83 Pac. 178, 4 L. R. A., N. S., 196; Douglas v. La Rica etc., 41 Wash. 699, 83 Pac. 182; Ahrens v. Seattle, 39 Wash. 168, 81

Pac. 558; State v. White, 40 Wash. 560, 82 Pac. 907, 2 L. R. A., N. S., 563.

The fact that an undertaking on appeal contains language commonly used in *supersedeas* bonds does not of itself invalidate it. Bridge v. Calhoun etc. Co., 57 Wash. 272, 106 Pac. 762.

In South Dakota (section 457, Code of Civil Procedure), express provision is made for the consolidation of all undertakings required by the chapter on appeals into "one instrument or several, at the option of the appellant."

<sup>8</sup> Dobbins v. Dollarhide, 15 Cal. 374; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

<sup>9a</sup> Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323.

<sup>9b</sup> Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

<sup>9c</sup> Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511.

<sup>9d</sup> Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780.

<sup>9e</sup> Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

<sup>9f</sup> Klatschmidt v. Weber, 139 Cal. 76.

"motion for a new trial herein made" instead of from "order on motion for new trial."<sup>8s</sup>

Nor is the misplaced signature of a surety a fatal defect, where both sureties have signed, although one has signed in the wrong place.<sup>8h</sup> So an undertaking which omits the statutory clause as to dismissal of the appeal is merely "insufficient,"<sup>8k</sup> but unless cured by filing a new undertaking as provided in section 954, the appeal will be dismissed.<sup>8l</sup>

Undertakings defective for ambiguity, and for failure to distinctly specify the appeal to be perfected, are considered elsewhere.<sup>8m</sup>

<sup>8s</sup> *Buchner v. Malloy*, 152 Cal. 484, 92 Pac. 1029.

<sup>8h</sup> *Bay City etc. Assn. v. Broad*, 128 Cal. 670, 61 Pac. 368.

<sup>8k</sup> *Jarman v. Rea*, 129 Cal. 157, 61 Pac. 790.

<sup>8l</sup> *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147; *Estate of Fay*, 126 Cal. 457, 58 Pac. 936; *Jarman v. Rea*, 129 Cal. 157, 61 Pac. 790.

<sup>8m</sup> See sections 211, *ante*, and 214, *post*.

In other jurisdictions the following decisions illustrate the same general rules: In *Johnston v. Letson*, 3 Ariz. 344, 29 Pac. 893, it was held that an undertaking that appellant will pay all costs awarded against him on his appeal, not exceeding a certain sum, and which was not made payable to the appellee, and not conditioned that the appellant would prosecute his appeal with effect, was insufficient. In *Reilly v. Crowley*, 3 Ariz. 286, 29 Pac. 14, it was held that an appeal bond which did not provide, as required by the statute, that the appeal shall be prosecuted with effect, and mentions no obligee, though the statute provides that the bond be made payable to the appellee, was insufficient. But see *Willoughby v. Brown*, 4 Colo. 120, as to designation of obligee by reference.

The judgment must be specifically described, the obligee be named, and the penalty so fixed as to be ample protection, within the law, to the respondent. *Putman v. Putman*, 3 Ariz. 182, 25 Pac. 320; *Hill v. Herrick*, 3 Ariz. 313, 73 Pac. 399.

The obligee may be sufficiently designated by a reference to the title. See *Willoughby v. Brown*, *supra*.

The mere fact that the bond refers to the appeal as being to the supreme court instead of the court of appeals does not prevent the latter from acquiring jurisdiction. The defect was an amendable one under the provisions of section 388. *Pershing v. Wolfe*, 8 Colo. App. 82, 44 Pac. 754. An appeal bond is not fatally defective because not dated, if it was in fact delivered to the clerk within the statutory time. *Byers v. Gilmore*, 10 Colo. App. 79, 50 Pac. 370.

Where two appeals are taken together, and the undertaking is "on the appeal," without designating which appeal, there being but provision for a single undertaking, and neither appeal being specified, both will be dismissed. *Schiller v. Small*, 4 Idaho, 422, 40 Pac. 53; and see section 211, *ante*.

Where an appeal bond is radically defective in matters both of form and substance, the appeal should be dismissed. *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241.

In the following cases the undertaking was held sufficient in form and substance: *Idaho etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975; *Ramsay v. Tacoma etc. Co.*, 31 Wash. 351, 71 Pac. 1024; *Murray v. Moynahan*, 27 Wash. 379, 67 Pac. 810; *Jones v. Herrick*, 33 Wash. 197, 74 Pac. 332; *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421; *King v. Branscheid*, 32 Wash. 634, 73 Pac. 668; *Anderson v. Provident etc. Co.*, 26 Wash. 192, 66 Pac. 415; *White etc. Co. v. Sims*, 29 Wash. 389, 69 Pac. 1094; *Dossett v. St. Paul etc. Co.*, 31 Wash. 489, 72 Pac. 116; *Colburn v. Seymour*, 29 Colo. 292, 68

Two or more appellants may join in a single appeal, and one undertaking is sufficient, no matter how many appellants there are.<sup>82</sup> It is essential that the undertaking should distinctly specify who the appellants are, and the particular appeal in which each appellant is interested, and the undertaking should correspond substantially to the appeal as noticed. The rule is similar to the one heretofore outlined, which requires that each appeal attempted to be perfected by the undertaking shall be clearly and distinctly specified. This principle was announced in *Zane v. De Onativia*,<sup>83</sup> where the notice of appeal from the judgment was signed by both appellants, but the undertaking perfected only one appeal. The appeal of the appellant who was not mentioned in the undertaking was dismissed. The notice of appeal from the new trial order was signed by only one of the appellants, but the undertaking perfected both appeals. The appeal was dismissed as to both. The court held the sureties not bound, inasmuch as there had been no such appeal noticed as was perfected. Nor was section 954, Code of Civil Procedure, applicable.

A defective undertaking may be cured by filing a new one in the supreme court as shown in the next section. If there be any defect in the undertaking and it be not attacked in the cause as prescribed in rule XV,<sup>84</sup> the sureties cannot avail themselves of such defects

Pac. 219; *Thomas v. Territory*, 10 Ariz. 180, 85 Pac. 1063; *Sanborn v. Fitzpatrick*, 51 Or. 457, 91 Pac. 540; *State v. Pendergast*, 39 Wash. 132, 81 Pac. 324; *Faust v. Rustler etc. Co.*, 34 Mont. 368, 86 Pac. 421; *Greenus v. Seattle*, 39 Wash. 703, 81 Pac. 560; *Rowell v. Seattle*, 39 Wash. 703, 81 Pac. 560; *Callbreath v. Coyne*, 48 Colo. 199, 109 Pac. 428; *Price v. Western etc. Co.*, 35 Utah, 379, 100 Pac. 677.

In the following the bond was held insufficient, and the appeal was dismissed: *Coleman v. Perry*, 24 Mont. 237, 61 Pac. 129; *Dodge v. Corliss*, 27 Wash. 685, 68 Pac. 177; *David v. Guich*, 30 Wash. 266, 70 Pac. 497; *Title etc. Co. v. McDonnell*, 28 Wash. 359, 68 Pac. 890; *Graham v. American etc. Co.*, 28 Wash. 735, 69 Pac. 365; *Loy v. Coey*, 31 Wash. 684, 71 Pac. 552; *Winchester v. Morris*, 33 Wash. 706, 74 Pac. 361; *Hewitt v. Lansdale*, 26 Wash. 615, 67 Pac. 354; *Barela v. Tootle*, 29 Colo. 52, 66 Pac.

899; *Macy v. Sullivan*, 41 Wash. 564, 84 Pac. 601; *Tibbetts v. Henry*, 46 Wash. 306, 89 Pac. 880; *Washington etc. Co. v. Abacus*, 49 Wash. 261, 94 Pac. 1072; *Denver etc. Co. v. Paonia etc. Co. (Colo.)*, 112 Pac. 692.

<sup>82</sup> See section 17, Code of Civil Procedure. Also see *Downing v. Rademacher*, 136 Cal. 673, 69 Pac. 415; *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486.

<sup>83</sup> 135 Cal. 440, 67 Pac. 685.

<sup>84</sup> Quoted in section 270, *post*. Rule XV applies only to defects which do not go to the jurisdiction. No notice of motion to dismiss is required where the ground is failure of jurisdiction by reason of an ineffectual appeal. It is sufficient if the respondent points out the objection in his brief filed five days before the hearing, and asks for a dismissal on this ground. See *San Francisco etc. Co. v. Anderson*, 77 Cal. 297, 9 Pac. 517.

as a defense to an action upon the undertaking.<sup>9</sup> Every undertaking must be accompanied by an affidavit of justification as provided in section 1057 of the Code of Civil Procedure.<sup>10</sup> But such affidavit is not, strictly speaking, a part of the undertaking. It is a separate instrument appended to the undertaking.

§ 214. **Curing Defective Undertaking by Filing New One in the Appellate Court.**—There are cases in relation to appeals from justices of the peace to county courts which permit great looseness of practice in the filing of undertakings on appeal. Under these cases the want of an undertaking on appeal from the judgment of a justice of the peace is to be objected to in the county court,<sup>1</sup> and is waived if not objected to; and a refusal by the county court to allow the defect to be supplied by the filing of an undertaking in that court was ground for reversal.<sup>2</sup> These cases, however, are not authority in relation to undertakings on appeal to the supreme court; for the statute concerning appeals to the county court fixed no time for the filing of the undertaking. In this respect the provision of the General Practice Act<sup>3</sup> in relation to appeals from justices' courts was like the provision of the Forcible Entry and Detainer Act. That act did not limit any time for the filing of the undertaking on appeal,<sup>4</sup> and in *Rabe v. Hamilton*,<sup>5</sup> it was held that the filing of the undertaking was not a condition of the appellate jurisdiction, and that the county court should have allowed an undertaking to be filed. The difference between the statute under which *Rabe v. Hamilton* was decided and the statute in relation to appeals to the supreme court was pointed out in *Shaw v. Randall*.<sup>6</sup> In that case no undertaking was filed within the five days allowed therefor. The appellant offered to file one in the supreme court, but the court declined to allow this, and dismissed the appeal; and Cope, J., delivering the opinion, said:

<sup>9</sup> *Dore v. Covey*, 13 Cal. 502; *Hathaway v. Davis*, 33 Cal. 161; *Murdock v. Brooks*, 38 Cal. 596; but compare *Chapin v. Broder*, 16 Cal. 403. For instances of actions upon undertakings in addition to those just cited, see *Swain v. Graves*, 8 Cal. 549; *Osborn v. Hendrickson*, 6 Cal. 175; *Karth v. Light*, 15 Cal. 324; *Chamberlain v. Reed*, 16 Cal. 207; *Bostic v. Love*, 16 Cal. 69; *Whitney v. Allen*, 21 Cal. 233; *Ellis v. Hull*, 23 Cal. 160; *De Castro v. Clarke*, 29 Cal. 11; *Wood v. Orford*, 56 Cal. 157; *Crane v. Weymouth*, 54 Cal. 476.

<sup>10</sup> See, also, sections quoted in section 228.

<sup>1</sup> *Howard v. Harman*, 5 Cal. 78; *Coulter v. Stark*, 7 Cal. 244.

<sup>2</sup> *Cunningham v. Hopkins*, 8 Cal. 33; *Billings v. Roadhouse*, 5 Cal. 71.

<sup>3</sup> Section 628.

<sup>4</sup> *Laws of 1850*, p. 427, sec. 16; *Laws of 1852*, p. 158; *Laws of 1858*, p. 90; *Laws of 1861*, p. 582; *Laws of 1862*, p. 420; *Laws of 1863*, p. 652.

<sup>5</sup> 15 Cal. 31.

<sup>6</sup> 15 Cal. 384.



"The case of *Rabe v. Hamilton*, *ante*, 31, is not in point. The sixteenth section of the act concerning forcible entries and detainers merely provides that the party aggrieved may appeal within ten days, and that a bond shall be given containing certain conditions. No time is fixed within which the bond is to be filed, and no consequence is attached to a failure to file it. We held that the objection in that case did not go to the jurisdiction, but was addressed to the discretion of the court, and that the failure to execute the bond did not necessarily defeat the appeal. The case at bar is essentially different. The undertaking is required to be filed within five days after the notice, and the evident meaning is that it must be so filed to render the appeal effectual for any purpose. Such is our understanding of the statute. . . . In the present case there is no question as to the power of the court to allow an amendment. No undertaking was filed within the time limited by the statute, and the consequence is that there is nothing to amend. It is not the case of a defective undertaking, but of no undertaking at all. In construing the statute we must look to the language used, and endeavor if possible to ascertain the intention of the legislature. That provisions in regard to time are generally to be construed as directory is not disputed, but such a construction is improper where a consequence is attached to a failure to comply. In such a case the consequence can be avoided only by a compliance with the statute."

The present provision of the Code of Civil Procedure in relation to appeals from the justices' courts is like that of the old Practice Act, in not fixing any time within which the undertaking on appeal must be filed.<sup>7</sup> And such being the case, it may be said that under the case above cited the superior court, as a general thing, should allow an undertaking to be filed whenever the party offers (in good faith and without unreasonable negligence) to do so. But even in appeals to the superior court, if no undertaking be filed or be offered to be filed, the court should not hear the appeal.<sup>8</sup>

In regard to appeals to the supreme court the rule may be said to be that where no undertaking at all was filed within the time allowed therefor, the matter cannot be cured by filing one in the supreme court, but that where one has been filed which is defective merely, the defect may be cured by filing a new one in the appellate

<sup>7</sup> Section 978, California Code of Civil Procedure.

<sup>8</sup> *Gray v. Supr. Ct. of Amador*, 61 Cal. 337.

court. This is believed to have been the rule before the statute of 1861, and to be the rule under that statute. Before the statute it was held in *Shaw v. Randall*,<sup>\*</sup> above quoted, that where no undertaking at all had been filed within the five days a new one would not be permitted to save the appeal; but it would seem from the cases of *Stark v. Barrett*<sup>10</sup> and *Bryan v. Berry*<sup>11</sup> that where there was one filed which was defective merely the appellant would be permitted to file a proper one. In *Stark v. Barrett* an undertaking had been properly filed, but the sureties had failed to justify properly after exception taken to them. The supreme court allowed a new undertaking to be filed. In *Bryan v. Berry* it was held that "where a mere defective undertaking has been *bona fide* given, and the appellant will file a good one before the case is submitted, this court will allow him to do so."

The above rule was incorporated in the act of 1861, section 3 of which is as follows:<sup>12</sup>

"Sec. 3. No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; provided that a good and sufficient undertaking, approved by a judge of the supreme court be filed in the supreme court, before the hearing upon motion to dismiss the appeal, and upon payment of such reasonable costs as the court may adjudge; *provided*, that the respondent shall not be delayed, but may move when the cause is regularly called, for the disposition or dismissal of the same, if such undertaking be not given."

This section received construction in *Buffendeau v. Edmonson*.<sup>13</sup> That case related to the notice of appeal, and not to the undertaking, but the reasoning applies to the one as much as to the other. The facts were that the notice had been served two days before it was filed, which was improper under the rule then prevailing. For this the appeal was dismissed. The appellant then moved to vacate the dismissal, and cited the statute above quoted; but this motion was denied, the court saying: "The section of the act of 1861 above cited presupposes the existence of a notice of appeal, to which the word 'insufficiency' stands in qualifying relation. . . . The construction which the counsel claims for the act of 1861 would give

\* 15 Cal. 384.

<sup>10</sup> 15 Cal. 361. Offer to execute new undertaking must be before dismissal of appeal. *Tevis v. O'Connell*, 21 Cal. 512.

<sup>11</sup> Quoted in *Cunningham v. Hopkins*, 8 Cal. 33. The part so quoted appears to have been left out of the report of the case.

<sup>12</sup> Laws of 1861, p. 589.

<sup>13</sup> 24 Cal. 94.

it the effect to abrogate the conditions on which the fact of a subsisting appeal must of necessity depend. In our view the act of 1861 was intended to relieve appellants from the results which without it would be likely to happen in consequence of defects of form, and deficiencies in substance apparent on the face of notices of appeal; but we cannot find in this act any authority for excusing, in any case, performance of the acts necessary to effect an appeal in accordance with the provisions of the three hundred and thirty-seventh section of the Practice Act, viz., the filing and service of notice, and without the performance of which acts the appellate court could not acquire jurisdiction."

The doctrine of this case accords with the decision in *Shaw v. Randall*, above quoted, and does not appear to have been questioned either with respect to notices of appeal or undertakings.

The Code of Civil Procedure has the following:

"Section 954. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking, approved by a justice of the supreme court, or (where the appeal is pending before a district court of appeals either by direct appeal thereto or by transfer thereto by the supreme court) if a good and sufficient undertaking, approved by a justice of said district court of appeal, be filed in said district court, before the hearing upon motion to dismiss the appeal. . . . "

<sup>14</sup>

<sup>14</sup> The remainder of this section is as follows:

" . . . . When it is made to appear to the satisfaction of the court or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed, the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the

judgment as if no undertaking to stay execution had been given."

This last portion, except as herein-after noted, was added by the amendment of 1895 (Stats. 1895, p. 59). As to the scope and construction of this provision, see below and note 15k. In 1906 (Stats. 1906, p. 52) the following amendment was added to the last portion, "or that the bond has been lost or destroyed." In 1907 (Stats. 1907, p. 579) the following amendment was made to the last portion: Strike out "thereon" after "insufficiency of the undertaking." In the same year the portion quoted in the text was amended by the addition of phraseology applying the provisions of the section to appeals in the district courts of appeal. No further changes have been made.

Similar provisions are to be found in section 388, *Mills' Annotated Code of Colorado*; section 4822, *Revised*

The provision is—so far as undertakings are concerned—substantially the same as section 3 of the act of 1861, above quoted. The new undertaking must be filed in the appellate court, and not in the court below, and the approval of the justice must be obtained.<sup>15</sup>

The rule of the earlier cases has been followed in the decisions under the code. Thus in *Home etc. Assn. v. Wilkins*,<sup>15a</sup> where the appeal was from two separate and distinct orders, with a single undertaking, which might refer to and perfect either, the undertaking was held ineffectual because of ambiguity, the court saying:

“The section referred to (954) does not authorize it. It only authorizes a new undertaking when the one filed is insufficient. But in this case there has really been none filed. To allow a new one to be filed would be in effect to permit a new appeal to be perfected after the time fixed by law.”

So in *Duffy v. Greenbaum*,<sup>15b</sup> where there was an undertaking to stay execution but none to perfect the appeal, the court said:

“In this case there is no undertaking on appeal, and the section of the code (Code Civ. Proc., sec. 954) allowing an undertaking to be filed on the insufficiency of the undertaking filed has no application.”

So in *Berniaud v. Beecher*,<sup>15c</sup> where there was an attempted appeal from a judgment and a new trial order, and the undertaking

Codes of Idaho; section 7116, Revised Codes of Montana (section 1740, Code of Civil Procedure); section 550, subdivision 4, Lord's Oregon Laws; sections 1733, and 1734, Rem. & Bal. Code of Washington (sections 6517 and 6518, Bal. Code).

<sup>15</sup> Under the law which required the sureties on the three hundred dollar bond to justify it was held the approval of a justice of the supreme court dispensed with justification, and that after that exception could not be taken to the sureties. *Stevenson v. Steinberg*, 32 Cal. 373. Under the present law the sureties on the three hundred dollar bond need not justify. See section 228, *post*.

<sup>15a</sup> 71 Cal. 626, 12 Pac. 799. See, also, *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815.

<sup>15b</sup> 72 Cal. 157, 12 Pac. 74, 13 Pac. 323.

<sup>15c</sup> 74 Cal. 617, 16 Pac. 510. In this case a new undertaking was filed

in the supreme court, approved by a justice thereof, but it seems to have been disregarded. In *Wood v. Pendola*, 77 Cal. 82, 19 Pac. 183, which was practically the same kind of case, a new undertaking was filed in the supreme court, without being approved, however, as in the first-cited case. The court said:

“If the undertaking be considered as simply irregular and insufficient under section 954, the failure to file a good and sufficient undertaking within the time allowed by that section, and to have indorsed thereon the approval of a justice of this court, renders the appeal ineffectual.” It thus appears that the court contented itself with merely deciding that the appeal was ineffectual because of the appellant's failure to remedy his defective undertaking in the manner pointed out by the statute, without determining positively whether it was really a case that

recited the judgment but did not refer to the order, the court held the appeal ineffectual as to the appeal from the latter. So in *McCormick v. Belvin*,<sup>154</sup> where the appeal was from the judgment and two separate orders and the undertaking did not refer to the judgment or the orders separately, but to all, in general terms, it was held ineffectual and void, and that it could not be cured under the provisions of section 954. So in other cases.<sup>155</sup>

could be so remedied or not. In *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657, however, a similar case, the point was thoroughly cleared up. In that case, after the time to file an undertaking in the first instance, but before objection to the undertaking was raised, the appellant filed a new undertaking, approved by the chief justice, in the supreme court. Justice Works, for the court, said:

"This section does not authorize the giving of an undertaking in this court in the first instance, but when an insufficient one has been given in the court below, the defect may be remedied by filing a new undertaking here. The giving of a new bond is in the nature of a defective proceeding. In this case no bond was given on the appeal from the order denying a new trial, nor was there any attempt to do so. For these reasons, the bond approved and filed in this court was ineffectual for any purpose, and the appeal must be dismissed. No amendment of the undertaking could be allowed, because none had been given, and there was nothing to amend."

See, also, *Crew v. Diller*, 86 Cal. 554, 25 Pac. 66; *Pacific Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650; *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983; *Dodge v. Kimple*, 121 Cal. 580, 54 Pac. 94.

<sup>154</sup> 96 Cal. 182, 31 Pac. 16.

<sup>155</sup> See *Centerville etc. Co. v. Bach-told*, 109 Cal. 111, 41 Pac. 813, where the appeal was from several orders, and there was a single three hundred dollar undertaking. On the motion to dismiss the court entered thoroughly into the consideration of the action and its application. Justice Harrison, for the court, said:

"When an appeal is taken from two or more orders, or from a judg-

ment and an order, whether the notice of such appeal is given by separate notices or in one instrument, the appellant must file the jurisdictional undertaking for three hundred dollars for the appeal from the judgment and from each of the orders appealed from, except in the single instance of an appeal from a judgment and an order denying a new trial. If a single undertaking for three hundred dollars is given, and refers to only one of the orders appealed from, or to the judgment alone, this court will have jurisdiction of only the matter referred to in the undertaking, and the other appeals will be dismissed. . . . If the undertaking has no special reference to either matter appealed from, but is conditioned generally upon 'such appeal,' . . . or 'said appeals' . . . all the appeals will be dismissed upon the ground that by reason of its ambiguity it cannot be determined for which appeal it is given. . . . The subsequent filing of an undertaking in this court, approved by one of the justices, does not obviate the objection to the appeal, or confer any jurisdiction upon this court to hear the appeal. The undertaking filed in the superior court 'is so ambiguous that it must be regarded as if it had never been filed.'"

In *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147, not only was no reference made to the new trial order, but the undertaking itself omitted the clause with reference to the dismissal of the appeal. The appeal from the new trial order was unequivocally dismissed, but it was only because of appellant's failure to file a new undertaking containing the missing clause with reference to the dismissal of the appeal that the ap-

peal from the judgment was dismissed. The court clearly intimated that this was a matter that might be cured. This suggestion was afterward followed in *Jarman v. Rea*, 129 Cal. 157, 61 Pac. 790, but not in *Estate of Fay*, 126 Cal. 457, 58 Pac. 936, where the appeal was dismissed for failure to do so, as in *Duncan v. Times-Mirror Co.*, here cited. To the same effect, see *Woodman v. Calkins*, 12 Mont. 456, 31 Pac. 63.

In *Estate of Heydenfeldt*, 119 Cal. 346, 51 Pac. 543, a single undertaking for several separate and distinct orders was held invalid for any purpose, and the appeal was dismissed.

In *Pignaz v. Burnett*, 121 Cal. 292, 53 Pac. 633, where there was a single undertaking on an appeal from the judgment, and an order after judgment, it was held wholly ineffectual, and the appeal was dismissed. See, also, *Carter v. Butte Creek Co.*, 131 Cal. 350, 63 Pac. 667; *Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418; *Estate of Sutro*, 152 Cal. 249, 92 Pac. 486.

The following decisions illustrate the rule of practice in other jurisdictions:

Where, by an excusable mistake, the undertaking was filed before the notice of appeal, an order on terms was made authorizing the filing of an amended undertaking, under the provisions of subdivision 4 of section 527 of the Oregon Code (550, Lord's Oregon Laws). *Hawthorne v. East Portland*, 12 Or. 210, 6 Pac. 685. If the appellant has acted in good faith, and has used fair diligence to complete and file a sufficient undertaking, he will be allowed to file a perfected instrument out of time. *Nottingham v. McKendrick*, 38 Or. 495, 57 Pac. 195, 63 Pac. 822; *Matlock v. Wheeler*, 29 Or. 64, 40 Pac. 5, 43 Pac. 867; *Mendenhall v. Elwert*, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; *Hanley v. Stewart*, 54 Or. 38, 102 Pac. 2. It is essential that there should be a showing of excusable mistake. *De Lashmott v. Sellwood*, 10 Or. 51; *Pencinse v. Burton*, 9 Or. 178. This does not apply to a difference of opinion as to what is the statutory requirement, but a patent omission to execute or

file a proper instrument. *Mendenhall v. Elwert*, *supra*; *Quartz etc. Co. v. Patterson*, 53 Or. 85, 96 Pac. 551. And if there has been a want of diligence, or of an excusable mistake, there will be no exercise of the power of the court in the direction indicated. *Newberg etc. Co. v. Osborn*, 39 Or. 370, 65 Pac. 81. See *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

In Colorado, where the statute required the approval of the undertaking by the trial judge, it was held that when an undertaking, though radically defective, has been thus approved, it is error to refuse to allow it to be amended (*Wheeler v. Kuhns*, 9 Colo. 196, 11 Pac. 97), but if there is no approval as the law requires, the failure cannot be cured by an amendment. *Orman v. Keith*, 1 Colo. 81. If the appeal bond is insufficient merely, it may be corrected. *Standley v. Hendrie etc. Co.*, 25 Colo. 376, 55 Pac. 723. This provision does not contemplate the curing of a void, but merely an insufficient undertaking (*Cook v. Oregon etc. Co.*, 7 Utah, 416, 27 Pac. 5), and where there was an entire absence of an undertaking, a new one will not be allowed to cure the defect. *Larson v. Utah etc. Co. (Utah)*, 19 Pac. 196; *Fuller v. Fuller's Estate*, 7 Colo. App. 555, 44 Pac. 72. The section does not refer to such a case. *Hahn v. James*, 26 Mont. 50, 66 Pac. 463.

In the following cases the undertaking was held merely insufficient and not fatally defective. *Westland etc. Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096; *Miller v. Vermurie*, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; *Hayes v. Union etc. Co.*, 27 Mont. 264, 70 Pac. 975; *Coleman v. Perry*, 24 Mont. 237, 61 Pac. 129; *Elwert v. Norton*, 34 Or. 567, 51 Pac. 1097, 59 Pac. 1118; *Wolfer v. Hurst*, 47 Or. 156, 80 Pac. 419, 82 Pac. 20, 8 Ann. Cas. 725; *Jackson v. Barrett*, 12 Idaho, 465, 86 Pac. 270.

Fatally defective: *Hill v. Cassady*, 24 Mont. 108, 60 Pac. 811; *Faust v. Rustler etc. Co.*, 34 Mont. 368, 86 Pac. 421; *Pirrie v. Moule*, 33 Mont. 1, 81 Pac. 390. See this last case in particular, where many cases illus-

The supreme court in *Jarman v. Rea*<sup>1st</sup> drew the distinction very clearly between undertakings merely insufficient, and those which were ineffectual for any purpose. Justice Harrison, for the court, said:

"The respondent is in all cases entitled to such an undertaking as is prescribed in section 941, and if the appellant, after notice of motion to dismiss his appeal for want of a sufficient undertaking, fails to file a sufficient undertaking before the hearing of the motion, his appeal will be dismissed, even though the defect be merely 'insufficiency.' (*Estate of Fay*, 126 Cal. 457, 58 Pac. 936.) The provision of section 954 contemplates that, although an undertaking has been filed, it may be of such a character or in such a form as not to fully indemnify the respondent against the costs and damages which he may sustain by reason of the appeal. The use of the phrase 'insufficiency of the undertaking' indicates a distinction between an undertaking which does not fully comply with all the terms of section 941, and the entire absence of an undertaking. An undertaking may be filed which is so defective as not to constitute any obligation upon the sureties therein, and which is, in reality, no undertaking at all. In such a case there is more than mere insufficiency. There is an entire want of indemnity to the respondent, and section 954 has no application . . . . On the other hand, the undertaking may be defective in the form in which it is framed, and yet sufficiently indicative of an intent to comply with the terms of the statute as to be binding on the sureties, or it may be defective in that it indemnifies the respondent against only a portion of the costs and damages that may be awarded him. There is in such cases a mere 'insufficiency'

trative of the principles involved are collected and analyzed.

The application to file a new undertaking must be made before the motion to dismiss has been granted. In *re Paige's Estate*, 12 Idaho, 410, 86 Pac. 273. And before submission of the motion. *Baker v. Butte etc. Co.*, 24 Mont. 113, 60 Pac. 817.

Where the time to file a bond in the first place has expired, it is too late to apply to the higher court for permission to file. *David v. Guich*, 30 Wash. 266, 70 Pac. 497; *Galloway v. Tjossem*, 22 Wash. 103, 60 Pac. 129; *Creek v. Bozeman etc. Co.*, 22 Mont. 327, 56 Pac. 362.

<sup>1st</sup> 129 Cal. 157, 61 Pac. 790. See *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022, where the appeal was from the judgment and an order after judgment, and the undertaking, which was for six hundred dollars, specified both order and judgment. The supreme court held that the intention was sufficiently apparent, and the undertaking filed under section 954 was held effectual. Also see *Bay City Assn. v. Broad*, 128 Cal. 670, 61 Pac. 368, where one of the sureties attached his signature to the wrong place. It was held such an undertaking as was contemplated in section 954.

which, under section 954, may be remedied by the filing of a sufficient undertaking."<sup>15c</sup>

Section 954, as above quoted, was amended in 1895,<sup>15b</sup> by the addition of a clause providing for a new bond in the event a sufficient showing should be made in the superior court that the undertaking as originally filed had become inadequate. The phraseology of this amendment is manifestly applicable to stay bonds, and its presence in section 954, which has always been deemed to refer exclusively to undertakings on appeal, has given rise to some confusion. In *Mersfelder v. Spring*,<sup>15k</sup> however, it was held that the expression, "as a condition to the maintenance of the appeal," made use of in the amendment was not open to the construction that appeals that had been already perfected were to be discriminated against, either on account of the supposed inadequacy of the undertaking, or because of a failure to justify on the stay bond, and that a failure to give a new appeal bond is not to be a ground for dismissing the appeal as though it had never been perfected. The expression quoted was held to be subordinated to the last clause of the section, which clearly refers to the failure to provide an ade-

<sup>15c</sup> In the somewhat recent case of *Little v. Thatcher*, 151 Cal. 558, 91 Pac. 21, the supreme court again stated the doctrine "that the recitals in the undertaking must identify the particular appeal which it is intended to perfect," without ambiguity, otherwise it must be regarded as no undertaking at all, and the provisions of section 954, above referred to, with respect to the filing of a new bond, will be deemed inapplicable. In other words, such a failure would be regarded as incurable. While no fault can be found with this particular statement of the doctrine in question, which as an expression of the general rule is of the greatest utility, the application of it here made is believed to be somewhat too strict. The learned chief justice, who delivered the opinion, thus expressed his own views upon the point:

"The fact that when the undertaking was executed the time for appealing from the judgment had expired, and that the only appeal for which the judgment might be set aside was an appeal from the order, the fact that the date of the judgment as re-

cited shows that the surety confused the judgment and the order, and all the extraneous facts in the case amount to nothing," in the face of such a strict construction. The time for the appeal from the judgment had expired; the judgment referred to in the undertaking was as of the date of the order, and not as of the date of the judgment. If the word "order" had been used in place of the word "judgment," the undertaking would no doubt have been held sufficient. It is therefore believed that upon the authority of the cases cited in section 313, note 8b et seq., this particular appeal was sufficiently identified, and the doctrine stated would not have been violated by such a construction as would call in extraneous facts, *dehors* the undertaking, in support of the recitals thereof, for the purpose of making it sufficient.

And see to same effect a *dictum* in *Buchner v. Malloy*, 152 Cal. 484, 29 Pac. 1029.

<sup>15b</sup> See note 14, *supra*. And see part 2 of section 228, *post*.

<sup>15k</sup> 136 Cal. 619, 69 Pac. 251.



quate stay bond, and not to a supposed failure to file a new undertaking on appeal, after having once perfected the appeal.

The validity of an undertaking is not affected by the fact that the appeal is prematurely taken and therefore is to be dismissed because the appellate court is without jurisdiction. The expense of securing the dismissal of a void appeal is a sufficient consideration for such an undertaking.<sup>15m</sup>

As to filing undertakings to stay execution in the supreme court, see section 215, *post*.<sup>16</sup>

As to certificate that an undertaking has been filed, see section 268, *post*.

**§ 214a. Undertakings by Bonding Companies.**—So-called bonding companies, incorporated for the purpose under the laws of any state in the Union, are authorized to do business in California, and to act as sole surety in undertakings on appeal (to stay execution also).<sup>1</sup> The statute has been attacked on the ground of unconstitutionality, as being obnoxious to subdivision 3 of section 25, article 4, of the Constitution, but the supreme court, in *Cramer v. Tittle*,<sup>2</sup> upheld it, and its authority seems now to be unquestioned.

<sup>15m</sup> *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64.

<sup>16</sup> And see *Hill v. Finnigan*, 54 Cal. 493.

<sup>1</sup> This statute was originally sections 1056 and 1057 of the California Code of Civil Procedure. Section 1056 was repealed in 1880, and section 1057 was amended to correspond with the change thus effected. An act was passed in 1885, re-enacting the former law, and this was the act attacked in *Cramer v. Tittle*, cited below. In 1889 the code provision was replaced in sections 1056 and 1057, practically in its original form. Another minor amendment of the last-named section was adopted in 1907.

Section 616 of the California Political Code prescribes the method of regulating such corporations.

Corresponding provisions are to be found in the statutes of other states as follows: Sections 413-425, Revised

Statutes of Arizona; section 548, Mills' Annotated Statutes of Colorado; sections 2938-2960 (particularly section 2945), chapter 11, Revised Codes of Idaho; section 7193, Revised Codes of Montana (section 1900, Code of Civil Procedure); sections 968-970, Cutting's Compiled Laws of Nevada (particularly section 968); sections 4455-4462 (particularly 4455), Revised Codes of North Dakota; section 1561, Compiled Laws of Oklahoma; sections 4670-4680 (particularly section 4677), Lord's Oregon Laws; sections 878-880, Civil Code of South Dakota; section 424, Compiled Laws of Utah; section 6225, Rem. & Bal. Code of Washington; sections 4145-4154 (particularly section 4145), Compiled Statutes of Wyoming.

<sup>2</sup> 72 Cal. 12, 12 Pac. 869. See, also, *Gutzeit v. Pennie*, 95 Cal. 598, 30 Pac. 836; *Fox v. Hale & Norcross Co.*, 97 Cal. 353, 32 Pac. 446.

## CHAPTER XXXV.

## UNDERTAKINGS TO STAY EXECUTION.

- § 215. Undertakings to stay execution—Time of filing, etc.
- § 216. Undertaking to stay money judgment.
- § 217. Undertaking to stay judgment for the assignment or delivery of documents or personal property.
- § 218. Stay of execution of judgment directing execution of conveyance or other instrument.
- § 219. Undertaking to stay execution of a judgment directing the sale or delivery of possession of real property.
- § 220. Stay of execution on an appeal by an executor, administrator or trustee.
- § 221. Cases belonging to more than one of the classes mentioned.
- § 222. Miscellaneous cases.
- § 223. Stay of execution in cases not otherwise provided for.

§ 215. **Nature and Kinds of Undertakings to Stay Execution—Time of Filing, etc.**—As has been shown,<sup>1</sup> no appeal is effectual for any purpose, unless within five days after the service of the notice of appeal<sup>2</sup> an undertaking be filed, in the sum of three hundred dollars, conditioned to secure the respondent against the damages and costs that may be awarded upon the appeal.<sup>3</sup> This undertaking is commonly referred to as the three hundred dollar bond.<sup>4</sup> Its main purpose is to render the appeal effectual; but, as will be shown,<sup>5</sup> it operates in general as a stay bond where no other stay bond is provided. In addition to this undertaking the statute has provided certain others, which have no relation to the validity of the appeal, but whose sole purpose is to effect a stay of execution of the judgment or order appealed from. These latter undertakings are commonly referred to as undertakings to stay execution. They are not required, like the three hundred dollar bond, to be filed within a certain number of days,<sup>6a</sup> but may be filed at any time before the judgment or order is executed. As was said in *Hill v. Finnigan*:<sup>6</sup> "There is nothing in section 942, or elsewhere in the

<sup>1</sup> See section 211, *ante*.

<sup>2</sup> See section 212, *ante*.

<sup>3</sup> See section 213, *ante*.

<sup>4</sup> See *Hill v. Finnigan*, 54 Cal. 493.

<sup>5</sup> See section 223, *post*.

<sup>6a</sup> But undertakings to continue an attachment in force must be filed

within five days after the entry of the order appealed from. Section 946, California Code of Civil Procedure.

<sup>6</sup> 54 Cal. 493. Upon the authority of this case stay bonds have often been filed after appeals have been perfected. Stay bond may be given at

code, which prohibits the making and filing of a stay undertaking at any time before the execution is satisfied by sale under it. An execution may be issued upon the judgment after the cause has been brought here on appeal, and after the appeal it may be stayed by proper undertaking filed below."

The appellant may, however, fail to secure the justification of his sureties on the undertaking filed in the court below. In which event, his efforts to obtain a stay of proceedings pending appeal will prove abortive, unless, by a showing of accident, surprise, inadvertence or excusable neglect, in the appellate court, he is permitted to furnish a new stay bond as a basis for a writ of *supersedeas* out of that court.<sup>6a</sup>

The undertaking to stay execution upon a money judgment is usually given on appeal from the judgment. It may be given, however, on an appeal from an order denying a new trial.<sup>7</sup> So that a party may have a stay of execution of the judgment, without appealing from the judgment itself, or even though such appeal be dismissed.<sup>7a</sup> The theory upon which this doctrine rests was well stated by Mr. Justice Shaw in a later case, that of *Credits Com. Co. v. Superior Court*,<sup>7b</sup> as follows:

"A reversal of an order denying a new trial has the same effect as an order granting a new trial, which is to vacate the judgment. A reversal of a judgment upon a direct appeal has precisely the same effect, and no more; it merely vacates the judgment. The relief being in form and substance the same in both cases, an appeal from an order denying a new trial should be held to be, in legal effect, an indirect appeal from the judgment; and, thus considered, the rule with respect to a stay of proceedings on such indirect ap-

any time before execution. *Silver Pick etc. Co. v. Court* (Nev.), 110 Pac. 503.

<sup>6a</sup> See section 228, *post*, as to the conditions under which stay bonds may be filed in the appellate court.

A query is here suggested. Failure to justify on the three-hundred dollar undertaking involves loss of a right to a stay of proceedings in cases where an effective undertaking would operate as such stay. Would the appellant be permitted, upon a showing similar to that suggested in section 228, *post*, to file a new undertaking on appeal which would operate as a stay in cases not included in sections 942 to 945, California Code of Civil Procedure, inclu-

sive? If not, appellants in cases where the stay bond is not required are at a disadvantage. No case has been found throwing any light upon the subject.

<sup>7</sup> *Fulton v. Hanna*, 40 Cal. 278; *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006; *Owen v. Pomona etc. Co.*, 124 Cal. 331, 57 Pac. 71; *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9; *Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185; *Starr v. Kreuzberger*, 131 Cal. 41, 63 Pac. 134; and see *Weldon v. Rogers*, 154 Cal. 632, 98 Pac. 1070.

<sup>7a</sup> *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006; and see, also, *Fulton v. Hanna*, 40 Cal. 278.

<sup>7b</sup> 140 Cal. 82, 73 Pac. 1009.

peal should be the same as upon a direct appeal from the judgment, and all the requirements of the code in regard to undertakings for stay of proceedings on appeal from different forms of judgments should be applicable also to appeals from orders denying a new trial after such judgments."

The principle would seem to bring within the rule appeals from other orders which have similar effect, but it is probable that the rule will not be extended to any other save the order on motion for new trial, as here referred to. In *Carit v. Williams*<sup>7c</sup> the supreme court refused an application for a *supersedeas* on an appeal from an order refusing to set aside an execution, and in *Credits Com. Co. v. Superior Court*, above cited, the same court refused a writ of *supersedeas* on an appeal from an order dismissing a motion to vacate a former order for the payment of money and the settlement of a receiver's account current, upon an appeal bond which operated as a stay on such appeal, holding that while the appellant was entitled to a *supersedeas* as to the order appealed from, yet the former order remained in force until vacated, although it might be declared erroneous on the appeal from the order dismissing the motion to vacate. In *Green v. Hubbard*,<sup>7d</sup> however, which was an appeal from an order denying a motion to vacate an order for a writ of possession, a writ of mandate was issued to the judge of the superior court to fix a stay bond on appeal which would operate as a stay of proceedings under the writ of possession. The effect was manifestly the same as though the writ of possession, or rather the order therefor, was the judgment, and the order denying the motion to vacate was a new trial order. The supreme court, as was suggested in the case of *Credits Com. Co. v. Superior Court*, above cited, treated the appeal as being from the order for the writ of possession.

On the whole, as was also suggested in the last-cited case, the *Fulton v. Hanna* decision, and the other cases in line therewith, "might have been more satisfactory, and the logical results would have been less troublesome, if the court had declined to give the relief upon this theory as to the nature of such an appeal, and had adopted the policy of itself giving the stay of proceedings under its inherent power to preserve to a party the fruits of an appeal of which it has jurisdiction, by ordering a stay of proceedings upon

<sup>7c</sup> 67 Cal. 580, 8 Pac. 93. And see *Weldon v. Rogers*, 154 Cal. 632, 98 Pac. 1070.

<sup>7d</sup> 95 Cal. 39.

the giving of a bond sufficient to protect the adverse party."<sup>1</sup> The logic of the situation plainly demands the extension of the principle to all orders the reversal of which results in the vacation of other orders which are sought to be stayed, and which ought to be stayed for the preservation of the *status quo*.

The mere pendency of a motion for a new trial does not operate as a stay of proceedings.<sup>2</sup>

**§ 216. Undertaking to Stay Money Judgment.**—The provision of the act of 1851 was as follows:<sup>3</sup>

"Sec. 349. If the appeal be from a judgment or order directing the payment of money, it shall not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed if affirmed only in part; and all damages and costs which shall be awarded against the appellant upon the appeal."

The amendment of 1863<sup>4</sup> reproduced the above with the addition of the following:

"When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and payable in the same kind of money or currency specified in such judgment."

Section 942 of the Code of Civil Procedure as first enacted was substantially the same as the amendment of 1863, except that it omitted the words, "stating their places of residence and occupation,"<sup>5</sup> and inserted the words, "or the appeal be dismissed,"<sup>4</sup>

<sup>1</sup> See section 3, *ante*. And see *People v. Bank of San Luis Obispo* (Cal.), 112 Pac. 866.

<sup>2</sup> Laws of 1851, pp. 106, 107.

<sup>3</sup> Laws of 1863, p. 690, sec. 349.

<sup>4</sup> These words were probably omitted because of the provision of section 1057, California Code of Civil Procedure, that the undertaking should be accompanied with an affidavit that "they are each residents and householders within the state."

<sup>5</sup> These words did not change but only expressed the pre-existing rule. In *Osborn v. Hendrickson*, 6 Cal. 175, it was held that a dismissal by consent did not change the sureties. But the contrary was held in *Chase v. Beraud*, 29 Cal. 138. And it is well settled that a dismissal for want of prosecution charged them. *Chamberlin v. Reed*, 16 Cal. 207; *Karth v. Light*, 15 Cal. 324. See chapter in relation to dismissal.

after the words, "if the judgment or order appealed from, or any part thereof, be affirmed."

As amended in 1874 the provision of the code is as follows:

"Sec. 942. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency."

This section has not been changed since 1874.<sup>5</sup>

<sup>5</sup> In Newmark's California Code of Civil Procedure this section is given as amended in 1880. But the language given by the learned annotator is precisely the same as the amendment of 1874.

Corresponding provisions are the following: Section 4810, Revised Codes of Idaho; section 7102, Revised Codes

of Montana (section 1726, Code of Civil Procedure); section 3437, Cutting's Compiled Laws of Nevada (section 342, Civil Practice); section 7209, Revised Codes of North Dakota; section 6078, subdivision 1, Compiled Laws of Oklahoma; section 551, subdivision 1, Lord's Oregon Laws; section 446, Code of Civil Procedure of

The foregoing section is not clear as to whether, where the judgment is for more than two thousand dollars, the sureties are required to bind themselves in double the amount of the whole judgment, or only for the amount in which they justify. So far as the mere language of the provision is concerned, the former construction would seem to be proper. For the requirement is that the undertaking shall be executed "by two or more sureties to the effect that they *are bound in double the amount* of the judgment or order"; and the language of the restriction seems to apply only to the entry of the judgment upon motion. But there can be no reason in requiring the sureties to bind themselves in a greater amount than that for which they can justify, nor in making part of their liability enforceable by motion and the remainder by action. And it is difficult to believe that such could have been the intention. The point does not appear to have been decided.

Stay of proceedings on appeal in divorce cases has been sought in a number of cases under the provisions of this section on the ground that orders for alimony and suit money were, in effect, orders directing the payment of money, though, as to the first named, not customarily in specific sums. In *Ex parte Cottrell*<sup>6</sup> the alimony sought to be stayed was a monthly payment of thirty-seven dollars and fifty cents, and the court held that the sum was indeterminate, and doubt was expressed whether such a payment could be stayed. In the *Sharon* case<sup>7</sup> the alimony was two thousand five hundred dollars per month, and fifty-five thousand dollars counsel fees. The court thought a stay bond in double the amount of such counsel fee and the aggregate alimony for three years was sufficient. The principle on which that decision rests, however, was not made clear. The court seemed to think that there was no question but that it was an order for the payment of money, and accepted the amount fixed as sufficient. This case has not been overruled or questioned, and is the basis for whatever settled practice there is on the point. It is true, the doubt is sometimes expressed as to whether the payment of suit money can be stayed at all,<sup>8</sup> but

South Dakota; section 3307, Compiled Laws of Utah; section 1722, Rem. & Bal. Code of Washington (section 6506, Bal. Code); section 5116, subdivision 1, Compiled Statutes of Wyoming.

These provisions vary considerably, though not in so substantial a manner

as to demand detailed consideration in this place.

<sup>6</sup> 59 Cal. 417.

<sup>7</sup> 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

<sup>8</sup> The fact of marriage once established by a *prima facie* showing, it would seem that the husband-plaintiff

this doubt does not extend to alimony, and has not in fact crystallized into any definite rule of practice different from that suggested. In *Anderson v. Anderson* <sup>9</sup> it was held that a judgment for alimony which was in terms a lien upon defendant's estate was stayed by the three hundred dollar appeal bond.

A judgment for costs is not a judgment for the payment of money within the meaning of this section.<sup>10</sup> Nor is an order striking out a cost bill.<sup>11</sup>

Section 942 "refers solely to a judgment *in personam* for a certain sum of money," and an undertaking or stay bond under that section must provide "that upon affirmance on appeal the sureties must pay the whole amount, or have personal judgment entered against them therefor." The section cannot apply to an undertaking for an "unascertained deficiency," and cannot, therefore, apply to an appeal from a judgment of foreclosure of a mortgage where there is a deficiency any more than where there is none.<sup>12</sup> Until a judgment for the deficiency is entered there can be no personal judgment within the meaning of this section.<sup>13</sup> The same principle governs in case of a foreclosure of a lien upon a vessel, her equipment, tackle and furniture, such a judgment not being for the payment of a definite sum of money. A stay bond in such a case would be without consideration and void.<sup>14</sup>

is obliged to supply the wife-defendant with funds necessary to defend the suit, and perhaps temporary alimony. See *Hite v. Hite*, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227, 45 L. R. A. 793; and *Allen v. Superior Court*, 133 Cal. 504, 65 Pac. 977.

<sup>9</sup> 123 Cal. 445, 56 Pac. 61.

<sup>10</sup> *McCallion v. Hibernia etc. Society*, 98 Cal. 442, 33 Pac. 329; and see *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699.

<sup>11</sup> *Reay v. Butler*, 118 Cal. 113, 50 Pac. 375.

<sup>12</sup> *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977. But compare the cases above cited where unascertained amounts of alimony and counsel fees were stayed by an undertaking under this section.

<sup>13</sup> *Painter v. Painter*, 98 Cal. 625, 33 Pac. 483. And see *Kreling v.*

*Kreling*, 116 Cal. 458, 48 Pac. 383, where it was said that section 942 was applicable to a judgment that could be directly enforced by writ of execution and not where it could be satisfied in other ways before execution was permissible.

<sup>14</sup> *Olsen v. Birch & Co.*, 1 Cal. App. 99, 81 Pac. 656.

The following decisions illustrate the practice with respect to the provisions of section 942, Code of Civil Procedure of California, and corresponding provisions in other states; *Ahrens v. Seattle*, 39 Wash. 168, 81 Pac. 558; *Greenus v. Seattle*, 39 Wash. 703, 81 Pac. 560; *Rowell v. Seattle*, 39 Wash. 703, 81 Pac. 560; *Horrell v. California etc. Assn.*, 40 Wash. 531, 82 Pac. 889; *Russell v. Graumann*, 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830; *Lazier v. Cady*, 43 Wash. 82, 86 Pac. 209.



§ 217. **Undertaking to Stay Judgment for the Assignment or Delivery of Documents or Personal Property.**—The provision of the act of 1851 was as follows: <sup>1</sup>

“Sec. 350. If the judgment or order appealed from direct the assignment or delivery of documents, or personal property, the execution of the judgment or order shall not be stayed by appeal, unless the things required to be assigned or delivered, be placed in the custody of such officer or receiver as the court may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or the judge thereof, or county judge, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.”

This section was never amended, and was reproduced <sup>2</sup> in section 943 of the Code of Civil Procedure as first enacted. In 1880 section 943 was amended by substituting the words, “a judge thereof,” for the words, “the judge thereof or county judge.” This change was to adapt the section to the new courts created by the Constitution of 1879.

In 1897 the section was again amended, this time almost out of any resemblance to its former self, and it now reads as follows: <sup>2a</sup>

“Sec. 943. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court on the appeal. If the judgment or order appealed from appoint a receiver, the execution of the judgment or order cannot be stayed by appeal unless a written under-

<sup>1</sup> Laws of 1851, p. 107.

<sup>2</sup> The only change is the substitution of the phrase “cannot be stayed” for “shall not be stayed.”

<sup>2a</sup> Corresponding provisions in other states are as follows: Section 4811, Revised Codes of Idaho; section 7103, Revised Codes of Montana (section 1727, Code of Civil Procedure); section 3438, Cutting's Compiled Laws of

Nevada (section 343, Civil Practice); section 7210, Revised Codes of North Dakota; section 6078, subdivision 4, Compiled Laws of Oklahoma; section 551, subdivision 3, Lord's Oregon Laws; section 447, Code of Civil Procedure of South Dakota; section 3308, Compiled Laws of Utah; section 5116, subdivision 4, Compiled Statutes of Wyoming.

taking be executed, on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking. If the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order cannot be stayed on appeal, unless an undertaking be entered into on the part of the appellant, with at least two sureties, in such amount as the court, or the judge thereof, may direct, to the effect that the appellant will, on demand, deliver the mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery that the appellant and sureties will, on demand, pay the proper officer the full value of such property at the date of the appeal."

It is to be noted that two more exceptions were thus added to the list of judgments or orders stayed by the ordinary appeal undertaking, to wit, judgments appointing receivers, and judgments of foreclosure of personal property. In both cases the amount of the bond was required to be fixed by the court where the judgment or order was rendered or made, or a judge thereof. Prior to the enactment of this amendment judgments appointing receivers<sup>3</sup> and judgments for the foreclosure of chattel mortgages<sup>4</sup> were stayed by the undertaking provided for the purpose of perfecting the appeal.

**§ 218. Stay of Execution of a Judgment Directing the Execution of a Conveyance or Other Instrument.**—Where the judgment directs the execution of a conveyance or other instrument, the state makes no provision for an undertaking, but requires the instrument to be executed and deposited with the clerk. The provision of the act of 1851 was as follows:<sup>1</sup>

<sup>3</sup> See *Dennery v. Superior Court*, 84 Cal. 7, 24 Pac. 147; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; *State etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; and see, also, *Jacobs v. Superior Court*, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826.

<sup>4</sup> See *Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806; *Powers v. Crane*, 67

Cal. 65, 7 Pac. 135; *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070.

<sup>1</sup> Laws of 1851, p. 107.

Corresponding provisions of other states are as follows: Section 4812, Revised Codes of Idaho; section 7104, Revised Codes of Montana (section 1728, Code of Civil Procedure); section 3439, Cutting's Compiled Laws of Nevada (section 344, Civil Practice); section 7211, Revised Codes of North

"Sec. 351. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order shall not be stayed by the appeal, until the instrument is executed and deposited with the clerk, with whom the judgment or order is entered, to abide the judgment of the appellate court."

It was never amended, and was reproduced in the code as section 944, without other change from the original than the substitution of the word "cannot" for the words "shall not," in the third line, and so remains at present.

**§ 219. Undertaking to Stay Execution of a Judgment Directing the Sale or Delivery of Possession of Real Property.**—The provision of the act of 1851 was as follows:<sup>1</sup>

"Sec. 352. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency."

This section was never amended, and was reproduced in the code as section 945, with the following minor changes: By substituting

Dakota; section 6078, subdivision 2, Compiled Laws of Oklahoma; section 551, Lord's Oregon Laws; section 448, Code of Civil Procedure of South Dakota; section 3309, Compiled Laws of Utah; section 5116, subdivision 2, Compiled Statutes of Wyoming.

<sup>1</sup> Laws of 1851, p. 107.

Corresponding provisions of other states are as follows: Sections 1510 and 1511, Revised Statutes of Arizona (sections 301 and 302, Civil Practice); section 4813, Revised Codes of Idaho; section 7105, Revised Codes of Mon-

tana (section 1729, Code of Civil Procedure); section 3440, Cutting's Compiled Laws of Nevada (section 345, Civil Practice); sections 7212 and 7213, Revised Codes of North Dakota; section 6078, subdivision 3, Compiled Laws of Oklahoma; section 551, subdivisions 2 and 4, Lord's Oregon Laws; sections 449 and 450, Code of Civil Procedure of South Dakota; section 3310, Compiled Laws of Utah; section 5116, subdivision 3, Compiled Statutes of Wyoming.

"cannot" for "shall not," in the third line; by inserting "or the appeal dismissed," after the word "affirmed," in the seventh line; and by substituting "must" for "shall" before "be specified," in the eleventh line, and before "also provide," in the last line. It has not been amended since its adoption with the code.

Taken literally, the above provision would seem to mean that a judgment which directs the sale of real property requires a bond for waste, and one for the value of the use and occupation of the property. But in *Whitney v. Allen*<sup>2</sup> it was held that in an action of foreclosure no bond for use and occupation is required, for the reason that the plaintiff is not entitled to the possession of the property until after sale. This doctrine was explained by Sanderson, C. J., delivering the opinion in *Englund v. Lewis*,<sup>3</sup> as follows:

"This section is double, and provides for two distinct undertakings upon two distinct kinds of judgments, one directing a sale of real property and the other directing a delivery of the possession of real property. In a case where the judgment directs a sale, the undertaking need only provide security against waste, unless such sale is of mortgaged premises and the judgment provides for the payment of a deficiency, in which case it must provide for the payment of such deficiency. In such a case no provision need be inserted in the undertaking for the payment of the value of the use and occupation of the premises pending the appeal, for the obvious reason that the judgment creditor does not become entitled to the value of the use and occupation until after a sale has been made. (Pr. Act; sec. 236.) Where the judgment directs a delivery of the possession of real property, the undertaking must provide against waste and for the payment of the value of the use and occupation, and for those two only, for there can be in such case no question as to deficiency. (*Whitney v. Allen*, 21 Cal. 233.) Where a sale is directed for the purpose of satisfying any lien other than a mortgage lien, the undertaking need not provide for the payment of any deficiency which the judgment may direct. To this extent the statute discriminates in favor of mortgage and against all other liens."

The rule stated in the foregoing extract seems to be this: that where the judgment is for the delivery of the possession of real property, the undertaking must provide against waste and for the payment of the value of the use and occupation; but that where it is for a sale, it need provide against waste only, except that where,

<sup>2</sup> 21 Cal. 233.

<sup>3</sup> 25 Cal. 337.

on foreclosure of mortgage, there is a judgment for a deficiency, the undertaking must provide for such deficiency as well as against waste.

So in the earlier cases a distinction seems to have been made between an appellant in and one out of possession of the mortgaged premises.<sup>2a</sup> In the later decisions, however, both on the subject of the deficiency and possession, the views of the court have undergone a material change. The clause with reference to the fixing of the amount of the undertaking was construed as relating to the last sentence with reference to the deficiency, and it was held that the amount of the deficiency must be specified. In other words, that the undertaking must contain a recital covering the deficiency, not in terms of description, as formerly, but in terms of computation. The reason given in *Boob v. Hall*,<sup>2b</sup> the leading case upon the point,

<sup>2a</sup> The distinction here referred to was recognized in *Home Loan Assn. v. Wilkins*, 64 Cal. 379, 1 Pac. 348; and see *Root v. Bryant*, 54 Cal. 182. In *McMillan v. Hayward*, 84 Cal. 85, 24 Pac. 151, however, where an administrator and minor children sought a stay without giving the special bond, on the ground that they were not in possession, the widow being in possession, the court held that she was in possession subordinate to the administrator, Mr. Commissioner Hayne delivering the opinion, as follows:

"But if such be the proper construction, a large meaning must be given to the word 'possession.' In the first place, it must be held to apply to any person who is actually residing on the premises. If such a person appeal, and desires a stay, he must give the special bond. He cannot have a stay without it upon the plea that he is only an agent, or that he occupies in subordination to or in connection with somebody else. And in the second place, the word must be held to include the persons in subordination to whom the property is held. If such persons appeal and desire a stay, they cannot have it without the required undertaking on the ground that another is in actual occupation of the property, if such other holds in subordination to them."

In *Spence v. Scott*, 95 Cal. 152, 30 Pac. 202, the court overturned the old theory:

"It was substantially decided in the case of *Johnson v. King*, 91 Cal. 307, 27 Pac. 644, that in such a case (where the decree of foreclosure included a deficiency judgment), the appellant, whosoever he may be, if he desires a stay of proceedings, must give an undertaking for the deficiency. And that case is not in conflict with either *Home Loan Assn. v. Wilkins*, 64 Cal. 379, 1 Pac. 348, or *Englund v. Lewis*, 25 Cal. 337, cited by appellant. In the former case an opinion seems to have been first rendered in department, but a hearing in bank was ordered, and in the opinion of the court in bank the point involved was not determined; while *Englund v. Lewis*, 25 Cal. 337, is strictly in accord with *Johnson v. King*, 91 Cal. 307, 27 Pac. 644.

"Section 945 of the California Code of Civil Procedure is entirely clear upon the subject. It provides a judgment of foreclosure shall not be stayed unless there be an undertaking 'on the part of the appellant,' etc."

<sup>2b</sup> 105 Cal. 413, 38 Pac. 977. In this case the bond was fixed by the trial court without regard to the amount of the judgment, or the deficiency, and not in terms specifying the deficiency otherwise than in connection with the other items covered by the undertaking.

Justice Harrison dissented in part in the following language:

" . . . The legislature has said in clear and unambiguous language that

for the rule as stated is that until the deficiency is ascertained and docketed, it is not a determinable amount; and that it cannot be ascertained and docketed until the property is sold, an event that is stayed by the appeal bond, and may never occur. Besides, it is made the duty of the court to fix the amount of the bond. It was also said that the only provision for a stay bond on appeal from a judgment of foreclosure, with or without a deficiency clause, was that contained in section 945, and that section 942, under which previous undertakings had been drawn, and under which alone an undertaking indeterminate in form could be drawn, had no application to such an appeal.<sup>32</sup>

As to the distinction between an appellant in possession and one out of possession it was definitely decided in *Spence v. Scott* that there must be a bond for the deficiency regardless of the fact of possession, and this decision is regarded as settling the question, so far as mortgage foreclosures are concerned.<sup>34</sup>

'when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.' This is an absolute requirement, and cannot be limited by any order of the judge. To give to this clause the construction that, instead of providing for the payment of the deficiency—that is, the whole deficiency—the undertaking need provide for the payment of only such sum as the judge may determine will be the deficiency, is to interpolate into the clause a provision that the legislature has not made, and to give to the appellant a stay of proceedings without securing to the respondent the means of satisfying his judgment."

See, also, *Hubbard v. University Bank*, 120 Cal. 632, 52 Pac. 1070, and *Wheeler v. Karnes*, 130 Cal. 618, 63 Pac. 62.

There must be a bond for a deficiency, of course, whether it specify the deficiency by words or description or of computation. See *Gutzeit v. Penne*, 97 Cal. 484, 32 Pac. 584. But only on the foreclosure of mortgage liens. It does not apply to other liens, or to the mere sale of real estate.

*Painter v. Painter*, 98 Cal. 625, 33 Pac. 483.

<sup>32</sup> In *Eby v. Foster*, 61 Cal. 282, it was held that there could be no judgment lien until the judgment for a deficiency was actually docketed.

<sup>34</sup> See note, 3a, *supra*. While the distinction between one in and one out of possession, where the judgment is one of foreclosure of a mortgage lien, is no longer recognized, it is still considered in all other cases. In *Owen v. Pomona L. & W. Co.*, 124 Cal. 331, 57 Pac. 71, the court said: "The judgment here is, in fact, one directing the sale of real property, and would be governed by the provisions of section 945 of the Code of Civil Procedure, if they were applicable. If the defendant had been in the possession of the real property, the bond to stay proceedings should have secured to the respondent damages by waste, and the value of the use and occupation; but the plaintiff being himself in the exclusive possession, these clauses of the statute have no application, and the case not being one of mortgage, no undertaking for the payment of the deficiency was required."

As above stated, it is made the duty of the court to fix the amount of the bond to be given under this section,<sup>30</sup> and refusal may be relieved against by *mandamus*.<sup>31</sup>

It is sufficient if the bond contain separate covenants for the various items, although a single amount in the aggregate is named.<sup>32</sup>

It is not to be inferred from the above, however, that no other undertaking than the ones mentioned is required where the judgment directs the sale of real property. For as shown in section 221, a judgment may provide for several different kinds of relief, and where such is the case, the bond required by the statute for each kind must be given in order to effect a stay. A judgment in foreclosure under our practice is usually a personal judgment against the debtor with a direction for the sale of the mortgaged property, and the application of the proceeds to the payment of the debt, and that judgment be docketed against the debtor for any deficiency that may remain after the application of the proceeds. In such case there must be an undertaking in double the amount of the judgment as well as the ones above mentioned, and the usual three hundred dollar undertaking to validate the appeal.<sup>4</sup> Where the only undertakings given were one in the sum of three hundred dollars and another in an amount fixed by the judge to provide for waste and the value of the use and occupation, it was held that there was no stay, and the sheriff was ordered to proceed with the sale.<sup>5</sup>

<sup>30</sup> *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383; *Hubbard v. University Bank*, 120 Cal. 632, 52 Pac. 1070; *Clute v. Superior Court*, 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362.

<sup>31</sup> *Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083. See, also, *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202; *Gutierrez v. Hebbard*, 104 Cal. 103, 37 Pac. 749; *Gordan v. Graham*, 153 Cal. 297, 95 Pac. 145.

The rule would seem to be that where the statute makes provision for a stay bond, and does not fix its amount, or make any provision for determining what the amount of the penalty shall be, it is the duty of the judge of the trial court to fix such amount, and if he refuses to do so, he may be coerced by *mandamus*. See

*State v. Sachs*, 3 Wash. 96, 27 Pac. 1075. Also, *State v. Court*, 30 Wash. 177, 70 Pac. 256.

*Mandamus* will not lie to require the judge to fix the amount of a bond to supersede a judgment of disbarment, which is self-executing. *State v. Poindexter*, 43 Wash. 147, 86 Pac. 176.

The bond is fatally defective if there is no order fixing the amount, in cases where it is not fixed by statute, or its amount otherwise regulated. *Gilbert v. Husted*, 50 Wash. 61, 96 Pac. 835.

<sup>32</sup> *Wheeler v. Karnes*, 130 Cal. 618, 63 Pac. 62.

<sup>4</sup> See *Englund v. Lewis*, 25 Cal. 337. See, also, section 22.

<sup>5</sup> *Societe D'Epargnes v. McHenry*, 49 Cal. 351.

The provision with reference to reversal in part in section 942 is omitted from section 945, and in *Heinlen v. Beans*<sup>6</sup> the undertaking was held to be ineffective to bind the sureties on the ground that the judgment was reversed only in part. It was said that the omission was intentional, and the provision could not be implied.

The cases illustrate the rules above stated.<sup>7</sup>

**§ 220. Stay of Execution on Appeal by an Executor, Administrator or Trustee.**—Section 946 of the code provides that “the court below may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, admin-

<sup>6</sup> 71 Cal. 295, 12 Pac. 167.

<sup>7</sup> In *Neale v. Superior Court*, 77 Cal. 28, 18 Pac. 790, it was held that a defendant in a condemnation proceeding who elects to take an order restoring possession which has been unlawfully taken subjects himself to the condition of appeal, which is that he must furnish the bond prescribed in section 945 if he would have a stay of proceedings on such appeal. In *Shepherd v. Tyler*, 92 Cal. 552, 28 Pac. 601, it was held that the defendant in an action of ejectment who gave the bond for use and occupation here prescribed was in effect a lessee of the premises in controversy, and that the grantee of the plaintiff took the same subject to the right of such defendant to such possession. In *Gutzeit v. Pennie*, above cited, it was held that a bond to stay execution on a judgment of foreclosure of a mortgage lien which provided for a deficiency alone and omitted to guarantee against waste and occupation was insufficient. And it was held not to relieve this want of sufficiency by reason of a clause that it is given under the provisions of section 945. In *Hoppe v. Hoppe*, 99 Cal. 536, 34 Pac. 222, the facts and the decision followed the decision in the last-cited case. In *Ogden v. Davis*, 116 Cal. 32, 47 Pac. 772, it was held that the sureties on a bond such as was held sufficient in *Boob v. Hall*, above cited, that is, where the trial judge fixed the amount of the bond to cover all three of the items of waste, occupation, and the deficiency, were bound for no more than the sum fixed in the bond, al-

though such sum was insufficient to cover the items of waste and occupation and that of the deficiency as well. The decision is the logical result of the *Boob v. Hall* decision. In *Central etc. Co. v. Center*, 107 Cal. 193, 40 Pac. 334, it was held that a stay bond on appeal from a judgment foreclosing a mechanic's lien must be given under section 945, and a bond for double the amount of the judgment is insufficient. In *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383, which was an appeal from a judgment foreclosing an equitable lien, a bond for waste alone was held sufficient, and neither a bond under section 942 nor one for a deficiency under section 945 was appropriate. In *Bank of Woodland v. Stephens*, 137 Cal. 458, 70 Pac. 293, where a deficiency judgment was waived, and a receiver was appointed to take charge of the rents and profits, no bond for a deficiency nor for use and occupation was required, but a bond against waste was demanded, although the tenancy might expire pending the appeal.

The following decisions of other states illustrate the prevailing rules with respect to the provisions of section 945, California Code of Civil Procedure, and corresponding sections of other codes: *Elliot v. Whitmore*, 10 Utah, 238, 37 Pac. 459; *Northwestern etc. Bank v. Griffiths*, 17 Wash. 98, 49 Pac. 223; *Deming etc. Co. v. Fariss* (Okl.), 50 Pac. 130; *Naylor v. Lewiston*, 14 Idaho, 722, 95 Pac. 827; *Silver Peak etc. Co. v. District Court* (Nev.), 110 Pac. 503.



istrator, trustee, or other person acting in another's right."<sup>1</sup> This provision was at one time regarded as being somewhat inconsistent with section 965, which provides that:

"Sec. 965. When an executor, administrator, or guardian who has given an official bond appeals from a judgment or order of the superior court, made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking."

But the later and, it is believed, the better view seems to be that section 965 applies to probate appeals, while section 946 applies to cases in which the executor, administrator or trustee is a party while acting in another's right.<sup>2</sup> Under this view it has not been difficult to apply the two sections without confusion, and whether under the one section or the other, it has been fully determined that an appeal once perfected, either by proper undertaking or by operation of the sections of the code above quoted, the effect in probate proceedings, and in proceedings in which an administrator, executor, trustee or other person acting in another's right, is similar to that in other proceedings. The decree, order or judgment appealed from is set at large, the subject matter removed from the jurisdiction of the lower court, and the latter has no power to proceed farther therein, until the appeal is determined, and the matter remitted from the appellate court. Thus, in *Pennie v. Superior Court*,<sup>3</sup> the order was for a family allowance. Pending an appeal therefrom the lower court undertook to enforce payment of the money in accordance with the order, but its process was annulled on *certiorari*. So in *Ex parte Orford*,<sup>4</sup> where an administrator had been ordered to pay a certain claim against the estate of her decedent. Pending an appeal from that order, the lower court sought by contempt proceedings to enforce compliance with the order appealed from. The administratrix was imprisoned for contempt, but the supreme court ordered her release on *habeas corpus*. So in *Ruggles v. Superior Court*,<sup>5</sup> the order was for payment of an accrued and unpaid family allowance. Pending an appeal, the court

<sup>1</sup> As to provisions of old Practice Act, see section 353.

<sup>2</sup> See note 2a, section 211, *ante*. See same note for corresponding provisions of other codes, and comparison therewith.

<sup>3</sup> 89 Cal. 31, 26 Pac. 617, and see *Stateler v. Superior Court*, 107 Cal. 536, 40 Pac. 949.

<sup>4</sup> 102 Cal. 656, 36 Pac. 928.

<sup>5</sup> 103 Cal. 125, 37 Pac. 211.

below threatened, also by means of contempt proceedings, to enforce obedience to the order, but the supreme court, by a writ of prohibition, restrained such action.

In all these cases the contention was that the order was not an appealable order. In one instance, at least, the supreme court declined to dismiss the appeal on this ground, because to ascertain whether it was or was not appealable would not require a review of the merits. Chief Justice Beatty disagreed with his colleagues on the subject,<sup>6</sup> but the court held to the general doctrine that a perfected appeal, one that operated as a *supersedeas*, was sufficient to withdraw the case from the jurisdiction of the lower court until it should be remitted back from the appellate court.

As suggested above, each section operates in a separate and distinct sphere, but it is believed that within each sphere the bond of the official is both an undertaking on appeal and a stay bond, where required.<sup>7</sup>

To avail himself of the provisions of section 946, however, an official or other person acting in another's interest must have an order of the trial court dispensing with the undertaking as therein provided. And this order must be made and duly filed within the time prescribed for filing the undertaking itself. If not actually so made, a subsequent order made *nunc pro tunc* will not avail.<sup>8</sup>

**§ 221. Cases Belonging to More Than One of the Classes Mentioned.**—A judgment may give several different kinds of relief and where such is the case, the undertaking required for each kind of relief must be given. In this regard Sanderson, C. J., delivering the opinion in *Englund v. Lewis*, said:

“Our conclusions are that where there is a money judgment only, the undertaking, in order to stay proceedings, must be in double the amount of the judgment; and if in addition to a money judgment there be a judgment for the delivery of documents or the execution of a conveyance, or a sale of real property, or for the delivery of real property, an additional bond or bonds, as the case may be, must be given in order to stay proceedings upon each branch

<sup>6</sup> See dissenting opinion in *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211. Also see *Hale & Norcross Min. Co. v. Fox*, 122 Cal. 56, 54 Pac. 270.

<sup>7</sup> See *Ex parte Orford*, 102 Cal.

656, 36 Pac. 928; and also *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211.

<sup>8</sup> In *re Skerrett*, 80 Cal. 62, 22 Pac. 85; and see note 2a, section 211, *ante*.

or part of the judgment, and that if there be a part or branch of the judgment as to which no bond is given, proceedings upon such branch or part are not stayed. In the case of a judgment which directs the execution of a conveyance or other instrument, of course no bond, except for the money branch of the judgment, if such there be, is required, the appellant being required to execute and deposit with the clerk the conveyance or other instrument, instead of the bond exacted in other cases. In foreclosure cases, where there is no judgment *in personam*, but only a judgment in accordance with the old chancery practice, a bond for costs and a bond for waste and deficiency would be sufficient; but where the judgment is in the form authorized by our practice, as decided in *Rollins v. Forbes*, *Rowland v. Leiby*, and *Chapin v. Broder*, and it is desired to stay proceedings as to the whole judgment, there must be a bond for costs, a bond in double the amount of the personal judgment, and a bond for waste and deficiency, all of which may be included in one instrument or several, at the option of the appellant."

With respect to the point under consideration the decision in *Englund v. Lewis* doubtless states the correct rule. That case has been overruled, however, or at least distinguished, in so far as it held that there must be an undertaking for any deficiency that may be found to be due after sale under a mortgage lien, by the case of *Boob v. Hall*, and other later cases, as above shown.

### § 222. Miscellaneous Cases.

1. *Forcible Entry, etc.*—With reference to cases of forcible entry and unlawful detainer the code has the following provision:<sup>1</sup>

"Sec. 1176. An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered, so directs."

<sup>1</sup> Section 1176, California Code of Civil Procedure.

Section 2684, Revised Statutes of Arizona, provides for an undertaking on appeal in a sum double the yearly value or rental of the premises in dispute, "to be determined by such officer" (the justice of the peace who tries the case); and this bond shall, by authority of section 2686, stay all proceedings on the judgment, etc. This appeal is to the district court, and no further appeal is allowed (see

section 2689), unless the rental value of the property in controversy exceeds three hundred dollars per year. In the event of a further appeal (under the authority of section 1212, subdivision 4), the proceedings are governed by the practice which regulates appeals in general.

Section 1992, Mills' Annotated Statutes of Colorado.

Section 5108, Revised Codes of Idaho, provides that there shall be no stay unless the court directs the same,

This section has been held to take such cases out of the operation of the rule of *Hill v. Finnigan*<sup>1a</sup> as to the filing of stay undertakings in the supreme court after failure to file in the trial court thus referring the making of such undertakings in cases of forcible entry and unlawful detainer to the judicial discretion of the judge of the trial court.<sup>2</sup> But this discretion once exercised, and an undertaking executed in pursuance of the direction of the judge of the trial court, the proceedings are stayed precisely as in other

in effect, as the California provision quoted in the text.

Section 7285, Revised Codes of Montana (section 2096, Code of Civil Procedure), authorizes the prosecution of appeals in forcible entry and detainer cases as in other cases, and the two following sections make the practice as outlined by Part II of the code, and the provisions relative to appeals and new trials in general, applicable to this proceeding. Stay or proceeding must, therefore, be accomplished under the general practice, if at all. So, in Nevada, section 3834, Cutting's Compiled Laws, makes the general practice applicable to forcible entry and detainer proceedings, and a stay must be accomplished, if at all, under the general practice.

Appeals may be prosecuted from judgments in forcible entry and detainer of justices of the peace to the district courts, in New Mexico, and the appeal bond, which shall stay proceedings (section 3357, Compiled Laws), shall be "in a sufficient sum to cover all damages and judgment recovered" (section 3361, *Id.*).

Appeals to the supreme court are regulated by the general rule. Section 8504, Revised Codes of North Dakota, provides for a stay bond in terms almost identical with the provisions as to the delivery of real property.

No express provision for appeal to the supreme court in actions of forcible entry and detainer is made. If any such appeal is authorized, such authority is derived from the general practice, which also governs the subject of undertakings.

Section 7576, Lord's Oregon Laws (section 5754, B. & C.), provides that in addition to the regular appeal bond, the appellant in forcible entry and detainer shall give an undertaking in a sum equal to twice the rental value

of the property. This is not described as a stay bond, but the effect is no doubt to stay proceedings. The right of appeal itself in such cases is doubtful. But see *Wolfer v. Hurst*, 47 Or. 156, 80 Pac. 419, 82 Pac. 20, 8 Ann. Cas. 725.

The remark above made with reference to the Oklahoma practice is applicable in an equal degree to South Dakota.

Section 3586, Compiled Laws of Utah, requires a bond in double the amount of the judgment and costs to the effect that the obligor shall pay the value of the use and occupation of the property, and damages accruing during the pendency of the appeal. Section 3587 is, in effect, an application of the general rule of practice relating to new trial and appeal.

Section 829, Rem. & Bal. Code of Washington (section 5544, Bal. Code), makes general provisions as to new trials and appeals applicable to proceedings in forcible entry and detainer. Section 832 (5547) provides that the undertaking on appeal prescribed by the section immediately preceding shall stay and suspend the writ of restitution which is the conclusion of the trial in the lower court.

Section 5123, Compiled Statutes of Wyoming, prescribes in general terms for stay of proceedings in appeals from judgments of justice of the peace. And see section 5116, as to stay of proceedings in general.

<sup>1a</sup> 54 Cal. 493. See section 228, *post*.

<sup>2</sup> *McDonald v. Hanlon*, 71 Cal. 535, 12 Pac. 515; *Gross v. Kelleher*, 73 Cal. 639, 15 Pac. 362; *Cluness v. Bowen*, 135 Cal. 660, 67 Pac. 1048; *Bateman v. Superior Court*, 139 Cal. 140, 72 Pac. 922; *Sarthou v. Reese*, 151 Cal. 96, 90 Pac. 187.

cases. "The judge of the court below having directed a stay, and the bond having been given, the court below had no further control over the matter. To allow the judge to give the necessary direction, and then, after the defendant had complied with his order and the appeal and stay had been perfected, to permit him without any statutory authority to change his mind and withdraw his direction or discharge of such order, would lead to great uncertainty, inconvenience, and, in some case, perhaps, to wrong and injustice."<sup>3</sup>

2. *Eminent Domain*.—In the title in relation to proceedings in eminent domain is the following provision:<sup>4</sup>

"Sec. 1257. The provisions of part two of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; *provided*, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle-guards as provided in section 1251, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession as provided in section 1254), and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond, as aforesaid, in any manner retard the contemplated improvement. . . . "

This section must be construed in connection with section 1254 of the same code, which provides, in certain cases and under certain conditions therein specified, that the plaintiff may have possession of the property sought to be condemned, after trial and judgment entered, or pending appeal from the judgment, and neither a per-

<sup>3</sup> Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

<sup>4</sup> Section 1257, California Code of Civil Procedure. Corresponding provisions are as follows: Section 2468, Revised Statutes of Arizona, section 5228, Revised Codes of Idaho, and section 7351, Revised Codes of Montana (section 2231, Code of Civil Procedure), make the general practice as to new trials and appeals applicable to the procedure in eminent domain, being the same as section 1257, Code of Civil Procedure of California, but the codes of these two states contain no specific provisions similar in operation to the California section quoted. The same may be said of section 7603, Revised Codes

of North Dakota, in a lesser degree, however. See, also, section 1371, Compiled Laws of Oklahoma; section 6867, Lord's Oregon Laws; section 877, Code of Civil Procedure of South Dakota; section 3606, Compiled Laws of Utah; section 932, Rem. & Bal. Code of Washington (section 5646, Bal. Code); section 3858, Compiled Statutes of Wyoming.

Sections 1727 and 1728, Mills' Annotated Statutes of Colorado provide for the application of the general rules as to appeals, and for a payment into court of the amount of compensation awarded; which the owner may receive upon the making of a bond in double the amount, conditioned upon its repayment in the event of a reversal, etc.

fectured appeal nor a stay bond will be permitted to prevent such entry of possession.<sup>4a</sup>

3. *Attachments.*—Section 946 of the code provides that “. . . . An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless within five days after the entry of the order appealed from such appeal be perfected.”<sup>4b</sup> This section seems to apply in terms to appeals from orders dissolving attachments. Whether it would cover the case of an attachment dissolved by a final judgment for the defendant, so as to allow plaintiff to keep his attachment in force pending an appeal, is not clear.<sup>4c</sup>

<sup>4a</sup> See *San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972, where it was held that the amendments of 1903 to section 1254 created an exception to the general stay provided for by the three hundred dollar undertaking in cases not included within sections 942, 943, 944 and 945, and in this respect distinguishing the case of *Los Angeles v. Pomeroy*, 132 Cal. 340, 64 Pac. 477, where the undertaking on appeal was held to effect a stay. It is to be noted, however, that a judgment in condemnation proceedings is nominally, at least, in favor of the defendant for the payment of a sum of money for which he may have execution as provided in section 1252, and in favor of the plaintiff for the possession and occupation of land. It was therefore held in *Neale v. Superior Court*, 77 Cal. 28, 18 Pac. 790, that a plaintiff who appeals must give the bond provided in section 945. See note 7, section 219, *ante*.

<sup>4b</sup> As to provisions of the old Practice Act, see *Laws of 1865-66*, p. 707, sec. 353. The act of 1851 contained no such provision. *Laws of 1851*, p. 107, sec. 353.

Section 946, California Code of Civil Procedure. See, also, section 4814, Revised Codes of Idaho; section 7106, Revised Codes of Montana (section 1730, Code of Civil Pro-

cedure); section 3437, Cutting's Compiled Laws of Nevada; section 7217, Revised Codes of North Dakota; section 6093, Compiled Laws of Oklahoma; section 454, Code of Civil Procedure of South Dakota; section 3313, Compiled Laws of Utah.

<sup>4c</sup> Sections 553 and 946 of the California Code of Civil Procedure, are to be construed together, and so construed, an attachment may be continued in force pending an appeal by filing the appropriate undertaking as prescribed in the concluding clause of the latter, and the defendant is not deprived of his property without due process of law, where an appeal is taken from a judgment in his favor with a bond such as is therein prescribed. *Primm v. Superior Court*, 3 Cal. App. 208, 84 Pac. 786. A bond to prevent the levy of an attachment is not affected by a stay bond, or destroyed thereby, not being within the terms of section 671, Code of Civil Procedure. *Ayres v. Burr*, 132 Cal. 125, 64 Pac. 120.

Judgment for the defendant in the justice's court in an attachment suit vacates the attachment, and defendant may make whatever disposition of the attached property he pleases pending appeal. *Loveland v. Alvord et al.*, 76 Cal. 562, 18 Pac. 682.

4. *As to Injunctions*, see section 227.

5. *Alimony in Divorce Suit*.—Where the appeal was from an order directing the payment of the sum of sixty-seven dollars and fifty cents each month as alimony, it was held that (even if there could be a stay of such an order) an undertaking in the sum of three hundred dollars and another in double the amount of one month's allowance would not effect a stay.<sup>7</sup>

6. *Sale of Perishable Property*.—See section 223, and exception 1, and Code of Civil Procedure, section 949.

7. *Usurping an Office*.—See section 223, and exception 2, and Code of Civil Procedure, section 949.

8. *Change of Place of Trial*.—See section 223, and exception 3, and Code of Civil Procedure, section 949.

9. *Receivers*.—See section 219, *ante*. Formerly an appeal did not stay the functions of a receiver.<sup>8</sup> There were exceptions to this rule, however. Rather, the rule had its limitations. In *Dennery v. Superior Court*<sup>9a</sup> the supreme court held that a receiver in an insolvency proceeding had power only to preserve the property intact pending an appeal. In *Havemeyer v. Superior Court*<sup>9b</sup> it was held that the functions of a receiver appointed after judgment were suspended pending an appeal. Similar views were expressed in other decisions.<sup>9c</sup> And the amendment of 1897 to section 943 gave rise to new rules, which now control to the exclusion of those enunciated in the earlier cases.

<sup>7</sup> *Ex parte Cottrell*, 59 Cal. 417; and see section 216, *ante*.

<sup>8</sup> *In re Real Estate Associates*, 8 Pac. C. L. J. 966.

<sup>9a</sup> 84 Cal. 7, 24 Pac. 147.

<sup>9b</sup> 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

<sup>9c</sup> See *Stateler v. Superior Court*, 107 Cal. 536, 40 Pac. 949; *Bank of Savings (San Jose) v. Bank of Madera*, 121 Cal. 543, 54 Pac. 85.

In *Forrester v. Boston etc. Co.*, 22 Mont. 430, 56 Pac. 868, it was held that a stay and restitution (by removing the receiver) should have been allowed under a *prima facie* showing that the interests of the respondent would be as well or better conserved in that manner than by the reten-

tion of the receiver. This decision is somewhat questionable, however. The order appealed from was one refusing to vacate the receivership, and the result of a *supersedeas* would have been to accomplish the vacation sought indirectly.

An appeal with a *supersedeas* from an order appointing a receiver made on a hearing by affidavits does not deprive the parties of the right to a hearing on the merits pending the appeal. *State v. Bell*, 36 Wash. 196, 78 Pac. 908.

On appeal from an order denying an application for leave to sue a receiver, the applicant was entitled to a *supersedeas* staying proceeding by the receiver. *State v. Superior Court*, 38 Wash. 23, 80 Pac. 195.

10. *Mandamus*.—The regular undertaking on appeal stays proceedings.<sup>9</sup>

11. *Insolvency Proceedings*.—The Insolvency Act of 1895<sup>10</sup> provided that "The notice, undertaking and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases," and in *Dennery v. Superior Court*, above cited, the supreme court held that a perfected appeal from an order granting an adjudication in insolvency, not being included in sections 942 to 945, inclusive, operated as a stay of proceedings under the provisions of section 949.

The official bond of an assignee in insolvency does not operate as a stay bond under the provisions of section 946.<sup>11</sup>

**§ 223. Stay of Execution in Cases not Otherwise Provided for.** In cases not provided for under the preceding heads, the filing of the three hundred dollar bond operates as a stay of execution. The provision of the act of 1851 in this regard was as follows:<sup>1</sup>

"Sec. 356. In cases not provided for in sections 349, 350, 351, and 352, the perfecting of an appeal by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in section 348, shall stay proceedings in the court below upon the judgment or order appealed from, except that where it directs the sale of perishable property the court below may order the property to be sold, and the proceeds thereof to be deposited to abide the judgment of the appellate court."

This section stood until the adoption of the Code of Civil Procedure. The provision of the code as first enacted was substantially the same as section 356, except that it omitted the words, "and the justification of the sureties thereon if required."

The section was amended in 1874,<sup>1a</sup> by inserting the second exception, and in 1905,<sup>1b</sup> by inserting the last, so as to read as follows:

<sup>9</sup> *Palache v. Hunt*, 64 Cal. 473, 2 Pac. 245.

<sup>10</sup> Section 70, Act of 1895, Stats. 1895, p. 131, c. 143.

<sup>11</sup> *Buhlert v. Superior Court*, 72 Cal. 97, 13 Pac. 155.

<sup>1</sup> Laws of 1851, p. 108.

<sup>1a</sup> Code Amendments 1873-74, p. 408.

<sup>1b</sup> Stats. 1905, p. 22.

Corresponding provisions in other codes are as follows: Section 1512,

Revised Statutes of Arizona; section 402, Mills' Annotated Code of Colorado; section 4817, Revised Codes of Idaho; section 7109, Revised Codes of Montana (section 1733, Code of Civil Procedure); section 3444, Cutting's Compiled Laws of Nevada (see, also, section 3440, last sentence); section 7222, Revised Codes of North Dakota; section 552, Lord's Oregon Laws; sections 452 and 453, Code of Civil Pro-



"Sec. 949. In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping, or intruding upon, or unlawfully holding a public office, civil or military, within this state, and except, also, where the order grants, or refuses to grant, a change of the place of trial of an action; and except also where it orders a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder or member of such corporation a reasonable opportunity to inspect or take copies of such books, papers or documents of the corporation as the court finds that such director, stockholder or member is entitled by law to inspect or copy."

No further amendment has up to this time been made.

The section above quoted makes the three hundred dollar bond operate (except in certain enumerated cases) as a stay of execution in cases where no stay bond is expressly provided, or, in the language of the code, "in cases not provided for in sections 942, 943, 944, and 945." If the case be provided for in any of those sections this bond does not operate as a stay. Thus it does not effect a stay in the ordinary action of foreclosure of mortgage,<sup>1</sup> because such action is provided for in the sections mentioned. But as above stated, if the case be not provided for in such sections, the three hundred dollar bond operates as a stay. Thus in an action of foreclosure of a mechanic's lien, where the decree gave no personal judgment, and no judgment for a deficiency, but ordered the property to be sold and the proceeds applied first to respondent's claim, and afterward to the appellant's, it was held that the three hundred dollar bond

cedure of South Dakota; section 3314, Compiled Laws of Utah.

Section 402, Mills' Annotated Code of Colorado, provides that no writ of error shall operate as a *supersedeas* unless, after an inspection of the record by a justice of the supreme court, he should so order, in which event the

plaintiff in error, or applicant for the *supersedeas*, files a bond conditioned as in appeals, and approved as a *supersedeas* bond by such justice, or, if the order shall direct, approved by the clerk.

<sup>2</sup> *Societe D'Epargnes v. McHenry*, 49 Cal. 351.

operated as a stay, and the court said: "This, in our opinion, is not a case provided for in sections 942, 943, 944, or 945 of the Code of Civil Procedure, and therefore the undertaking filed is sufficient to stay proceedings pending the appeal, as it does not appear that the property which the sheriff is about to sell is perishable property."<sup>3</sup>

So in *Covarrubias v. The Supervisors of Santa Barbara County*,<sup>4</sup> where the petitioner was removed from his office of sheriff for malfeasance in office, it was held that an appeal from the judgment or removal with a three hundred dollar bond operated as a stay, and the court said:

"And the judgment rendered in the district court not being of the character mentioned in sections 942, 943, 944, or 945 of the Code of Civil Procedure, the perfecting of the appeal by giving the undertaking *ipso facto* operated a *supersedeas* (section 949); for it was not adjudged in the district court, nor could it have been properly adjudged in this proceeding that the petitioner was guilty of usurping or intruding into the office of sheriff, or 'unlawfully holding' that office within the intent of section 949 just referred to."

So in a large number of other cases later in date.<sup>4a</sup> In all the cases wherein the appellate courts have held proceedings in the

<sup>3</sup> *Root v. Bryant*, 54 Cal. 182. Usually, however, appeals from foreclosure judgments in mechanic's lien cases, to operate in stay of proceedings, must be accompanied with a stay bond drawn under the provisions of section 945. *Central etc. Co. v. Carter*, 107 Cal. 193, 40 Pac. 334.

<sup>4</sup> 52 Cal. 622.

<sup>4a</sup> In *re Schedel*, 69 Cal. 241, 10 Pac. 334, which was an appeal by a legatee from a decree of distribution. In *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617, where the order sought to be stayed was one requiring the payment of a family allowance. Also *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211. In *re Woods*, 94 Cal. 566, 29 Pac. 1108, where the appeal was from an order appointing an administrator. In *McCallion v. Hibernia etc. Society*, 98 Cal. 442, 33 Pac. 329, where the order appealed from was one for the payment of a certain sum of money in court to a claimant thereof. In *Kaufman v. Superior Court*, 108 Cal. 446, 41 Pac. 476, the order sought to be stayed was one for the payment of a sum of money into court, after

a judgment of dismissal had been set aside. In *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, where the judgment appealed from was one of removal of a board of supervisors, the supreme court held that the ordinary appeal bond suspended the judgment so as to restore to the board its right to continue in office pending the appeal, thus following the decision in the *Covarrubias* case. In *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560, the appeal was from a decree of distribution by the widow of the decedent. In *Day v. Gunning*, 125 Cal. 527, 58 Pac. 172, the appeal was in a contested election case. The decision was upheld in *Anderson v. Browning*, 140 Cal. 222, 73 Pac. 986; *Wilson v. Fisher*, 148 Cal. 13, 83 Pac. 421; *Chubbuck v. Wilson*, 151 Cal. 162, 90 Pac. 524, 12 Ann. Cas. 888, and in *Rohrbacker v. Superior Court*, 144 Cal. 631, 78 Pac. 22, which was an appeal from a judgment in a contest with reference to an election to a directorship in a private corporation, the court holding that the principle was identical. In *Estate v. Kennedy*, 129 Cal. 384, 62 Pac. 64,

court below under the judgment or order appealed from stayed by the regular undertaking on appeal, as provided in section 949, refer-

the appeal was from a decree of distribution. In *Bank v. Hornberger*, 134 Cal. 90, 66 Pac. 74, the appeal was from a judgment of foreclosure of a pledge of a life insurance policy, and it was held that the application of the rule to such a case was not affected by the fact that the security is particularly subject to destruction by reason of a violation of the terms of the policy by the beneficiary. The court said that such danger, inherent in the nature of the security, was known and understood by the pledgee, who accepted it with such knowledge at the time the loan was made. In *Rohrbacher v. Superior Court*, 144 Cal. 631, 78 Pac. 22, the appeal was from a judgment foreclosing a pledge of personal property as collateral security. In *Owen v. Pomona etc. Co.*, 124 Cal. 331, 57 Pac. 71, the appeal was from a judgment for the plaintiff in an action by a purchaser in possession to enforce a rescission of the contract of purchase and sale to recover the money already paid, for the value of the improvements placed thereon, to declare a lien for the amount of the judgment, and for a deficiency judgment. It was held that the regular three hundred dollar undertaking on appeal stayed proceedings under the judgment, and the supreme court directed that an order of sale be quashed and the sale to plaintiff set aside. In *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577, the appeal was from an interlocutory decree in partition. In *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563, the appeal was from an injunction order requiring the defendant not to interfere with plaintiff in making a water-pipe connection with defendant's pipe-line. The three hundred dollar undertaking was held to stay proceedings, and where it appeared that the plaintiff went ahead, after the appeal had been duly 'perfected,' and made the connection which he was authorized by the order appealed from to make, the appellate court held that the defendant was not in contempt for breaking the connection. In *State etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac.

549, the appeal was from a judgment dissolving an insurance corporation. The three hundred dollar undertaking stayed proceedings, and it was held that the superior court could not appoint a receiver under the dissolution judgment. In *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956, the appeal was from an order modifying a divorce decree so as to award the custody of the children to a parent different from the one to which the award was made in the original decree. The three hundred dollar undertaking was held to stay further proceedings, and a further order requiring the appellant to surrender the children under the modified decree, as well as an order adjudging her guilty of contempt for refusing to obey the same, were both declared by the supreme court to be null and void. In *Anderson v. Anderson*, 123 Cal. 445, 56 Pac. 61, the appeal was from a judgment for alimony, which was in terms a lien upon the defendant's real estate. The three hundred dollar undertaking was held sufficient to stay proceedings, and the superior court was without authority to make an order appointing a receiver to take charge of such property. In *Daly v. Ruddell*, 129 Cal. 300, 61 Pac. 1080, the appeal was from a judgment authorizing the laying of a pipe-line through defendant's premises. In *Los Angeles v. Pomeroy*, 132 Cal. 340, 64 Pac. 477, the appeal was from a final order of condemnation. The three hundred dollar undertaking was held to be sufficient to stay proceedings, pending appeal. But see *San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972, and note 4 in section 222, *ante*. In *Credits Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009, the appeal was from an order refusing to vacate a prior order. The regular undertaking on appeal was held to stay further proceedings under the order appealed from, but not under the prior order vacation of which was refused. In *Olsen v. Birch*, 1 Cal. App. 99, 81 Pac. 656, the appeal was from a judgment against the owners of a vessel, providing for its sale, with engines, boilers, tackle, apparel and furniture, under the provi-

ence was made, either directly or indirectly, to the fact that such judgment or order was not one of those covered by either of the four sections from 942 to 945, inclusive, and this was also always assigned as the reason of the decision in the particular case. Thus in the case of *In re Schedel* <sup>4b</sup> the court said: "The provisions of sections 942, 943, 944 and 945 have no application to the case of an appeal by a legatee from a decree of distribution." So in *Denery v. Superior Court* <sup>4c</sup> the court said: "We think it clear that the appeal in the case at bar does not come within any of the enumerated cases in which an additional undertaking is required to stay the execution of the judgment, and the appeal having been 'perfected' in accordance with the requirements of the code, it stays all further proceedings upon the judgment appealed from, and 'upon the matters embraced therein.' " So in *Daly v. Ruddell* <sup>4d</sup> the court said: "The judgment does not contain any of the directions mentioned in the Code of Civil Procedure from section 942 to 945, inclusive; and therefore the undertaking in the sum of three hundred dollars, prescribed in section 941, 'stays proceedings in the court below upon the judgment or order appealed from.' " So in *Los Angeles v. Pomeroy* <sup>4e</sup> the court said: "The undertaking mentioned in section 941 of the Code of Civil Procedure stays all proceedings in the court below upon the order appealed from, except in those cases specified in sections 942, 943, 944, 945, and 949. The order appealed from is not one of the cases mentioned in either of the said sections. The undertaking therefore stayed all proceedings."

There were cases, however, occasionally arising for determination to which the test, simple as it appears to be, was applied with difficulty, and it was often contended that certain cases were within the "spirit" of certain specified exceptions for which stay bonds in addition to the regular appeal bond were required. Thus in the case first above cited, *In re Schedel*, which was an appeal by a legatee from a decree distributing certain moneys of the estate, the respondents contended that it was within the spirit of section 943, which provides: "If the judgment or order appealed from direct

sions of section 813 et seq., Code of Civil Procedure, and the three hundred dollar undertaking was held sufficient to stay proceedings under the judgment.

<sup>4b</sup> 69 Cal. 241, 10 Pac. 334.

<sup>4c</sup> 84 Cal. 7, 24 Pac. 147.

<sup>4d</sup> 129 Cal. 300, 61 Pac. 1080.

<sup>4e</sup> 132 Cal. 340, 64 Pac. 477. But see section 222, note 4, *ante*. Unless the court intended to include the exceptions of section 949, that section must have been inadvertently included.

the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed," etc. The court, however, did not agree with this contention, and applied to it, and to others similar in character, the test suggested in the opening provision of the four sections mentioned, which prescribe the cases in which stay bonds are required, to wit: If the appellant is required to do anything suggested by those four sections, a stay bond is required. If someone else is directed to do the thing referred to, the case is not one requiring a special stay bond on appeal. Thus in the Schedel case the court said: "Sections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the order appealed from." So in *Born v. Horstmann*,<sup>4t</sup> after quoting from the Schedel case, the court said: "In the case before us the appellants are not required by the judgment to do anything. Therefore, the undertaking mentioned in section 941, *ipso facto*, operates as a *supersedeas*." So in other cases similar language was used.<sup>4s</sup> In every case, the distinction was clearly drawn between an order or judgment which imposed some duty upon the appellant, or required some proceeding at his hands, and those in which he bore no more than a merely negative part.

But section 949 enumerates certain exceptions, viz.:

1. Where the decree directs the sale of perishable property the court may, notwithstanding the appeal, order the property to be sold and the proceeds deposited to abide the judgment of the appellate court. In *Tolle v. Heydenfeldt*,<sup>4h</sup> where the appeal was from a judgment foreclosing liens on personal property, described therein as "mortgages and liens," the ordinary three hundred dollar appeal bond was held insufficient to operate as a stay, the court having found the property to be "perishable."

2. Where the judgment "adjudges the defendant guilty of usurping or intruding into, or unlawfully holding a public office, civil or military, within this state," an appeal does not stay the execution. In *Covarrubias v. Santa Barbara County*,<sup>5</sup> above quoted, it was held that a judgment of the district court removing a person from the office of sheriff under the act of March 30, 1874, was not within this

<sup>4t</sup> 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577.

<sup>4s</sup> *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *In re Woods*, 94 Cal. 566, 29 Pac. 1108; *McCallion v. Hi-bernia etc. Society*, 98 Cal. 442, 33 Pac. 329.

<sup>4h</sup> 138 Cal. 56, 70 Pac. 1013. It would seem not to have been sufficient in any event, under the 1897 amendment of section 943.

<sup>5</sup> 52 Cal. 622. And see, to same effect, *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644.

exception. In *Woods v. Varnum*,<sup>5a</sup> however, which was a proceeding under section 772 of the Penal Code, for summary removal, it was held that on an appeal from the judgment of removal the ordinary appeal bond did not operate as a *supersedeas*, the provisions of section 770 of the same code being applicable.

3. Where the appeal is from an order granting or refusing to grant a change of the place of trial of the action, it does not prevent the lower court from proceeding with the case;<sup>6</sup> and

4. Where the judgment orders a corporation or its officers, agents, etc., to give to a person adjudged to be a director, stockholder or member a reasonable opportunity to inspect or take copies of such books, papers, etc., as the court finds such director, etc., entitled to inspect or copy.

In addition to the above exceptions, it has been held that an appeal neither suspends the operation of an injunction issued nor revives an injunction dissolved; but this exception has also been limited strictly to injunctions which are mandatory, the object manifestly being, in all cases, the preservation of the *status quo*, and of the fruits of the appeal to the successful party.<sup>7</sup>

An appeal in a criminal case stays proceedings under the judgment until the determination of the appeal.<sup>8</sup> So an appeal to the supreme court of the United States from the circuit court in a *habeas corpus* proceeding instituted on behalf of a prisoner under sentence of death stays the hands of the state, and state authorities, during its pendency.<sup>9</sup> So a writ of error to the supreme court of the United States operates as a *supersedeas*.<sup>10</sup>

The giving of a stay bond does not relate back. Its effect is to preserve the *status quo*. Thus, where, after the modification of a divorce decree, so as to give to the father the custody of children which had been originally awarded to the mother, the latter voluntarily surrendered such custody in accordance with the modified

<sup>5a</sup> 83 Cal. 46, 23 Pac. 137.

<sup>6</sup> Before the amendment of 1874, the rule was different. See *Pierson v. McCahill*, 23 Cal. 249; but compare *People v. Whitney*, 47 Cal. 584. See *Howell v. Thompson*, 70 Cal. 635, 11 Pac. 789.

<sup>7</sup> See section 227, *post*.

<sup>8</sup> *Spears v. Modoc*, 101 Cal. 303, 35 Pac. 869; and see cases cited in the next two notes.

<sup>9</sup> *People v. Durrant*, 119 Cal. 54, 50 Pac. 1070; *Ex parte Edgar*, 119

Cal. 123, 51 Pac. 29; and see *People v. Ross*, 135 Cal. 59, 67 Pac. 13.

<sup>10</sup> *Ex parte Rodley*, 132 Cal. 40, 64 Pac. 91. In this case petitioner was being conveyed to the state prison, notwithstanding the fact that the writ of error to the federal court had been perfected. The supreme court of California, on *habeas corpus*, remanded him to the custody of the sheriff, and ordered him returned to the county jail pending the determination of the writ.

decree, it was held that she could not afterward, having perfected her appeal, demand the restoration of the custody of the children by virtue of the stay of proceedings thus effected.<sup>10a</sup> This principle has its limitations, however. For example, section 946 specifically provides that property levied upon must be released from levy upon the filing of a stay bond, or upon the perfecting of an appeal which operates as a stay; and in *Sam Yuen v. McMann*<sup>11</sup> the supreme court held that it was by this section made the duty of the sheriff to release from levy property in his possession immediately upon the filing of the undertaking which operates as a stay, and not await the justification of the sureties, or until their justification is waived. The filing of a stay bond on appeal from the judgment does not stay action by the trial court on a motion for a new trial.<sup>12</sup>

The provisions of sections 1056 and 1057, Code of Civil Procedure, as to bonding companies, authorize stay bonds as well as ordinary appeal bonds by such companies.

The provision of section 954 of the Code of Civil Procedure with reference to the justification of sureties has application solely to stay bonds and not to appeals perfected under the code.<sup>13</sup>

The new and alternative method of appeal contains no provision for an undertaking on appeal, and an appeal may be "perfected" under that method simply by filing a notice with the clerk of the superior court. Upon the question whether an appeal perfected in that manner accomplishes a stay of proceedings in all cases not included within the scope of sections 942 to 945, inclusive, and with the exceptions prescribed in section 949, there has been no expression. It must therefore be regarded as still an open one.

<sup>10a</sup> *De Lemos v. Siddall*, 143 Cal. 313, 76 Pac. 1115. This case was distinguished from that of *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956, where the application for the writ was made by the mother, herself, who had refused, pending her perfected appeal from a similar order, to comply with an order of court requiring

her to surrender the custody of the children in accordance with the modified decree.

<sup>11</sup> 99 Cal. 497, 34 Pac. 80.

<sup>12</sup> *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468.

<sup>13</sup> See *Mersfelder v. Spring*, 136 Cal. 619, 69 Pac. 251. And see chapter 37.

## CHAPTER XXXVI.

## EFFECT OF AN APPEAL.

- § 224. Effect of an appeal with undertaking for costs and damages.  
 § 225. Effect of an appeal with undertaking to stay proceedings.  
 § 226. Effect of an appeal with a stay bond upon the judgment lien.  
 § 227. Effect of an appeal upon injunction proceedings.

§ 224. **Effect of an Appeal With an Undertaking for Costs and Damages.**—As has been shown, an undertaking in the sum of three hundred dollars to pay costs and damages must be given upon every appeal to render it effectual for any purpose.<sup>1</sup> And in cases not otherwise provided for this undertaking operates as a stay of execution.<sup>2</sup> There are, however, other proceedings in a cause besides proceedings to execute the judgment or order, and such other proceedings may or may not be affected by an appeal according to their nature.<sup>3</sup> The effect of an appeal upon the judgment appealed from is a matter of statutory regulation,<sup>3a</sup> and the code very clearly differentiates between cases which require a stay of execution, in addition to stay of proceedings in general, and those which do not.<sup>3b</sup> It is not to be understood from this that a stay “of all further proceedings,” as declared in section 946, can be accomplished without a stay of execution. The result of the code provisions is to require a regular undertaking on appeal in the sum of three hundred dollars, or a deposit of like amount, in all cases of whatsoever description, and a stay bond, or undertaking to stay execution,<sup>3c</sup> in certain specified cases. The distinction is based, apparently, upon the particular character of the judgment, as whether it is self-executing, or whether it involves the performance

<sup>1</sup> See section 211, *ante*.

<sup>2</sup> See section 223, *ante*.

<sup>3</sup> In this connection see section 946, California Code of Civil Procedure, quoted in next section.

<sup>3a</sup> *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58.

<sup>3b</sup> In *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58, the supreme court said:

“Sections 942-945 of the California Code of Civil Procedure provide a mode by which the ‘execution’ of the judgment or order appealed from may in certain cases be stayed until the deter-

mination of the appeal; and section 949 of the Code of Civil Procedure provides that, ‘in cases not provided for’ in these sections, the perfecting of an appeal by giving the three hundred dollar undertaking ‘stays proceedings in the court below upon the judgment or order appealed from,’ except in certain designated cases.  
 . . . . .”

<sup>3c</sup> “Stay of proceedings” and “stay of execution” should not be confused. They are wholly distinct, though, in a sense, the former may be said to include the latter.



of some act on the part of the losing party or some independent process for its enforcement. But there are cases which plainly disregard this distinction, and appear to treat the provisions of sections 942-945 as casual enactments.<sup>34</sup>

If the required undertakings are placed on file, and the appeal thus "perfected" in the manner prescribed by the code provisions, the effect in every case is to "stay proceedings" or "to stay all further proceedings" in the trial court. This phraseology carries no mystic signification. It indicates a stay of action, not of mere passive condition or state of being. And it is not limited to any particular action. It stays every possible action in connection with the litigation in the lower court which could have the slightest effect upon its status as marking the respective rights of the parties.

What may be understood to be the effect of an appeal which accomplishes a stay of all proceedings? As heretofore shown, the first effect is to remove the litigation from the lower to the higher court. No judgment or order of a superior court is ever so final and determinative of the rights of the parties to the action in which it is rendered or entered that such rights can be said to be concluded thereby so long as the right of appeal exists, and particularly so long as an appeal is actually pending.<sup>35</sup> A superior court is a *nisi prius* court, and while its jurisdiction is exclusive until judgment is entered, and, for some purposes, until the litigation is concluded, after entry of judgment its jurisdiction becomes subservient until the right of appeal to a higher court no longer exists, or until the appeal itself has reached a final determination.

While the cause is pending in the higher court, the effect of a perfected appeal is to preserve the rights of the parties to the con-

<sup>34</sup> It is difficult to believe that the legislature was not controlled, in the enactment of these provisions, by a definite purpose to outline a distinct class of judgments, rather than to except from the operation of the general stay of the regular appeal bond a list of judgments which happened to unite in the one element—that they all required some act of the appellant or some exercise of process, for their enforcement. It is believed that these four cases are intended to carry a definition of every recognized judgment having this element. There may be cases which come within the description, and yet are not included

in the definition of either of the sections. In *Foster v. Superior Court*, *supra*, it is said that section 949 includes all judgments not within the scope of the sections referred to, those which may be described as requiring some act on the part of the appellant for their execution and those that are self-executing. There may be other cases. If so, and if there are such cases (such, perhaps, as some mandatory injunctions), they are cases which escaped the notice of the lawmakers.

<sup>35</sup> See *In re Moss*, 120 Cal. 695, 53 Pac. 357; also *Broder v. Conklin*, 121 Cal. 289, 53 Pac. 797.

troversy in the same condition as when the appeal was perfected.<sup>27</sup> The *status quo* is preserved. The fruits of the litigation are guaranteed to the successful party. The execution of the judgment is suspended.<sup>28</sup> Were it otherwise, few appeals would ever be prosecuted. The functions of the appellate jurisdiction would be rendered nugatory; for if those fruits were subject to be consumed by his adversary, pending the prosecution of the appeal, there would be no advantage in such prosecution.

While the appeal is pending under such a stay the trial court cannot carry into execution any substantial part of its judgment.<sup>29</sup> Nor can it compel the appellant to do any act, perform any duty, or sustain any loss, directed, or required, or imposed, by such judgment, or punish him for contempt for refusing to carry out its directions or obey its orders.<sup>30</sup>

Whether the appeal is perfected by a single undertaking on appeal, or by two undertakings, the undertaking on appeal and a stay bond, the result is the same. No act will be permitted tending to disturb the *status quo*. The cases are numerous. Thus in *Snow v. Holmes*<sup>31</sup> an ordinary appeal bond was held to be a stay of proceedings. In *Powers v. Crane*<sup>32</sup> the statutory undertaking on appeal was held "to operate to stay execution" of the decree. In *Re Schedel*<sup>33</sup> the usual undertaking on appeal was held "to stay all proceedings," etc. In *Born v. Horstmann*<sup>34</sup> the three hundred dollar undertaking was held to "*ipso facto*" "operate as a *super-sedeas*." And so in many other cases.<sup>35</sup>

<sup>27</sup> See *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Dulin v. Superior Court*, 98 Cal. 304, 33 Pac. 123; *State etc. Co. v. San Francisco*, 101 Cal. 135, 35 Pac. 549; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956. The subject matter of the controversy is removed from the jurisdiction of the trial court pending the appeal. *Burnett v. Jackson*, 27 Okl. 275, 111 Pac. 194. Also, *Callbreath v. Coyne*, 48 Colo. 199, 109 Pac. 428.

<sup>28</sup> See previous chapter as to stay of execution.

<sup>29</sup> See *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627. And see *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Dulin v. Su-*

*perior Court*, 98 Cal. 304, 33 Pac. 123; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *Marks v. Superior Court*, 129 Cal. 1, 61 Pac. 436.

<sup>30</sup> See *Ex parte Orford*, 102 Cal. 656, 36 Pac. 928; *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956; also *Rugles v. Superior Court*, 103 Cal. 125, 37 Pac. 211.

<sup>31</sup> 64 Cal. 232, 30 Pac. 806.

<sup>32</sup> 67 Cal. 65, 7 Pac. 135.

<sup>33</sup> 69 Cal. 241, 10 Pac. 334.

<sup>34</sup> 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577.

<sup>35</sup> See *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070; *In re Woods*, 94 Cal. 566, 29 Pac. 1108; *McCallion v. Hibernia etc. Co.*, 98 Cal. 442, 33 Pac.

If, notwithstanding an appeal duly perfected, sufficient to accomplish the statutory *supersedeas* here described,<sup>27</sup> so as to entitle the appellant to the preservation of the *status quo*, action should be taken looking to the enforcement of the judgment, a writ of *supersedeas* will be issued out of the appellate court, with a view to the preservation of the fruits of the appeal to the party who may ultimately be entitled thereto. This writ will be directed to the court below, and to its officers, who may threaten or attempt such enforcement by means of the process of such court, and its improper use.<sup>28</sup>

329; *Painter v. Painter*, 98 Cal. 625, 33 Pac. 483; *Hoppe v. Hoppe*, 99 Cal. 536, 34 Pac. 222; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563; *State etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Ex parte Orford*, 102 Cal. 656, 36 Pac. 928; *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211; *Stateler v. Superior Court*, 107 Cal. 536, 40 Pac. 949; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956; *Anderson v. Anderson*, 123 Cal. 445, 56 Pac. 61; *Daly v. Ruddell*, 129 Cal. 300, 61 Pac. 1080; *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64; *Los Angeles v. Pomeroy*, 132 Cal. 340, 64 Pac. 477; *Bank v. Hornberger*, 134 Cal. 90, 66 Pac. 74; *Rohrbacher v. Superior Court*, 144 Cal. 631, 78 Pac. 22; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Estate of Thayer*, 1 Cal. App. 104, 81 Pac. 658; *Olsen v. Birch*, 1 Cal. App. 99, 81 Pac. 656.

<sup>27</sup> See *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123.

<sup>28</sup> See *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123; *Rose v. Mesmer*, 131 Cal. 631, 63 Pac. 1010; *Madera v. Raymond Granite Co.*, 138 Cal. 244, 71 Pac. 112.

In the case of *In re Epley*, 10 Okl. 631, 64 Pac. 18, the principles herein stated were applied to review proceedings by writ of error. It was held that the supreme court, or any justice thereof, was empowered to stay the execution of any judgment or final order in any case not provided for by statute, and upon such terms as are necessary to maintain

the *status quo*, and secure to the successful litigant the proper fruits of his writ. The following language was used with reference to the power thus stated: "At common law a writ of error in an appellate court operated as a *supersedeas* by implication, and stayed the proceedings in the inferior court from the time of its allowance, without an undertaking or other security. 24 Am. & Eng. Ency. of Law, p. 585. The inherent power of an appellate court to grant a *supersedeas* in the absence of any statutory provision is clearly and fully discussed in volume 20, page 1237 of the Encyclopedia of Pleading and Practice, where the rule is thus stated: 'Where there is no statutory provision for a *supersedeas* bond in a particular case, the court may stay the proceeding for the protection of the parties, in the exercise of this inherent power.' And on page 1238 of the same volume it is said: 'In cases which do not fall within the provisions of the statute the supreme court may, in its discretion, and after it obtains jurisdiction of the cause, order *supersedeas* upon such terms as it may prescribe.'" See, also, cases cited in that case.

In *State v. Board*, 19 Wash. 8, 67 Am. St. Rep. 706, 52 Pac. 317, 40 L. R. A. 317, it was held that the right to issue a *supersedeas* in cases where not expressly authorized by statute resided in the supreme court in consequence of the provision of section 4, article 4 of the Constitution, which provides that the court shall have power to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction.

It is essential that the threat or attempt referred to come from the court or its officers, and the writ will be limited to the restraint of official action, and the improper use of the court's process. The parties themselves cannot be prevented by such a writ from doing any act looking to the enforcement of their rights short of the misuse or improper use of the process of the court directed to the carrying out of the judgment and the enforcement of its provisions.<sup>31</sup> Nor can the writ be used to restrain those not parties to the proceedings.<sup>32</sup>

It is also to be understood that the appeal is the statutory *supersedeas* above referred to,<sup>33</sup> and not the stay bond or the undertaking on appeal, and it is the disregard of the rights conferred by the perfected appeal that gives ground for the issue of the writ. But whether it is the appeal or the undertaking, or both, the result is the same. The office of the writ is to restrain action in the shape of the improper use of process of the court below, in disregard of the appellant's rights, directed to the enforcement of the judgment, to place within reach of the successful party whatever benefits it confers, and so permanently change the *status quo*, and, in most cases, thus render the appeal ineffectual.

The writ will not issue unless there is a threat, or an attempt to disregard the stay which is the appellant's right. The appeal itself is effective until there is a threat of improper use of process. So, where the judgment itself affords all the relief possible, and no further proceeding thereunder is necessary, as is sometimes the case when the judgment is self-executing, the writ will not issue.<sup>34</sup> And this is merely saying, in effect, that the writ will be directed to proceedings, and not to the judgment.<sup>35</sup>

The writ of *supersedeas*, as the same is used in the California jurisdiction, and in most code states, has undergone considerable change since it was borrowed from the common-law practice.<sup>36</sup> In its chief characteristics it is little else than a prohibitory injunction. It will not issue as a mandatory injunction. In that case it would

<sup>31</sup> *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123.

<sup>32</sup> *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123.

<sup>33</sup> See *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *State etc. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Spears v. Modoc*, 101 Cal. 303, 35 Pac. 869; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580;

*Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Mark v. Superior Court*, 129 Cal. 1, 61 Pac. 436.

<sup>34</sup> See *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856; *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123.

<sup>35</sup> *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452.

<sup>36</sup> *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123.

cease to be a preservative process.<sup>33</sup> Within its peculiar sphere the writ is ample enough as a remedy, and, ordinarily, neither prohibition nor any other writ may be made use of in its place.<sup>4</sup> In *Havemeyer v. Superior Court*,<sup>4a</sup> the writ of prohibition was called into operation for the purpose of restraining certain proceedings looking to the carrying into effect of a judgment forfeiting a corporation charter and imposing a fine in punishment for certain acts in restraint of trade, but it was then believed that the relief by *supersedeas* was doubtful, by reason of the fact that the petitioner for the writ was not a party to the original action. And in *State etc. Co. v. Superior Court*,<sup>4b</sup> a writ of prohibition was issued restraining the appointment of a receiver pending an appeal from the judgment. The remedy by *supersedeas* was apparently not called to the attention of the court, and the point was not passed upon. Writs of *certiorari* have sometimes been issued for the purpose of annulling orders of the trial court made by way of enforcing judgments which have been suspended pending appeal, but it seems to have always been after the making of the order, when *supersedeas* would be ineffectual.<sup>4c</sup> So, in the same manner, the writ of *habeas corpus* has been sometimes made use of.<sup>4d</sup>

A writ of *supersedeas* will be issued to prevent the enforcement of a judgment, even though not stayed, where a motion to dismiss is pending, and the motion cannot be disposed of without a consideration of the merits. In such case, it has been said that it is the duty of the superior court to refrain from taking any step toward the enforcement of the judgment, and if such enforcement is threatened, *supersedeas* will issue.<sup>4e</sup>

<sup>33</sup> See *Bliss v. Superior Court*, 62 Cal. 543; *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452.

<sup>4</sup> See *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Buggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211.

<sup>4a</sup> 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

<sup>4b</sup> 101 Cal. 135, 35 Pac. 549.

<sup>4c</sup> See *Dennery v. Superior Court*, 84 Cal. 7, 24 Pac. 147; *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563; *Stateler v. Superior Court*, 107 Cal. 536, 40 Pac. 949; *Kaufman v. Superior Court*, 108

Cal. 446, 41 Pac. 476; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58, and compare *Buhlert v. Superior Court*, 72 Cal. 97, 13 Pac. 155. See, also, *Clute v. Superior Court*, 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362, where the supreme court was asked for a writ of *certiorari* to review an order in a contempt proceeding for refusing to obey an injunction, mandatory in effect, stayed by a perfected appeal, but, while refusing this writ, made an order to show cause why *supersedeas* should not issue.

<sup>4d</sup> See *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956.

<sup>4e</sup> *Hale & Norcross Co. v. Fox*, 122 Cal. 56, 54 Pac. 270.

An affidavit in support of a motion for a writ of *supersedeas* must state the facts relied upon, and not merely conclusions. It is not sufficient for a moving party to state generally that a person was not "in possession" of the property.<sup>41</sup> A motion for a writ of *supersedeas* will be transferred without action along with the entire appeal, from the district courts of appeal to the supreme court, when it appears that a case belongs to the latter, and not to the former.<sup>42</sup> In appeals from judgments in actions of unlawful detainer it is in the discretion of the trial court to say whether there shall be a stay of proceedings pending appeal. *Supersedeas* cannot issue until he has fixed the stay bond and it has been placed on file; but having once fixed it, he cannot revoke or vacate it.<sup>43</sup>

An appeal from the judgment in criminal actions operates as a *supersedeas*, and suspends the execution thereof until the appeal is finally disposed of.<sup>44</sup> The certificate of probable cause cannot, however, be dispensed with, except in capital cases.<sup>45</sup>

The statutory *supersedeas* above outlined is directed solely to the preservation of the *status quo*, and of the fruits of the appeal for the benefit of the successful party. Its purpose does not extend further; nor can its effect be stretched beyond its purpose. Neither the judgment itself nor proceedings of the trial court which do not affect the *status quo* can be said to be affected by the perfected appeal therefrom. Section 946 of the Code of Civil Procedure provides that, pending an appeal perfected under the provisions of the previous sections,—

" . . . . The court below may proceed upon any other matter embraced in the action and not affected by the order appealed from."

<sup>41</sup> *McMillan v. Hayward*, 84 Cal. 85, 24 Pac. 151.

<sup>42</sup> See *Weldon v. Rogers*, 1 Cal. App. 388, 82 Pac. 352.

<sup>43</sup> See section 222, *ante*.

<sup>44</sup> See section 1470, California Penal Code. Also section 223, *ante*. And see *Spears v. Modoc*, 101 Cal. 303, 35 Pac. 869.

<sup>45</sup> See *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378. In this case it was held that while the certificate of probable cause was necessary in all save capital cases, it was the duty of the trial judge to give such a certifi-

cate if there is room for an honest difference of opinion, even though, in his own opinion the record is free from error. The defendant is entitled as a matter of right to the certificate, unless his appeal is clearly frivolous, and if the trial judge refuses the certificate, the defendant may apply to the appellate court, and a justice of that court will furnish the certificate. Time should be given for the preparation and settlement of a bill of exceptions, and for the filing of the transcript, and the *supersedeas* should extend to such time.

Under the authority of this provision the supreme court in *San Francisco etc. Co. v. Superior Court*<sup>42</sup> held that the lower court had jurisdiction, pending appeal, to issue a commission to take the testimony of a witness under sections 2020 and 2021 of the same code, for use in a new trial of the action.

But even in the absence of such a provision, it is believed that the trial court may take any action that may be proper in connection with the cause, provided the conditions are allowed to remain substantially unchanged as when the appeal was perfected. Matters ancillary or collateral, in connection with the appeal itself or the proceedings in the lower court, as the settlement of a bill of exceptions,<sup>43</sup> hearing and disposing of a new trial motion,<sup>44</sup> or compelling the payment of alimony in a divorce case, are not affected by an appeal.<sup>45</sup>

So the trial court always has jurisdiction to correct its records so as to make them speak the truth, and it has often been held that this might be done, even in a material respect, after an appeal had removed the cause to a higher court. Thus in *Fay v. Stubenrauch*<sup>46</sup> a clerical misprision as to the name of the appellant was corrected after an appeal from the judgment had been perfected, and this action was upheld, even though the result was to necessitate an affirmance of the judgment appealed from, as a matter of course. The court said:

"Whenever it is apparent on the face of the record, that the error to be corrected consists of a clerical misprision, the court always has inherent power to correct this. (*Estate of Schroeder*, 46 Cal. 304; *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381; *San Joaquin etc. Co. v. West*, 99 Cal. 345, 33 Pac. 928; *Chicago Clock Co. v. Tobin*, 123 Cal. 377, 55 Pac. 1007.) Nor is the right of the lower court to amend suspended or impeded by an appeal, where an amendment does not affect any substantial rights of appellant."

<sup>42</sup> 155 Cal. 30, 99 Pac. 359, 17 Ann. Cas. 933. As to extent of control of appellate court over proceedings in the cause, as affected by date of appeal, see *Miller v. Mining Co.*, 3 Idaho, 603, 32 Pac. 207.

<sup>43</sup> *Colbert v. Rankin*, 72 Cal. 197, 13 Pac. 491. Also, as to settlement of statement on appeal, *William Mercantile Co. v. Fussy*, 13 Mont. 401, 34 Pac. 189.

<sup>44</sup> *Rayner v. Jones*, 90 Cal. 78, 27 Pac. 24.

<sup>45</sup> *Harron v. Harron*, 128 Cal. 303, 60 Pac. 932. In this case the court said: "It is true, it suspended the operation of the judgment, but none the less for purposes of subsequent proceedings in the case it remained, until reversed, the determination of the trial court upon the questions involved."

<sup>46</sup> 141 Cal. 573, 75 Pac. 174; and see *Fox v. Stubenrauch*, 2 Cal. App. 88, 83 Pac. 82.



But the right of amendment after appeal from the judgment has been perfected does not go beyond mere clerical misprisions, and, possibly, cases within the language of the last sentence. Thus in *Bryan v. Berry* " it was held that although execution in the case was not stayed, yet that the appeal prevented the court below from amending the judgment appealed from, and the court said: "The case was pending in this court upon appeal, and the district court had lost all power over the judgment. The right to issue the execution was not suspended by the appeal, but the right to amend the judgment was taken away." So in *Baggs v. Smith* <sup>6</sup> it was held that the court below could not amend its findings after appeal taken.

And the jurisdiction over collateral and ancillary proceedings will never be permitted to interfere with the substantial rights of the parties to the appeal as they existed at the time of the perfecting of the appeal. The following cases illustrate the rule:

In *Livermore v. Campbell* <sup>6</sup> it was held that the court below could not, after appeal, set aside a judgment of dismissal entered by the clerk. So in *Ford v. Thompson* <sup>7</sup> it was held that after an appeal with a three hundred dollar undertaking from an order granting a new trial it was irregular in the court below to proceed with the retrial. So in *Pierson v. McCahill* <sup>8</sup> it was held that an appeal from an order denying a change of venue prevented the court from proceeding with the trial of the cause; but this was afterward changed by statute.<sup>9</sup> So in *Reynolds v. Reynolds*<sup>10</sup> it was held that after an appeal had been perfected, the trial court had no jurisdiction to amend the judgment appealed from so as to prevent a review of an alleged error brought up by bill of exceptions. So in *Stewart v. Taylor* <sup>11</sup> it was held that pending an appeal from an order denying a new trial, before settlement of the statement on which it is to be heard, the lower court could not vacate it or set it aside. So in *Kirby v. Superior Court* <sup>12</sup> it was held that the superior court

<sup>6</sup> 8 Cal. 130. No alternative can be allowed for the completion of some act relating to the filing of a proper undertaking. *Hanley v. Stewart*, 54 Or. 38, 102 Pac. 2.

<sup>7</sup> 53 Cal. 88. Cited in *People v. Center*, 54 Cal. 236; and look at *Estate of Garraud*, 36 Cal. 277.

<sup>8</sup> 52 Cal. 75.

<sup>9</sup> 19 Cal. 118. In one sense this may be said to be a stay of execution, but not in the ordinary sense.

<sup>10</sup> 23 Cal. 249.

<sup>11</sup> See section 223, *ante*.

<sup>12</sup> 67 Cal. 176, 7 Pac. 480.

<sup>13</sup> 68 Cal. 5, 8 Pac. 605.

<sup>14</sup> 68 Cal. 604, 10 Pac. 119. See, also, *San Francisco Sav. Union v. Myers*, 72 Cal. 161, 13 Pac. 403, where it was held that the superior court could not deprive the supreme court of its jurisdiction of an appeal from a judgment by amending the latter after such appeal had been perfected and was pending.



was without jurisdiction, pending appeal, to allow an amendment to a pleading, and thereafter proceed with the trial of the case. So in *Shay v. Chicago Clock Co.*<sup>9d</sup> it was held that pending an appeal, the superior court could not amend or correct the judgment appealed from. So in *Peycke v. Keefe*<sup>9e</sup> it was held that, pending appeal from a judgment by default (after striking out the answer of defendant, and rendering judgment against him on the pleadings), and from an order refusing to set the same aside, the trial court loses jurisdiction of the cause, and could not of its own motion set the judgment aside. So in *People v. Mayne*<sup>9f</sup> it was held that after appeal from an order denying a new trial the subject matter of that order is removed from the jurisdiction of the superior court; and that, while such appeal is pending, it is without jurisdiction to change such order. So in *Vosburg v. Vosburg*<sup>9g</sup> it was held that pending appeal from a divorce decree, and a judgment awarding the custody of the children of the parties to the suit to one of them, the superior court had no jurisdiction to modify the judgment as to the custody of the children.

The *status quo* preserved by a perfected appeal from the judgment is that existing at the time the appeal is perfected. The appeal is not retroactive in its effect. It does not go back even to the time of the rendition or entry of the judgment. To hold otherwise would be to hold, in effect, that the appeal is not preservative. But it has been, time and again, contended with some appearance of seriousness that an appeal from a judgment or order had the effect of restoring the conditions which existed prior to the rendition of the same. Thus it was contended that an appeal from an order removing an administrator,<sup>9h</sup> or a guardian,<sup>9i</sup> had the effect of reviving or restoring the powers of such official. The supreme court denied this principle, however, holding that while the success-

<sup>9d</sup> 111 Cal. 549, 44 Pac. 237.

<sup>9e</sup> 114 Cal. 212, 46 Pac. 78.

<sup>9f</sup> 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

<sup>9g</sup> 137 Cal. 493, 70 Pac. 473. The plaintiff recovering judgment may file a transcript with the recorder notwithstanding an appeal perfected. *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063. And he may sue out execution thereon, and cause a levy to be made upon the property of his adversary, prior to the date of the filing of the undertaking on appeal. *Id.*

<sup>9h</sup> *Estate of Crozier*, 65 Cal. 332, 4 Pac. 109; *More v. More*, 127 Cal. 460, 59 Pac. 823.

<sup>9i</sup> *Guardianship of Van Loan*, 142 Cal. 429, 76 Pac. 39. A special administrator or guardian may be appointed pending appeal, and in the case of the former, at least, the regular administrator may be compelled to turn over to such special administrator the property and funds of the estate. *Estate of Heaton*, 142 Cal. 116, 75 Pac. 662.

ful party, after an appeal duly perfected, was not entitled to the fruits of his judgment until it was finally determined in his favor, yet, at the same time, his adversary would not be permitted to proceed as though no judgment or order had been made. The judgment or order is suspended in its operation, pending the appeal, it is true, but until it is finally set aside or reversed, it is none the less the judgment of a court of competent jurisdiction, and cannot be wholly disregarded.<sup>9m</sup>

*As Evidence in Another Action.*—In the earlier decisions it was held that a perfected appeal suspended the force and effect of a judgment, so that it could not serve as the foundation of, or be used as evidence to support, another action.<sup>10</sup> And this is practically

<sup>9m</sup> See *Dulin v. Pacific etc. Co.*, 98 Cal. 304, 33 Pac. 123, where it was said of the judgment: "The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay . . . is limited to the enforcement of the judgment itself, and does not destroy or impair its character." And in *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58, similar language was used.

<sup>10</sup> Thus in *Knowles v. Inches*, 12 Cal. 212, where the title of the plaintiff having been adjudicated in one action he brought a bill in equity (while the appeal was pending) to restrain the prosecution of other actions concerning the same title, it was held the bill could not be maintained, the court saying: "The judgment suspended by appeal cannot be considered as conclusive of the fact of title even without reference to the manner in which it was obtained." So in *Woodbury v. Bowman*, 13 Cal. 634, where a judgment in another action was offered in evidence to establish an estoppel as to fact in controversy, it was held that the rejection of the judgment was proper, an appeal being then pending, and the supreme court said: "We think it was properly rejected; the appeal having suspended the operation of the judgment for all purposes, it was not evidence in the questions at issue even between the parties to it." The same principle was laid down in *Thornton v. Mahoney*. The facts of that case were

as follows: The plaintiff claimed as a settler upon public land. The defendant claimed through a Mexican grant. The grant had been confirmed by the board of land commissioners, and an official survey had been made and was pending in the United States district court upon exceptions filed. This survey was finally rejected and a second survey was made, and was approved by the district court. The United States and the defendant Mahoney both appealed from the decree approving the second survey, which excluded the land in controversy from the grant. The action was commenced pending the appeals. The supreme court of California held that it could not be maintained and said: "It is not the practice for the [United States when] appellant in cases of appeal from the decree of the district court approving a survey made under the act of Congress mentioned to execute a bond in order to stay proceedings upon the decree, and we apprehend no such bond is necessary for the purpose. In the time of Mr. Chief Justice Hale it was the law of the house of lords in England that the presenting of an appeal to that court of *dernier resort* suspended all proceedings in the court below. It is true that their jurisdiction was for a long time questioned by the house of commons, and also by several distinguished judges, among whom was Mr. Chief Justice Hale himself; but notwithstanding the jurisdiction

the modern view. For a time, however, the reports of cases disclose a lack of harmony, both with reference to each other and to

of the house of lords became established, and so remained until nearly the beginning of the present century. (Palmer's Practice of the House of Lords, 3 Paige, 381.) . . . . The parties who have appealed from the decree approving the survey respectively seek to reverse it in the appellate court in order to obtain a different survey and location of the land to which the assignees of the confirmees are entitled by their grant. The appellate tribunal may reverse this decree and set aside the survey which has been approved by the district court, and the result may be that the land in controversy will eventually be selected by the government as a portion of the quantity to be assigned to the claimants and granted by the patent yet to be issued. Until this question be disposed of the plaintiff's action must be considered as premature." Thornton v. Mahoney, 24 Cal. 569.

This case was approved and followed upon the point in McGarrahan v. Maxwell, 28 Cal. 75, and was approved *arguendo* in Hills v. Sherwood, 33 Cal. 474. See, also, People v. Frisbie, 26 Cal. 135.

The doctrine of the above cases, that an appeal suspends the effect of a judgment, so that it cannot be made the foundation of a separate action, seems to have been overturned in Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478. In that case the plaintiff sued in California upon two judgments obtained in New York. The answer set up as a defense the fact that appeals had been taken in New York from such judgments, and were then pending. This was held to be no defense, and Sprague, J., delivering the opinion, said:

"The answer does not allege that the appeal, as taken and perfected to the court of appeals from said judgments, had, by the law of New York, the effect of suspending the judgment thus appealed from, or of staying the execution thereof, nor is it alleged that the undertaking on such appeal was to the effect that the

sureties thereon were bound in double the amount named in the judgment; that if the judgment appealed from, or any part thereof, be affirmed, the appellant would pay the amount directed to be paid by the judgment, or that any order was entered staying proceedings upon or execution of the judgment. In the absence of any proof to the contrary, the presumption is that the effect of the alleged appeal by the laws of the state of New York is the same as in this state; and in this state such appeal would not stay execution or proceedings for the collection of the amount of the judgment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of the judgment as evidence of the facts or matters necessarily determined thereby. Whether by an appeal from a judgment, in which appellant had given an undertaking on appeal in form and amount sufficient to stay proceedings for its enforcement, the effect of the record of the judgment as evidence is thereby suspended or nullified, is a question not involved in this case."

The earlier cases above mentioned were cited to the court in Taylor v. Shew, but are not noticed in the opinion. The court seems to lay stress upon the fact that it did not appear that execution of the judgment sued on had been stayed; and probably it was considered that execution of the judgment in the earlier cases was stayed, and that for that reason the cases were not authority upon the question before the court. There certainly does seem to be some ground for this notion. For in Knowles v. Inches and Woodbury v. Bowman it does not appear from the reports of the cases whether execution of the judgment was stayed or not; and in Thornton v. Mahoney and McGarrahan v. Maxwell the United States was a party appellant, and its appeal operated as a *supersedeas* without any bond. See 24 Cal. 569, and 28 Cal. 75. But the reasoning of the above cases does not seem to turn upon the stay of execution, but

the prevailing opinion elsewhere.<sup>10a</sup> The subject received serious consideration in *Smith v. Smith*,<sup>10b</sup> and the rule of the earlier cases was finally adopted as the settled view of the court. In that case, Temple, J., for the court, said:

"The question here involved is not new, but has been much discussed, and the decisions are not in accord. (See Freeman on Judgments, sec. 328.) In this state it has been held that a judgment, pending the appeal, cannot be used as an estoppel, but in many states the opposite is held. Either rule presents difficulties. If the suspended judgment cannot be used as evidence, then in other suits, in which such rights could not be tried as an original issue, as here, a bar may be obtained which would deprive the party of the fruits of his litigation in the case on appeal. If such judgment can be used, then the party may in other suits, where the suspended judgment would be evidence, obtain judgments which, when the appeal was finally determined, it would appear, he ought not to have. And in either case such other judgments, obtained through the use of, or suffered through not being able to use, the judgment which is on appeal, could not be reversed, for in either case the ruling would be correct.

"It is contended that the rule in this state is, that, pending the appeal, the judgment cannot be used as evidence for any purpose

rather upon the nature of the appeal itself. And in *Woodbury v. Bowman* there was no stay of execution. This does not appear from the report, but it is stated in the report that the judgment offered in evidence was in the case of *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185, and it is stated in the report of that case that the undertaking was insufficient to effect a stay of execution.

Upon principle the rule in *Taylor v. Shew* is clearly unsound, and has been very properly discredited. Its operation would in most cases destroy, for all practical purposes, the right of appeal. For if the respondent should commence an action upon the judgment appealed from, as soon as it was entered, he could almost always obtain a second judgment before the appeal could be determined. For if the complaint were verified the appellant could not deny the existence of the judgment, and an affirmative defense setting up the appeal would under *Taylor v. Shew* be un-

availing. The respondent could soon have issues of law disposed of, and could enter his second judgment in a short time. Even if issues of fact could be successfully raised, a second trial could in many cases be had before the determination of the appeal, and in any case there would be an unseemly race between the parties to see which matter should be determined first. A second trial before the determination of the appeal must, under *Taylor v. Shew*, result in a judgment for the plaintiff. And a subsequent reversal of the first judgment would not affect the second, which would have to be affirmed on appeal. For a ruling which is right when made cannot be rendered erroneous by any subsequent occurrence. In this way the right of appeal would be practically cut off. A rule which leads to such results cannot be sound.

<sup>10a</sup> See previous note for reference to case of *Taylor v. Shew*.

<sup>10b</sup> 134 Cal. 117, 66 Pac. 81.

whatever. A rule so general and absolute would manifestly be unreasonable, and goes much beyond the decisions. The rule is, simply, that one cannot avail himself of an adjudication establishing a right while the judgment is suspended by an appeal. In *Woodbury v. Bowman*, 13 Cal. 634, it is merely said: 'The appeal having suspended the operation of the judgment for all purposes, it was not evidence in the question at issue, even between the parties to it.' The attempt was to show an estoppel by the judgment. This was to enforce the suspended judgment. So far as they are used to determine questions of title, judgments are enforceable in no other way. A judgment merely quieting title cannot be enforced by execution. The ruling, therefore, was, as already said, merely that a judgment, while suspended by an appeal, cannot be enforced.

"The same explanation applies to the other citations. In *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, it is said that the true course of a defendant in such a case is, to plead the pending of the former suit in abatement 'until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order.' It is evident that such a plea would not in every case be available. The plea of another suit pending will be sustained only when the plaintiffs are the same (*Felch v. Beaudry*, 40 Cal. 439), and when the cause of action is the same in each suit,—when, in fact, the same evidence would support the judgment in each case. (*Montgomery v. Harrington*, 58 Cal. 270.)

"A much better mode to secure the benefit of the evidence, and to avoid a conclusion which may prove unjust, is to move for a continuance, as suggested in *Rose v. Superior Court*, 65 Cal. 570, 4 Pac. 577, and *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433."

The gist of this decision is that the rule that a judgment cannot be used in evidence pending an appeal therefrom is the true rule, as between such a rule and its converse; but that it is subject to at least two limitations. It may be used to establish an indirect or contingent right, and it may be pleaded in abatement, although suspended by appeal. Thus, in the case at bar, it was said that the judgment, order of sale, execution, deed, etc., the facts showing the decree for alimony, the issue of the execution, the levy and sale, and the conveyance of title thereunder, might be introduced as evidence of the contingent rights created thereunder in drafting the decree quieting plaintiff's homestead title. And, in a proper case,

as where the parties are the same and the cause of action is the same, former judgment may be successfully pleaded in abatement, pending the appeal, and when that is finally determined, it may be pleaded in bar.

Later cases support this position. In *Greer v. Greer*,<sup>100</sup> it was held that a judgment might be received in evidence, for the purpose of proving *res adjudicata*. This was a suit for a divorce, for alimony, and for the cancellation of a deed to property which it was desired to subject to execution under whatever judgment for alimony might be secured. It was brought by a wife against a husband. The latter offered in evidence a former judgment in an action for maintenance and for the cancellation of the same deed, the cause of action—desertion—being the same in both cases. It was held that the former judgment might be introduced in evidence, notwithstanding it was then pending on appeal, for the purpose of precluding a retrial of the validity of the deed or the finding as to desertion, both having been determined in the former suit.

In *Cook v. Ceas*,<sup>101</sup> the court, referring incidentally to this rule, said:

“The effect of these numerous decisions is not in the least impaired by the fact that in some cases, and for some purposes, an appealable judgment may be offered in evidence. It may, of course, be offered in evidence whenever the mere fact that it has been entered is material; as, for instance, in support of a plea in abatement, or to show the regularity of an execution. . . .”

Subject to these limitations, the rule which forbids the introduction of a judgment in evidence until the determination of the appeal therefrom, or until the time for appeal has lapsed, is well settled. In *Murray v. Green*<sup>102</sup> it was held that a judgment could not be given in evidence pending an appeal therefrom. So in *People v. Treadwell*<sup>103</sup> it was held that proceedings taken for disbarment on the ground of a conviction for a felony were premature when taken pending an appeal from the judgment of conviction. So in *Harris v. Barnhart*<sup>104</sup> it was held that while an appeal is pending and until the time therefor has expired, unless sooner satisfied, the judgment is not evidence in bar of a recovery in another action for the same cause, but the proceedings, including the

<sup>100</sup> 142 Cal. 519, 77 Pac. 1106.

<sup>101</sup> 143 Cal. 221, 77 Pac. 65.

<sup>102</sup> 64 Cal. 363, 28 Pac. 118.

<sup>103</sup> 66 Cal. 400, 5 Pac. 686.

<sup>104</sup> 97 Cal. 546, 32 Pac. 589. This case, as well as that of *Colton et al. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878, clearly foreshadow the decision in the *Smith* case quoted in the text.

judgment, may be admitted under proper pleadings in abatement of another action for the same cause. If the time for appeal has expired, it is admissible in support of a plea in bar. In *People v. Gibbs* <sup>10a</sup> it was held that a judgment is suspended for all purposes, pending appeal, and is not evidence upon the question at issue between the same parties, and cannot be introduced in evidence in a criminal action against one of them. In *Naftzger v. Gregg* <sup>10k</sup> it was held that until its final determination on appeal, or until the time for appeal has elapsed, a judgment cannot be introduced in evidence as a bar in another action between the same parties relating to the same subject matter. So in *Colton etc. Co. v. Swartz* <sup>10l</sup> it was held that a defendant in an action in ejectment who pleads title as purchaser at an execution sale may introduce the judgment which was the basis of the execution sale, but the general rule was sustained. So in *People v. Beevers* <sup>10m</sup> it was held that a judgment of divorce could not be introduced as evidence of the marriage in a criminal action for bigamy, while an appeal from such judgment was pending.

So in other cases.<sup>10n</sup>

**§ 225. Effect of Appeal With Undertaking to Stay Proceedings.**—Section 946 of the Code of Civil Procedure provides that.—

“Sec. 946. Whenever an appeal is perfected as provided in the preceding sections of this chapter it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. . . .”

The “perfection” of the appeal here referred to is the giving of the undertaking or making the deposit provided for by section

<sup>10a</sup> 98 Cal. 661, 33 Pac. 630.

<sup>10k</sup> 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757.

<sup>10l</sup> 99 Cal. 278, 33 Pac. 878. See note 10g, *supra*.

<sup>10m</sup> 99 Cal. 286, 33 Pac. 844.

<sup>10n</sup> *Gillmore v. American C. I. Co.*, 65 Cal. 63, 2 Pac. 882; *Rose v. Superior Court*, 65 Cal. 570, 4 Pac. 577; *Estate of Blythe*, 99 Cal. 472, 34 Pac. 108; *Story v. Story & Isham Co.*, 100 Cal. 41, 34 Pac. 675; *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep.

314, 35 Pac. 433; *S. C.*, 110 Cal. 644, 43 Pac. 12; *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *California etc. Bank v. Graves*, 129 Cal. 649, 62 Pac. 259; *Feeney v. Hinekley*, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580; *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84, 76 Pac. 976, 65 L. R. A. 419; *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 1, 82 Pac. 1119. See, further, in illustration of the general principles involved: *Day v. Holland*, 15 Or. 464, 15 Pac. 855.

941, and the undertaking provided for by sections 942, 943 and 945 to stay execution in the various cases covered by those sections, or, in a case falling under section 944, the execution and deposit of the instrument as therein prescribed.

This section does not apply to an appeal without a stay bond. For such an appeal does not stay execution, and hence cannot release a levy.

An undertaking sufficient in form and amount operates of itself to stay execution, and does not require an order of the court below to give it effect. And the court below has no power to order a stay upon an insufficient undertaking, and if such an order be made, it will be reversed on appeal.<sup>1</sup> Where the undertaking is insufficient to effect a stay, but the officers of the court below treat it as sufficient, it was said in *Dobbins v. Dollarhide*<sup>2</sup> that the proper course was to apply to the court below for leave to proceed, notwithstanding the undertaking. But in *Root v. Bryant*,<sup>3</sup> where the undertaking was sufficient to effect a stay, but the officers were proceeding to treat it as insufficient, the supreme court upon motion of appellant ordered that proceedings be stayed pending the appeal. While it would seem that there is no difference in principle between an order commanding the officer to proceed with the execution of the judgment and one commanding him to refrain from so doing, and that for this reason these two decisions are inconsistent, yet, when it is remembered that the order of the higher court is, in effect, a writ of *supersedeas*, and the order of the lower court is not, the distinction is made clear. Each decision must be regarded, therefore, as a proper precedent. The appellate court has no original jurisdiction to make an order, in effect the converse of a *supersedeas*, directing the officials of the lower court to execute a judgment, unless it be by a writ of mandate. On the other hand, the lower court is without jurisdiction to issue a writ of *supersedeas*. That writ is within the exclusive functions of an appellate court, since it is directed to and in restraint of the court of minor jurisdiction.

If an undertaking to stay execution be defective, but no objection on that account is taken in the cause itself, and the undertaking is

<sup>1</sup> *M. H. C. & M. Co. v. Woodbury*, 10 Cal. 188.

<sup>2</sup> 15 Cal. 374. This was the course taken in *Societe D'Epargnes v. McHenry*, 49 Cal. 351. See, generally, as to effect of appeal with *super-*

*sedeas*, *In re Epley*, 10 Okl. 631, 64 Pac. 18.

<sup>3</sup> 54 Cal. 182; look at *In re Hart*, 8 Pac. C. L. J. 1004; *In re Real Estate Associates*, 58 Cal. 356.



allowed to accomplish the purpose for which it was intended, the sureties cannot avail themselves of the defects as a defense to an action on the undertaking.<sup>4</sup>

The cases in which bonds to stay execution may be given are considered in the preceding chapter.

As to the effect of a stay bond upon the judgment lien, see section 226.

As to the effect of an appeal upon injunction proceedings, see section 227.

As to stay of proceedings and writ of *supersedeas*, see section 224, *ante*.

**§ 226. Effect of an Appeal With a Stay Bond upon the Judgment Lien.**—Section 204 of the old Practice Act, which stood from the time of its adoption in 1851<sup>1</sup> until the adoption of the Code of Civil Procedure, provided that when a judgment was docketed it should become a lien upon the real property of the judgment debtor, and that “the lien shall continue for two years unless the judgment be previously satisfied.”

This provision was construed in *Dewey v. Latson*,<sup>2</sup> and it was there held that an appeal with a bond sufficient to stay execution suspended the lien during the pendency of the appeal; in other words, that the time during which the appeal was pending was not to be counted as a part of the two years. Shortly after this decision the case of *Low v. Adams*<sup>3</sup> was decided, in which directly the contrary was held, the court saying: “The second point that the appeal bond operated a release of the lien acquired by docketing the judgment in the court below is not well taken. The appeal only stayed the execution, and did not impair the lien.” This case seems to have been lost sight of, for it is not mentioned in subsequent discussions of the subject; but *Dewey v. Latson* seems to have been considered the authority on the question. An attack was made upon *Dewey v. Latson*, by counsel, in *Englund v. Lewis*.<sup>4</sup> The main ground upon which the decision in the latter case turned was that the appeal bond given was insufficient to stay execution, and that therefore the lien was not suspended. The court, however, took occasion to consider the case of *Dewey v. Latson*, and said

<sup>4</sup> *Dore v. Covey*, 13 Cal. 502; *Hathaway v. Davis*, 33 Cal. 161; *Murdock v. Brooks*, 38 Cal. 596; but see *Chapin v. Broder*, 16 Cal. 403.

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<sup>1</sup> Laws of 1851, p. 82.

<sup>2</sup> 6 Cal. 130.

<sup>3</sup> 6 Cal. 277.

<sup>4</sup> 25 Cal. 337.

that it was to be followed upon the doctrine of *stare decisis*. In view of the fact, however, that the court held that there was no stay of execution, it would seem that what was said as to the consequences of a stay was mere *dictum*. In the subsequent case of *Solomon v. Maguire*,<sup>5</sup> it was said in discussing a different question that *Dewey v. Latson* was of very doubtful logic, and was only to be followed upon the principle of *stare decisis*, and that the court was "not disposed to extend the doctrine of that case beyond the precise question there determined."

The question as to the effect of an appeal with a stay bond upon the judgment lien was set at rest by the amendment to section 671 of the Code of Civil Procedure made in 1874. That amendment added to the section providing for the lien the following clause: "The lien continues for two years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, *in which case the lien of the judgment ceases.*"

No subsequent amendment to the section has, up to the present time, been made. The effect of different kinds of undertakings in staying execution has already been considered.<sup>6</sup> Unless the undertaking given be sufficient to stay execution, it does not affect the lien.<sup>7</sup> And if any period of time has intervened between the docketing of the judgment and the giving of the stay undertaking, such period is to be counted as part of the two years.<sup>8</sup>

An injunction has not the same effect as an appeal, and does not affect the lien.<sup>9</sup>

**§ 227. Effect of an Appeal upon Injunction Proceedings.**—It was at one time believed that appeal did not suspend the operation of an injunction. This was held in the case of the *Merced Mining Co. v. Fremont*.<sup>1</sup> In that case the court below issued a preliminary injunction restraining the defendants from doing certain acts. The defendants appealed to the supreme court from the order, and gave a bond in the sum of three hundred dollars, and continued the acts enjoined. The judge denied a motion to punish them for contempt upon the ground that the operation of the injunction was

<sup>5</sup> 29 Cal. 227.

<sup>6</sup> See chapters 33 and 34, herein.

<sup>7</sup> *Englund v. Lewis*, 25 Cal. 337;  
*Chapin v. Broder*, 16 Cal. 403.

<sup>8</sup> *Barroilhet v. Hathaway*, 31 Cal. 395, 89 Am. Dec. 193.

<sup>9</sup> *Rogers v. Druffel*, 46 Cal. 654.

<sup>1</sup> 7 Cal. 130, 7 Morr. Min. Rep. 309. See, also, *Slaughter-house Cases*, 10 Wall. 297.

suspended by the appeal. The supreme court awarded a *mandamus* to the court below to take some action in the matter, and Burnett, J., delivering the opinion, said:

"The language of this three hundred and fifty-sixth section is general, and would at first seem to include the appeal from an order granting an injunction; but upon an examination of the provisions of sections 349 to 352, inclusive, it will be seen that in all those cases the party is required by the judgment or order to do some affirmative act, not to refrain from doing a thing. This act, if completed, would change the condition of the parties, and render a reversal of the judgment in the supreme court partially ineffectual. But where a party is restrained by an injunction, he is not injured in contemplation of law, as he is already secured by the undertaking. If, on the contrary, an appeal with an undertaking of three hundred dollars would have the effect of staying the injunction itself, then the plaintiff would have no remedy and the writ be idle. It would entirely destroy the usefulness of this writ. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction."

This case was approved and followed in *Heinlen v. Cross*<sup>2</sup> and other cases.<sup>2a</sup> But they were all cases where the injunction *restrained* or prohibited action. There may be judgments likewise

<sup>2</sup> 63 Cal. 44.

<sup>2a</sup> *Bliss v. Superior Court*, 62 Cal. 543; *Swift v. Shepard*, 64 Cal. 423, 1 Pac. 493.

In *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452, referring to the cases cited here and in the text, the supreme court said:

"In the first case (*Merced Co. v. Fremont*) Judge Field says the purpose of a stay is to prevent any future change in the condition of the parties. If it dissolved an injunction it might have an opposite effect. The stay, therefore, will not affect an order restraining a party from doing an act to obtain which restraint a bond has been given. The stay only suspends that part of a judgment which commands something to be done. The language of the code conforms to this. It stays the lower court from proceeding upon the judgment or on the portion appealed from.

"In *Bliss v. Superior Court*, *supra*, it was held that an appeal from an order refusing to dissolve a temporary injunction will not deprive the superior court of jurisdiction to try the case pending the appeal. The stay is limited to the matter appealed from.

"In *Heinlen v. Cross*, *supra*, the question was whether, during an appeal from a judgment awarding an injunction, the lower court could proceed to punish a party for its violation during that period. It was properly held that it could. The judgment for an injunction required no writ for its execution. It was a self-executing judgment, and there were no proceedings upon it to be suspended by the appeal. Until reversed it stands as a valid command, and its violation is a contempt of court which should be punished. The effect of the decision is that to punish for such a contempt is not a proceeding upon the judgment."

which command action, and these are clearly not within the reason of the decision in *Merced Mining Co. v. Fremont*, and those which are cited in approval, and the modern rule recognizes this distinction. An injunction which commands the performance of some substantive act is suspended in its operation by the perfecting of an appeal therefrom. The reason of this rule is that which sustains the principle of *supersedeas* in all cases. An appeal is valueless to a litigant unless the conditions which exist when the same is perfected can be maintained. The rule is, therefore, that an appeal perfected according to the statute stays all proceedings in the cause which would change the status.

There are numerous cases in support of this principle, most of which have been cited in connection with the discussion in a previous section of the subject of *supersedeas* in general. A very few will suffice here. In *Stewart v. Superior Court*,<sup>2b</sup> where the injunction was permissive and preventive, or prohibitive, allowing the plaintiff to attach his pipe-line to that of defendant, and enjoining the latter from interfering therewith, it was held to be suspended as to the permissive part by an appeal therefrom, and that where it appeared that the plaintiff had made the connection, notwithstanding such stay or suspension, defendant could not be punished for contempt for breaking the connection, the court saying:

"An appeal would in many cases be useless if the execution of a decree which authorizes the plaintiff to use the property of the defendant cannot be stayed during the pendency of the appeal."

In *Schwarz v. Superior Court* <sup>2c</sup> it was said:

"It is conceded that the injunction, in so far as it requires petitioners to remove the signs bearing the name in controversy, is mandatory in character; and it is further conceded that as to the mandatory features thereof, it is stayed and suspended in its effect by the appeal taken by petitioners from the order granting the same. The appeal, however, has no such effect upon that part of the injunction which is merely prohibitory, but that remains in force and unimpaired, notwithstanding the appeal."

In *Mark v. Superior Court* <sup>2d</sup> the superior court was restrained by writ of prohibition from punishing for contempt, in violating or disregarding, pending appeal, an order of the court enjoining

<sup>2b</sup> 100 Cal. 543, 35 Pac. 156.

<sup>2c</sup> 111 Cal. 106, 43 Pac. 580.

<sup>2d</sup> 129 Cal. 1, 61 Pac. 436.

from using certain text-books and commanding the use of certain others, the members of the school board, the court saying:

"It is conceded that the board of education cannot be required, pending appeal, to cause to be used in said public schools the California system. And it seems equally clear that such board should not be compelled to carry out the other portion of the decree requiring them to cease from using the Shaylor system. The board should only be required to remain passive and take no action in favor of or against either of the real parties to the contest in said action, pending the appeal."

It is to be noted in all these cases that the question hinged upon the fact that a mandatory injunction would change the status and a prohibitory injunction would have the opposite effect. Again, in *Clute v. Superior Court*<sup>20</sup> it was held that a mandatory action which compels affirmative action cannot be enforced pending an appeal therefrom, although one which merely preserved the subject of the litigation *in statu quo* was not suspended by such an appeal. Nor does it matter what the form of the order may be, whether mandatory or prohibitive, the substance would be looked to.

An appeal does not revive an injunction which has been dissolved. This was held in *Hicks v. Michael*.<sup>21</sup> In that case the judge of the

<sup>20</sup> 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362. And see *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58. In this last case there was a contest between two parties for membership of the board of directors of a railroad company. The court which tried the issue decided in favor of Smith and against Lillienthal, and the latter and certain other persons, members of the board, were enjoined from interfering with Smith in the exercise of the office. An appeal was taken from the judgment and order, and, thereafter, at a meeting of the board, Smith sought entrance, but was prevented by Foster, who was chairman of the board. The latter was thereupon cited and adjudged to be guilty of contempt, but the order was annulled on *certiorari* by the supreme court. "Although preventive in form, it was in effect mandatory, as it required Foster and the other directors to recognize

Smith as one of the members and to refuse to recognize Lillienthal. As that portion of the judgment declaring Smith elected was suspended by the appeal, the injunctive portion of the judgment, being merely incidental thereto, was also suspended, and the power of the court to enforce any portion of its judgment by inflicting punishment for its violation was stayed. An enforcement of this portion of the judgment would operate to carry the decree into effect, and would change the relative positions of the parties from those existing at the time the decree was entered, and might render the reversal of the judgment entirely ineffectual."

<sup>21</sup> 15 Cal. 107 et seq.

The rule as to stay of injunctions, as outlined in the text, applies uniformly in all jurisdictions, practically without exception. The object of the court is held to be the preservation of the *status quo* and the fruits of the appeal to the successful litigant, and

court below issued an order to show cause why an injunction should not issue, and a restraining order pending the hearing. At the hearing, the court dissolved the restraining order, and discharged the order to show cause. The plaintiff then applied to the judge to fix the amount of a suspensive appeal bond, and upon his refusal so to do applied to the supreme court for a writ of *mandamus* to compel the judge to fix the amount of the bond. The supreme court, after a hearing, refused to award the writ, and Field, C. J., delivering the opinion, said:

“The appeal, then, which the plaintiff has taken or proposes to take is only from an order refusing an injunction, and the simple question is presented whether an appeal from an order of this character can operate to create an injunction, or to prolong a restraining order, until the ruling of the judge can be reviewed by the appellate court. It is clear that no such effect can be given to an appeal even when the most ample bond of indemnity is tendered. Where an injunction has been refused there is nothing operative. A stay can only be sought of that which has an existence, and by its operation is supposed to work injury to the appellant. It is therefore, from the nature of the case, only of orders or judgments which command or permit some acts to be done that a stay of proceedings can be had. (Merced Mining Co. v. Fremont, 7 Cal. 130.) Nor can an appeal operate to create an injunction under any circumstances. Injunctions are writs or orders of an extraordinary nature, and are never issued without a special direction of a judge or the court. To allow an appeal to have, in any case, the effect of creating an injunction would be in conflict with both precedent and principle, and would in fact confer a power upon parties of the most dangerous character. We do not understand the learned

wherever the effect of the *supersedeas* is to change the *status quo*, or dissipate the fruits of the appeal, it will be denied. Inasmuch as the essential characteristics of mandatory and prohibitive injunctions are such that the first tends to change the conditions as they existed upon the perfection of the appeal, and the last tends to the contrary, it is often said that a mandatory injunction will not be stayed, and that a prohibitory injunction will be. The principles involved are outlined and illustrated in the following cases: State v. Court, 39 Wash. 115, 109 Am. St. Rep. 862, 80 Pac. 1108,

1 L. R. A., N. S., 554, 4 Ann. Cas. 229; State v. Court, 35 Wash. 201, 77 Pac. 33; State v. Court, 30 Wash. 197, 70 Pac. 233; Maloney v. King, 26 Mont. 487, 68 Pac. 1012; S. C., 26 Mont. 492, 68 Pac. 1014; State v. Court, 28 Wash. 403, 68 Pac. 865; Lund v. Idaho etc. Co., 48 Wash. 453, 93 Pac. 1071; Elliot v. Whitmore, 10 Utah, 238, 37 Pac. 459; State v. Court, 43 Wash. 225, 86 Pac. 632; Bilger v. State, 60 Wash. 454, 111 Pac. 771; Roberts v. Kartzke, 18 Idaho, 552, 111 Pac. 1; Waters v. Dunn, 18 Idaho, 450, 110 Pac. 258.

counsel of the plaintiff as insisting upon any such doctrine, but as contending that the direction of the district judge discharging the restraining order amounts to an order dissolving an existing injunction, and that the restraining order may be continued in force by a sufficient bond pending the appeal. We do not think the two cases alike. We think the restraining order expired by its own limitation, but for the purposes of the argument, we will regard the order as a temporary injunction, and the appeal as being made from an order dissolving the same. The plaintiff is in no better condition upon this hypothesis. An appeal does not revive an injunction once dissolved. This has been so often adjudicated that it is only necessary to refer to the authorities. . . . ”

On a subsequent motion in the same case it was decided that the supreme court had no power to issue an injunction pending the appeal.<sup>4</sup> Nor can the court below issue an injunction after it has given final judgment.<sup>5</sup> Nor does the pendency of a motion for new trial suspend the operation of an injunction.<sup>6</sup>

<sup>4</sup> Hicks v. Michael, 15 Cal. 107.

<sup>5</sup> Section 527, California Code of Civil Procedure.

<sup>6</sup> Ortman v. Dixon, 9 Cal. 23.

## CHAPTER XXXVII.

## JUSTIFICATION OF SURETIES.

§ 228. **Justification of Sureties.**—Justification of sureties on undertakings on appeal is provided for in two separate and distinct proceedings. The first relates to justifications in the first instance, and applies to undertakings on appeal, so called, and to undertakings to stay proceedings, alike. The second relates to justifications in undertakings which have, for any reason or from any cause, become insufficient after having been accepted as sufficient, and applies solely to stay bonds upon money judgments. These two proceedings may with propriety be considered separately.

## 1. JUSTIFICATIONS IN THE FIRST INSTANCE.

a. *Provisions of the Statute.*—The statute in relation to the justification of sureties upon undertakings on appeal, in general, has been often amended. The provision of the act of 1851 was as follows:<sup>1</sup>

“Sec. 355. An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein, over and above all their just debts and liabilities, exclusive of property exempt from execution. The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking; and unless they or other sureties justify before a judge of the court below, or a county judge or the county clerk within five days thereafter (upon notice to the adverse party) the appeal shall be regarded as if no such undertaking had been given.”

Several changes were made in the above section by the amendment of 1854.<sup>2</sup> These changes were that the sureties were required to justify only in the amount specified in the undertaking, and were permitted to justify in a less amount where the undertaking was of more than two sureties, and the addition of a clause permitting a deposit of the amount of the judgment in lieu of the undertaking. In 1866 this section was amended so as to read as follows:<sup>3</sup>

“Sec. 355. An undertaking on appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each

<sup>1</sup> Laws of 1851, p. 108.

<sup>2</sup> Laws of 1854, p. 65.

<sup>3</sup> Laws of 1865-66, p. 708.



worth the amount specified therein, over and above all their just debts and liabilities, exclusive of property exempt from execution, except where the judgment exceeds three thousand dollars, and the undertaking is executed by more than two sureties, they may state in their affidavit that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. The adverse party, however, may except to the sufficiency of the sureties to the undertaking or undertakings mentioned in sections 349, 350, 351, and 352 at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant or appellants shall have been served with notice of such exception, justify before a judge of the court below, a county judge, or county clerk, upon five days' notice to the appellant, execution of the judgment or decree appealed from shall be no longer stayed, and in all cases where an undertaking is required on appeal by the provisions of this act, a deposit in the court below of the amount of judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent."

No further change was made until the adoption of the Code of Civil Procedure. Section 948 of the code, as first enacted, left off the clause at the beginning of the section in relation to the affidavit of the sureties,<sup>4</sup> but in other respects was substantially the same as

<sup>4</sup> This provision was rendered unnecessary by the provisions of section 1057, California Code of Civil Procedure, which related to affidavits to undertakings in general. It was adopted with the code and was amended in 1889, when section 1056, with reference to bonding companies, was re-enacted, so as to correspond with the provisions of that section. It was again amended in 1907, and now reads as follows:

"Sec. 1057. In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and

are each worth the sum specified in the undertaking or bond, over and above their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount is equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section, may become sole surety on such bond. No such corporation must be accepted in any case as a surety when its liabilities exceed its assets as ascertained in the manner provided in section ten hundred and fifty-six. Whenever an undertaking

the amendment of 1866. In 1874 section 948 was amended so as to correct a mistake committed in the act of 1866, and repeated in the code as first enacted, by which notice of the justification was required to be given to *the appellant* instead of to the respondent. In other respects the section was substantially the same as when first enacted. In 1880 the section was amended so as to read as follows:

"Sec. 948. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections 941, 942, 943, and 945, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, or county clerk, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent."

The section was again amended in 1905 so as to read as follows:<sup>4a</sup>

"Sec. 948. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time

has been given and approved in any action or proceeding, and it is thereafter made to appear to the satisfaction of the court that any surety upon such undertaking has for any reason become insufficient, the court may, upon notice, order the giving of a new undertaking, with sufficient sureties, in lieu of sufficient undertaking. If such new undertaking so required shall not be given within the time required by such order, or in case the sureties thereon fail to justify when required, all rights obtained by the filing of such original undertaking shall immediately cease."

<sup>4a</sup> Corresponding provisions are as follows: Sections 426-431, Revised Statutes of Arizona; section 4816, Revised Codes of Idaho; section 7108,

Revised Codes of Montana (section 1732, Code of Civil Procedure); section 3443, Cutting's Compiled Laws of Nevada (section 347, Civil Practice); section 7221, Revised Codes of North Dakota; section 6259, Compiled Laws of Oklahoma; section 458, Code of Civil Procedure of South Dakota; section 3312, Compiled Laws of Utah; section 1725, Rem. & Bal. Code of Washington (section 6509, Bal. Code). Section 550, Lord's Oregon Laws, provide for the justification of sureties in like manner as sureties on bail bonds. See, also, section 270.

Statutory provisions sometimes expressly exempt from the necessity of justification guaranty and surety companies. See section 4677, Lord's Oregon Laws.

within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent."

Two important changes were effected by this amendment. In the first place, notice of the filing of the undertaking was required. This provision obviated the necessity on the part of the respondent of watching the clerk's office during the five days following the service of the notice of appeal for the appearance on the files of the undertaking, and the further necessity of a careful inspection of such files up to the moment of issue of execution for a stay bond. The second change deprived the county clerk of jurisdiction to pass upon the sufficiency of the sureties of the new bond, which he had previously shared with the judge of the superior court.

b. *Of What Undertakings Justification may be Demanded—Consequences of Failure to Justify.*—From the sections above given it will be perceived that it is, and always has been, open to the respondent to require the sureties upon all appeal bonds to justify. But the consequence of a failure to justify has been different at different times. Before the amendment of 1866 the failure of the sureties upon the three hundred dollar bond to justify rendered the appeal ineffectual for any purpose, and subject to dismissal upon motion.\* In the language of the statute then in force, upon such failure to justify the appeal was "regarded as if no such undertaking had been given." But this language was omitted from the amendment of 1866, which declared the consequences of a failure to justify to be that "execution of the judgment or decree appealed from shall be no longer stayed." The subsequent statutes have been like the amendment of 1866 in this respect, as will be observed from the quotations above given. The consequence of this change

\* *Lower v. Knox*, 10 Cal. 480; *S. C.*, 18 Cal. 668; *Tevis v. O'Connell*, *Roush v. Van Hagan*, 17 Cal. 121. 21 Cal. 512.

is that the failure of the sureties upon the three hundred dollar bond no longer renders the appeal ineffectual. This was held in *Schacht v. Odell*,<sup>6</sup> which case was approved and followed in *Hill v. Finnigan*.<sup>7</sup> It is to be observed, however, that justification of the sureties upon the three hundred dollar bond may still be demanded. This is the express provision of the statute. Section 948 of the code, above quoted, provides that "the adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections 941, 942," etc., and the three hundred dollar undertaking is the one mentioned in section 941. The reason of the provision that the sureties upon this bond may be called upon to justify will be seen when it is remembered that in some cases it operates to stay execution.<sup>8</sup> The failure of the sureties upon it to justify does not, as formerly, render the appeal ineffectual for any purpose, but it destroys its character as a stay bond.

It follows from what is above stated that before 1866 the remedy for a failure to justify upon the three hundred dollar bond was a motion to dismiss the appeal, and such was the practice.<sup>9</sup> But since such failure no longer affects the validity of the appeal, a motion to dismiss is no longer proper.<sup>10</sup> As above stated, the only consequence of a failure to justify, as the statute stands at present, is that execution ceases to be stayed. And the remedy is to move for leave to take out execution or for an order commanding the officer to proceed. In the case of *Dobbins v. Dollarhide*,<sup>11</sup> it was said that such motion should be addressed to the court below. But in *Root v. Bryant*,<sup>12</sup> where the officers treated the bond as insufficient to

<sup>6</sup> 52 Cal. 447.

<sup>7</sup> 54 Cal. 311.

<sup>8</sup> See section 223, *ante*.

<sup>9</sup> See cases cited in note 5, above.

<sup>10</sup> *Hill v. Finnigan*, 54 Cal. 311; *Schacht v. Odell*, 52 Cal. 447. The rule established by these cases has been consistently followed. See *Wittram v. Crommelin*, 72 Cal. 89, 13 Pac. 160; *Swasey v. Adair*, 83 Cal. 136, 23 Pac. 284; *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006; and to same effect, *De Jarnett v. Marquez*, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45; *Wheeler v. Karnes*, 130 Cal. 618, 63 Pac. 62; *Klingler v. Henderson*, 137 Cal. 561, 70 Pac. 617.

But see *Holcomb v. Reed*, 5 Idaho, 60, 46 Pac. 1019.

As to dismissal of appeal from commissioner's court for failure to jus-

tify, see *Pratt v. Jarvis*, 8 Utah, 5, 28 Pac. 869.

If, without fault, sureties fail to justify, after exception, within the statutory time, the appellate court may permit a new undertaking to be filed. *Matlock v. Wheeler*, 29 Or. 64, 40 Pac. 5, 43 Pac. 867.

The failure of a surety to state in his affidavit that he is worth the amount over and above debts, liabilities, etc., required by law is not ground for dismissing the appeal. *Northern Counties Co. v. Hender*, 12 Wash. 559, 41 Pac. 913; *Horton v. Donohoe etc. Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435.

<sup>11</sup> 15 Cal. 374.

<sup>12</sup> 54 Cal. 182; and see section 225, *ante*.

effect a stay, the supreme court, upon motion of appellant, ordered them to desist. And it would seem that there can be no difference between commanding the officer to do an act and commanding him to refrain from doing it, and that if the motion in one case should be addressed to the court below, it should be in the other. Possibly the motion could be made to either court. Upon such motion, wherever made, it is believed, although no decision has been found upon the point, that the court should look into the evidence and determine from it the sufficiency or insufficiency of the justification, without regard to the conclusion of the officer before whom it was taken. If the motion be made in the court below, and the party be dissatisfied with the order of that court, it may be appealed from as a special order made after final judgment.<sup>13</sup>

When an undertaking is filed in the supreme court and approved by one of the justices thereof, justification of the sureties cannot be demanded.<sup>14</sup>

Justification may be waived after exception to the sureties.<sup>15</sup> Failure to appear at the time fixed for the required justification is a common method of waiver. Indeed, it is probable that the respondent, if he fails to be present, would not be permitted to claim the benefit of his exception to the sureties, even though they should omit to justify, if they were present and ready to justify.<sup>15a</sup>

Where the respondent allows the time to elapse without excepting to the sureties, the appeal is to be deemed perfected.<sup>15b</sup>

c. *Manner and Time of Justification.*—Justification consists in the appearance of the sureties before the proper officer, and their examination by or before him as to their property and qualifications to serve as sureties. The officers mentioned in the old Practice Act were a “judge of the court below, a county judge, or county clerk.” Under this provision it was held that the words “county

<sup>13</sup> In *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 188, an order of the court below staying execution upon an insufficient undertaking was reversed on appeal. But an order staying proceedings *before* judgment is not appealable. *Rhodes v. Craig*, 21 Cal. 419.

<sup>14</sup> *Stevenson v. Steinberg*, 32 Cal. 373.

<sup>15</sup> See *Blair v. Hamilton*, 32 Cal. 49.

<sup>15a</sup> See *Bank of Escondido v. Superior Court*, 106 Cal. 43, 39 Pac. 211.

<sup>15b</sup> *Bush v. Geiser*, 16 Or. 267, 19 Pac. 122. But the transcript should not be filed until the time to except to the sureties elapses. *Cook v. Albina*, 20 Or. 190, 25 Pac. 386. And if it is so filed, it will be stricken from the docket. *Chemin v. East Portland*, 19 Or. 512, 24 Pac. 1038. But though not perfected until the expiration of the time for exceptions to the sureties, the appeal operates as a *supersedeas* from date of filing. *Anderson v. Phegley*, 54 Or. 102, 102 Pac. 603.

judge" meant "the county judge of the county in which the action is pending."<sup>16</sup> The abolition of the county courts has done away with this question. Prior to the amendment of 1905 the provision was that the examination must be before "a judge of the court below or county clerk."<sup>17</sup> Upon the cases last cited it would seem that the words "county clerk" in the provision meant "county clerk of the county in which the action is pending." In practice the justification usually took place before the county clerk, as judges, as a rule, had no time to attend to such matters; but the justification might take place before either the judge or the clerk; but if made before the clerk, the judge had no power to review his action, and could not require a second justification.<sup>17a</sup>

The present provision, however, leaves no such question open for discussion. It limits justification to the exclusive jurisdiction of the "judge of the court below."

The justification must be "within twenty days after the appellant has been served with notice of such exception."<sup>18</sup> A justification after the prescribed time is of no avail.<sup>19</sup> Before 1861 the time for the justification could not be extended.<sup>20</sup> But section 530 of the Practice Act, as amended in that year,<sup>21</sup> enumerated "the justification of sureties" among the acts for the performance of which extensions could be granted, and this provision was reproduced in section 1054 of the Code of Civil Procedure. The justification must be "upon five days' notice to the respondent of the time and place of justification."<sup>22</sup> A justification without notice

<sup>16</sup> Roush v. Van Hagan, 18 Cal. 668; Tevis v. O'Connell, 21 Cal. 512.

<sup>17</sup> Section 948, California Code of Civil Procedure, quoted in first subdivision of this section.

<sup>17a</sup> Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892. See, also, Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383, where the supreme court said, in response to a suggestion for a review of this character: "The statute has designated that officer [the clerk] as a tribunal for hearing and determining that question [the sufficiency of the sureties], and has provided no mode by which he may be reviewed."

In Irwin v. Crook, 17 Colo. 16, 28 Pac. 549, it was held that where the court ordered the approval of a bond by the clerk, and the latter neglected or refused to do so, the order might be so far modified (dur-

ing the term) as to extend the time for filing the bond, and authorize its approval by the court.

<sup>18</sup> Section 948, California Code of Civil Procedure, above quoted.

<sup>19</sup> Roush v. Van Hagen, 17 Cal. 121. A similar ruling was made with reference to an appeal from a justice's court in McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845; and compare Gray v. Superior Court, 61 Cal. 337.

<sup>20</sup> See Laws of 1851, p. 108, sec. 355, and p. 134, sec. 530; and Roush v. Van Hagen, 17 Cal. 121.

<sup>21</sup> Laws of 1861, p. 591.

<sup>22</sup> Section 948, California Code of Civil Procedure, quoted above. Also Davelin v. Post etc. Co., 4 Idaho, 735, 44 Pac. 554. The court itself cannot attack the bond without notice. State v. Court, 12 Wash. 677, 42 Pac. 123.

is of no avail.<sup>23</sup> And where the notice was that the sureties would justify on a certain day "between the hours of 10 A. M. and 5 P. M. of that day," it was held that the clerk properly refused to take the justification in the absence of the adverse party until the last hour named in the notice.<sup>24</sup> The time for the notice may be shortened as in other cases.<sup>25</sup>

But the appellant has the full twenty days, under the code, within which justification may be accomplished, and if for any reason there should be a failure on the part of the sureties to appear and justify upon one notice, a second notice may be given, if time remains of the twenty days, always remembering that notice requires five days, so that a second or further attempt may be made to justify, and if the sureties justify within the twenty days it is sufficient.<sup>26a</sup>

d. *There can be but One Proceeding for Justification.*—The statute contemplates but one proceeding for the justification of sureties. If they do not succeed in justifying at the hearing noticed, or some regular adjournment thereof, the bond becomes ineffectual, and the only way in which execution can thereafter be stayed is by application to the supreme court for leave to file a bond in that court. This was held in *Hill v. Finnigan*,<sup>26</sup> in which case Ross, J., delivering the opinion, said:

"After a careful consideration of the different sections of the code we are convinced that they contemplate but one proceeding to stay the execution below, and that the failure of the sureties to justify leaves the plaintiff in a position to enforce the execution of

<sup>23</sup> *Stark v. Barrett*, 15 Cal. 361.

<sup>24</sup> *Lower v. Knox*, 10 Cal. 480.

<sup>25</sup> Section 1005, California Code of Civil Procedure; old Practice Act, sec. 517.

<sup>26a</sup> *Brown v. Rouse*, 115 Cal. 619, 47 Pac. 601. Also, in *re Skinner's Estate*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Davelin v. Post etc. Co.*, 4 Idaho, 735, 44 Pac. 554. Where the sureties on appellant's bond are excepted to, the appellant may at any time before the expiration of the time to justify abandon the appeal and take a new one. *Van Auken v. Dammeier*, 27 Or. 150, 40 Pac. 89. The use of the word "appeal" here is doubtless an inadvertence, for the time to appeal might have expired. But the bond itself may be abandoned, and a new bond filed, as above

shown. And the fact that the sureties do not appear to justify on the old bond does not disqualify them from becoming sureties on a new one. *State v. Court*, 12 Wash. 677, 42 Pac. 123. Where a surety is substituted it is a new bond. *State v. Chapman*, 17 Wash. 109, 49 Pac. 224.

Appellant may file a new bond in the place of the old one, where the sureties failed to justify thereon and the time has not elapsed. *Maney v. Hart*, 11 Wash. 67, 39 Pac. 268; *Spurlock v. Railroad Co.*, 12 Wash. 34, 40 Pac. 420.

<sup>26</sup> 54 Cal. 493. Compare *Hicks v. Michael*, 15 Cal. 107; and see *Williams v. Borgwardt*, 115 Cal. 617, 47 Pac. 594; *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006.

his judgment—a position the advantages of which he cannot be deprived of by any further act of appellant in the court below. Otherwise a series of pretended efforts to *justify* might lead to great delay in setting aside the stay, without respondent being afforded any real security for the payment of his judgment in case it should be affirmed. Yet it might very well be that an appellant, unable to furnish proper sureties at one time, might subsequently and pending the same appeal be able to obtain competent and amply sufficient bondsmen. True, the machinery of appeal is established, and the mode and manner of giving security in the *lower court* is regulated by the statute. But the statute does not treat of undertakings in the supreme court, and we have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right. There is nothing in the present record to indicate that the failure to justify was the result of other causes than inadvertence, and this court will make an order to operate as a *supersedeas* upon proper terms.”

The principle of this decision has been upheld in numerous later ones. In *Williams v. Borgwardt*,<sup>26a</sup> it was again stated, although in that particular case the showing was held insufficient. The court held that the appellate court has inherent power to make an order staying proceedings upon the filing of a sufficient bond for that purpose, but that it would not make such an order, after failure of the sureties on the bond filed in the court below to justify after being excepted to, unless it appears that the failure to justify was the result of accident, surprise, inadvertence, or excusable neglect; and, in the case at bar, the sureties were absent from the county, and there was nothing to show that they had been notified to appear and justify, or that their absence was beyond appellant's control, or that any effort had been made to secure their attendance for the purpose of justifying; and the application was therefore refused. On the other hand, the showing was deemed sufficient in the cases of *Tompkins v. Montgomery*<sup>26b</sup> and *Nonpareil etc. Co. v. McCartney*.<sup>26c</sup> In the latter case the court thus reiterated the rule in question:

“Under the above facts—and others not necessary to be here stated—we do not think that petitioners are entitled to a stay of

<sup>26a</sup> 115 Cal. 617, 47 Pac. 594.

<sup>26b</sup> 116 Cal. 120, 47 Pac. 1006.

<sup>26c</sup> 143 Cal. 1, 76 Pac. 653.



proceedings upon their said undertaking filed in the superior court; there has been no such justification of the sureties as relieves the undertakings from the objection to their sufficiency. We think, however, that under the rule announced in *Hill v. Finnigan*, 54 Cal. 493, which has since been followed in several cases, petitioners should be allowed a *supersedeas* upon their filing in this court a proper undertaking to stay proceedings. We do not want to be understood as holding that appellants in all cases can take this course without making an honest effort to give a stay bond in the court below. In the case at bar the petitioners evidently made a *bona fide* attempt to stay proceedings by filing the statutory undertaking, but seem to have been somewhat mistaken in their notions of the proper procedure to accomplish that result; but they should not for this reason lose the fruits of their appeal, if the same should be successful."

It is to be remembered in connection with the rule laid down in the above cases that the provision with reference to the justification of sureties is that "unless they or other sureties justify, etc.,"<sup>27</sup> the execution shall be no longer stayed. The only construction which can be given to this provision without violating the rule of *Hill v. Finnigan* is that the appellant may produce, at the time and place noticed for the justification of the sureties excepted to, a new bond, similar to the first, with new sureties, who may then and there (but not subsequently) justify in the place of the ones excepted to.<sup>28</sup>

e. *Effect of Justification Proceedings upon Stay of Execution.*—An exception to the sufficiency of the sureties on an undertaking to stay execution, or other proceedings, does not operate to suspend the force of such undertaking. If a new bond becomes necessary as a result of such exception, such new bond relates back in its operation to the date of the first bond.<sup>29</sup> If, however, no new bond should be given, and justification of the sureties on the old one should fail of accomplishment, such failure would not relate back to the date of the first bond, but only to the date of the failure to justify or to furnish a new bond.<sup>30</sup> In other words, if a stay

<sup>27</sup> Section 948, California Code of Civil Procedure, above quoted.

<sup>28</sup> Look at *Cummins v. Scott*, 23 Cal. 526. As a matter of course there might be an adjournment of that hearing.

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<sup>29</sup> *Lee Chuck v. Quan Wo Chong*, 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

<sup>30</sup> *Wheeler v. Karnes*, 130 Cal. 618, 63 Pac. 62.

bond be given, it is effective until called in question; and it continues effective, although so questioned, until twenty days have expired, and the sureties thereon, or other sureties, have failed to justify.

## 2. JUSTIFICATION OF SURETIES UPON THE NEW BOND REQUIRED UNDER SECTION 954, CODE OF CIVIL PROCEDURE.

The initial appearance of this provision in the code was by the amendment of 1895.<sup>31</sup> It was amended in 1906,<sup>32</sup> by the addition of the clause, "or that the bond has been lost or destroyed," and again in 1907,<sup>33</sup> by the clause making the section applicable to the district courts of appeals as well as the supreme court. But these latter amendments had no effect upon the clause as to justification, nor has the latter any connection whatever with the remainder of the section of which it forms a part. As heretofore noted, the justification here provided for refers exclusively to bonds to stay execution, and to such as relate to appeals from money judgments alone, while the section originally applied to undertakings on appeal only.<sup>34</sup>

The justification here provided for is also wholly distinct from that required by section 948. It has been said that: "1. It contemplates that a perfect bond had been prepared and filed in the first instance, and that the imperfections thereto subsequently arose; 2. It contemplates appeals from money judgments; 3. It gives the court or judge authority only to order a new bond; and 4. It in no way provides for a further or second justification of the sureties upon the original bond."<sup>35</sup> The phraseology here made use of is not free from ambiguity, and has been often and justly criticised on this account; but, in the main, it expresses with a certain clearness the salient elements of distinction between the two classes of justification. The language of the statute is itself not free from serious objections, besides those already pointed out.<sup>36</sup> For example, the phrase, "as a condition to the maintenance of the appeal," is meaningless; or it must be so construed to avoid a fatal inconsistency.<sup>37</sup> Aside from this, however, the provision is

<sup>31</sup> Stats. 1895, p. 59.

<sup>32</sup> Stats. 1906, p. 52.

<sup>33</sup> Stats. 1907, p. 579.

<sup>34</sup> See section 214, *ante*, note 15h.

<sup>35</sup> See *Boyer v. Superior Court*, 110 Cal. 401, 42 Pac. 892.

<sup>36</sup> See section 214, *ante*, note 15h.

<sup>37</sup> In *Mersfelder v. Spring*, 136 Cal. 619, 69 Pac. 251, it was necessary to so construe this phrase. The supreme court held that it could not be construed as discriminating against appellants who have duly perfected their appeals and yet have not given suffi-

clearly limited in its application to stay bonds on appeals from money judgments, as distinguished from ordinary undertakings, and those to stay execution of judgments other than those which require the payment of money. It is also clear that it contemplates a new bond rather than merely a second justification of the sureties upon the old one.<sup>38</sup>

So far as the procedure is concerned, it would seem that the rules which govern justification of sureties under section 948, so far as the same are applicable, should control here. There are no decisions upon the point, however, and the code provision is itself silent upon the subject. No provision is made for notice, and it is probable that the general rules as to notice would be applicable.

### 3. MISCELLANEOUS.

Under section 946, Code of Civil Procedure, property levied upon under execution issued under the judgment appealed from should be released upon the filing of the stay bond, regardless of any question as to justification of the sureties. It is made the duty of the sheriff to at once release the levy, and he cannot retain possession until the sureties have justified, or their justification waived.<sup>39</sup>

Appeal bonds in cases of appeals from justices' courts to the superior courts are provided for in section 978, Code of Civil Procedure, and justification was also provided for in the same section prior to the amendment of 1909,<sup>40</sup> under which provision is made for such justification in new section 978a. The respondent may except to the sureties within five days after filing the undertaking, and the appellant has five days thereafter in which to justify.

cient stay bonds; that it must be subordinated to the definite and explicit provision in the last clause of the section that upon the failure of the sureties to justify, "execution may issue upon the judgment as if no undertaking to stay execution had been given"; and that failure to give a new stay bond is not to be a ground for dismissing the appeal, as though it had never been perfected, as the phrase here under consideration seems to suggest.

Attention might also have been directed to that other phrase, "and the bond or undertaking *inadequate* as security for the payment of the judg-

ment appealed from." The three hundred dollar undertaking on appeal could hardly be regarded as a source from which payment of the judgment might be obtained in the event of a failure of the appeal.

<sup>38</sup> The proceedings are confined to the trial court—"that from which the appeal was taken." The amendment as to bonds lost or destroyed has, therefore, no application. The sole condition is, "When it is made to appear to the satisfaction of the court or the judge thereof," etc.

<sup>39</sup> *Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80.

<sup>40</sup> Stats. 1909, c. 695.

Unless he does so "the appeal must be regarded as if no such undertaking had been given." The provisions of section 978 cover in more condensed form, and with appropriate changes, the general scope covered by sections 941 to 948, and the jurisdiction of the superior court with respect to the justification of sureties on appeals from justices' courts is largely analogous to that of the supreme court and district courts of appeals with respect to appeals from the superior courts.<sup>41</sup>

<sup>41</sup> See *McCracken v. Superior Court*, 86 Cal. 74, 24 Pac. 845, for a discussion of this point. See, also, *Bennett v. Superior Court*, 113 Cal. 440, 45 Pac. 808.

## CHAPTER XXXVIII.

## RECORD ON APPEAL FROM THE JUDGMENT.

§ 229. What constitutes the record on appeal from the judgment.

§ 230. What constitutes the judgment-roll.

§ 229. **What Constitutes the Record on Appeal from the Judgment.**—It has already been shown that an appeal may be taken from the judgment in an action or proceeding. It is here proposed to consider the record by which such appeal must be supported. This matter was regulated by section 346 of the old California Practice Act, which, as enacted in 1851, was as follows:<sup>1</sup>

"Sec. 346. On an appeal from a final judgment the appellant shall furnish the court a copy of the notice of appeal, the judgment-roll, and the statement annexed, certified by the clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order made at a special term, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing of the court below; such copies to be certified by the clerk to be correct. If any written opinion be given on rendering the judgment, or making the order in the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers the appeal may be dismissed."

In 1854<sup>2</sup> this section was amended so as to leave out the words "made at a special term," and so as to insert the words "if there be one," after words "statement annexed." In other respects the section was substantially the same as before.

In 1864 the section was amended so as to read as follows:<sup>3</sup>

"Sec. 346. On an appeal from a final judgment the appellant shall furnish the court with a transcript of the notice of appeal, the pleadings or amended pleadings, as the case may be, which form the issues tried in the case, the judgment, and such parts of the judgment-roll and no more, as are necessary to present or explain the points relied on, and the statement if there be one, certified by attorneys of the parties to the appeal, or by the clerk, to be correct.

<sup>1</sup> Laws of 1851, p. 106.

<sup>2</sup> Laws of 1854, p. 64.

<sup>3</sup> Laws of 1863-64, p. 247.

On an appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering the judgments, or making the order in the court below, a copy shall be furnished. If the appellant fails to furnish the requisite papers the appeal may be dismissed."

The section, as thus amended, stood until the adoption of the Code of Civil Procedure. The sections of the code which correspond to section 346 above quoted are sections 950 and 951. The latter relates to appeals from judgments rendered on appeal and from orders; the former relates to appeals from judgments rendered in the court in which the action was commenced. Section 951 was as first enacted, as follows:

"Sec. 951. On appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial the appellant must furnish the court with a copy of the notice of appeal of the judgment or order appealed from, and of the bill of exceptions relating thereto."

In 1874 the section was amended so as to substitute the words "of papers used on the hearing in the court below," in place of the words "of the bill of exceptions relating thereto," at the end of the section. In other respects the section was unchanged.

The other section above referred to is in relation to judgments other than those rendered on appeal. This section as first enacted was as follows:

"Sec. 950. On an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, the pleadings or amended pleadings, which form the issues tried in the case, the judgment, bills of exception, and such other parts of the judgment-roll, and no more, as are necessary to present or explain the points relied on."

In 1874 this section was amended so as to read as follows:

"Sec. 950. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in

section 661, or any bill of exceptions settled as provided in section 649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment, equally as upon appeal from the order granting or refusing the new trial."<sup>2a</sup>

<sup>2a</sup> *Arizona*: Section 1485, Revised Statutes (section 276, Civil Practice): "Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence, or offered in evidence and rejected by the court, need be incorporated in a statement of facts in order to make it a part of the record."

Section 1486 (section 277) provides for extending in longhand the reporter's notes, the transcript of which, "when thus made, certified and filed, shall constitute a part of the record of the case."

Sections 1490, 1491 and 1492 (sections 281, 282 and 283, Civil Practice) provide for the preparation of the statement of facts. See section 250, *post*, note 3b.

See note 6, section 254, as to bill of exceptions; note 3b, section 230, as to judgment-roll; note 1, section 265, as to transcript on appeal. See, also, section 168, *ante*, note 8, as to record on appeal from new trial order.

*Idaho*: Sections 4818 and 4819, Revised Codes, are identical with the two California sections quoted in the text.

*Montana*: Section 7112, Revised Codes (act approved February 26, 1907, section 1), is as follows:

"On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll or of such parts thereof as may be necessary to be considered on the appeal, and of any bill of exceptions upon which the appellant relies. Any statement of the case settled after the decision of the motion for a new trial, when the motion is made upon the minutes of the court, as provided for in section 6796 (1173), or any bill of exceptions settled as provided for in section 6787 (1154), or in section

6788 (1155), or used on the motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."

The essential differences between the Montana and California section (950, Code of Civil Procedure) are outlined in italics. Section 7113 (section 1737, Code of Civil Procedure), corresponding with section 951, is identical therewith, except as to the provision with respect to appeals from "judgments rendered on an appeal," which are omitted from the Montana practice altogether, as they are from the California practice, except as to this and certain other provisions that have been overlooked. The Montana provision in the above section, "or of such parts thereof as may be necessary to be considered on the appeal," offers the parties an opportunity to eliminate unnecessary expense in the preparation of the record.

See note 1, section 265, *post*, as to the transcript on appeal.

*Nevada*: Section 3435, Cutting's Compiled Laws (section 340, Civil Practice), which covers the subject of both the California sections, is as follows:

"On an appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, and the statement, if there be one, certified by the respective attorneys of the parties to the appeal, or by the clerk of the court. On an appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering judgment or making the order in the court below, a copy shall be fur-

The foregoing shows the various provisions of the statute in relation to the record on appeal from a final judgment. It will be observed that aside from the notice of appeal, which has been fully considered, the requirement is that upon an appeal from a final judgment (other than one rendered on appeal) the appellate court shall be furnished with the judgment-roll, and the statement or bill of exceptions.\* These documents, with the notice of appeal, constitute the record upon appeal from the judgment. And the appellate court is confined to such record, and cannot consider anything not embraced in it. This rule has been frequently announced.

nished, certified in like manner.

It will be observed that no mention is made here of any bill of exceptions. The use of the phrase "and the statement, if there be one," is an intimation merely that the order may be upon affidavits. See section 3432, which suggests an appeal from such an order without any statement. See note 1, section 265, *post*.

*New Mexico:* Section 2685, subsection 172, Compiled Laws, is partially as follows:

"In all cases tried by the court, either with or without the intervention of a jury, the testimony and all rulings of the court shall be taken down by the court stenographer, unless waived by the parties to the action. . . . In all actions the testimony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action shall become and be a part of the record for the purpose of having the cause reviewed by the supreme court. . . . and it shall not be necessary to prepare or have settled, signed or sealed any bill of exceptions in order to make any of such matters a part of the record in such action. . . ."

Section 896 provides the method for the preparation of what is described as the common-law bill of exceptions. Sections 894 and 895 prescribe the practice as to the preparation, filing, serving, certification, etc., of the transcript on appeal. See note 1, section 265, *post*.

*South Dakota:* Section 443, Code of Civil Procedure, prescribes the contents and method of preparation,

etc., of the record on appeal. See note 1, section 265, *post*.

Section 308 provides that "A bill of exceptions or statement of the case used upon the hearing of a motion for a new trial, or a bill of exceptions prepared as provided in section 296, or a statement of the case, prepared after judgment in the manner provided in section 303, and within the same time after judgment as is allowed for the preparation of a bill of exceptions, may be used on appeal from the final judgment; such statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them, and it shall be the duty of the judge to exclude all other evidence or matter from the statement."

*Utah:* Section 3302, Compiled Laws provides that "the judgment-roll and bill of exceptions, if there be one, shall constitute the record on appeal to the supreme court."

Section 3316 prescribes that the original papers shall constitute the record, unless, for good cause shown copies are sent in lieu of the originals. See note 1, section 265, *post*, as to transcript on appeal.

The same section requires a certificate that an undertaking in due form has been properly filed, unless waived by stipulation.

\* The statement on appeal, under the old Practice Act, and the bill of exceptions are in reality portions of the judgment-roll, as will appear from the chapters in relation to those documents, but a practice has grown up of speaking of them as if they were something different. See section 252



Thus in *Karth v. Orth*,<sup>5</sup> the appeal was from the judgment, and the opinion of the court was as follows: "There being in the record no statement on appeal, we are confined to the judgment-roll, which being regular, the judgment must be affirmed." So in *Harper v. Minor*,<sup>6</sup> where there were several appeals, one of which was from the judgment. Sawyer, J., delivering the opinion said: "On appeal from the judgment where there is no statement we can only consider matters appearing in the judgment-roll. This has been so often held and so long settled that there ought to be no further occasion to repeat it." So in *Abbott v. Douglass*,<sup>7</sup> Shafter, J., delivering the opinion, said: "There is a diversity of interlocutory orders and other entries in the transcript, showing in detail the movement of the cause in the court below, and on which the appellant relies in the main to make out that the judgment is erroneous. But inasmuch as these entries are not embodied in a statement, they were for that reason improperly inserted in the transcript, and the respondent very properly insists that the question of error is to be treated on the judgment-roll alone." So in *Wetherbee v. Carroll*,<sup>8</sup> Sawyer, J., after explaining the different methods provided by the statute for presenting questions to the supreme court, said:

"On these appeals there may or there may not be a statement annexed to the judgment-roll as the parties may desire. The judgment-roll itself is a record for an appeal, and there may be no occasion for anything further to present the question raised. But it has been settled from an early day that on appeal from a judgment without a statement, nothing is brought up or is a part of the record on appeal except the judgment-roll; and no question arising outside of the roll can be considered. If any further record is required it must be made in the form of a statement. Now, however, exceptions may be taken and settled at the trial in the mode prescribed by sections 188, 189, and 190. (See *More v. Del Valle*, 28 Cal. 170.) These under section 203 are annexed to, and form part of the judgment-roll, and therefore constitute a part of the record on appeal from the judgment on the judgment-roll alone."

So in *Sutter v. San Francisco*,<sup>9</sup> it was held that an order on motion to strike out a part of a pleading could not be reviewed on appeal from the judgment without a statement, and the court said: "It is undoubtedly true that orders striking out immaterial por-

<sup>5</sup> 10 Cal. 192.

<sup>6</sup> 27 Cal. 107.

<sup>7</sup> 28 Cal. 295.

<sup>8</sup> 33 Cal. 549. See, also, *Strathern*

*v. Dakin*, 63 Cal. 478.

<sup>9</sup> 36 Cal. 112.

tions of a pleading, and orders sustaining demurrers are not appealable; and it is equally true that on an appeal from a judgment without a statement, no question can be determined that is not presented by the judgment-roll; and since these propositions have been announced over and over again, times almost without number, we should suppose that by this time it would have been found out that an attempt to maintain the contrary in oral or printed arguments is a useless expenditure of labor and money."

So in *Emeric v. Alvarado*<sup>9a</sup> it was held that on an appeal from the judgment the examination of the appellate court is confined to the judgment-roll, and any bill of exceptions, or statement on motion for new trial, or statement of the case relied on by the appellant, and that the questions to be considered must arise on these papers, otherwise the duty of deciding them is not devolved upon that court. So in *Jue Fook Sam v. Lord*<sup>9b</sup> it was held that questions not arising upon the face of the judgment-roll could not be considered unless embodied in a statement or bill of exceptions. So in *Spence v. Scott*,<sup>9c</sup> as to a certain question which was not presented on the face of the judgment-roll, it was said: "Manifestly the question cannot be presented without a bill of exceptions." So in *Bedan v. Turney*<sup>9d</sup> it was held that on an appeal from the judgment upon the judgment-roll alone, nothing can be assumed or considered that does not appear upon the face of the roll. So in *Batchelder v. Baker*,<sup>9e</sup> the appeal being on the judgment-roll, it was held that nothing outside of it could be considered in the determination of the question presented.

The rule laid down in the above cases has been applied in numerous others.<sup>10</sup> It is thoroughly well settled that on an appeal from

<sup>9a</sup> 64 Cal. 529, 2 Pac. 418.

<sup>9b</sup> 83 Cal. 159, 23 Pac. 225.

<sup>9c</sup> 97 Cal. 181, 31 Pac. 52, 939.

<sup>9d</sup> 99 Cal. 649, 34 Pac. 442.

<sup>9e</sup> 79 Cal. 266, 21 Pac. 754.

<sup>10</sup> *Dimick v. Campbell*, 31 Cal. 238; *Rush v. Casey*, 39 Cal. 339; *Morris v. Angle*, 42 Cal. 236; *Nevada Co. etc. Canal Co. v. Kidd*, 43 Cal. 180; *Feeley v. Shirley*, 43 Cal. 369, 12 *Morr. Min. Rep.* 132; *Douglas v. Dakin*, 46 Cal. 49; *Catanich v. Hayes*, 52 Cal. 338; *Spinetti v. Brignardello*, 53 Cal. 281; *Ord v. Chester*, 18 Cal. 77; *Millard v. Hathaway*, 27 Cal. 119; *Abadie v. Carello*, 32 Cal. 172; *Bacon v. Robson*, 53 Cal. 399; *Stoddart v. Burge*, 53 Cal. 394; *Strathern v. Da-*

*kin*, 63 Cal. 478; *Wilson v. Wilson*, 64 Cal. 92, 27 Pac. 861; *San Francisco Savings Union v. Myers*, 76 Cal. 624, 18 Pac. 686; *Paris v. Raynor*, 76 Cal. 647, 18 Pac. 788; *Tillman v. Averett*, 82 Cal. 576, 23 Pac. 875; *Siebe v. Hendy Machine Co.*, 86 Cal. 390, 25 Pac. 14; *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220; *Pedrorena v. Hotchkiss*, 95 Cal. 636, 30 Pac. 787; *La Fetra v. Gleason*, 101 Cal. 247, 35 Pac. 765; *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 Pac. 85; *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *Tomlinson v. Ayres*, 117 Cal. 568, 49 Pac. 717; *Hawley v. Kocher*, 123 Cal. 775, 55 Pac. 696; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826; *Orange*

the judgment on the judgment-roll alone only the matters shown by the latter can be considered, and if it is desired to present matters for the consideration of the appellate court which do not appear on the face of the judgment-roll, it is necessary to prepare a statement or a bill of exceptions, and embody therein the matter involved.<sup>10a</sup>

Matters which appear in the roll need no further record. For as was said in *Wetherbee v. Carroll*, above cited, "the judgment-roll itself is a record for an appeal." Thus errors in the pleadings can be reviewed upon an appeal from the judgment upon the judgment-roll,<sup>11</sup> and indeed that is the only way in which errors in the

*Growers' Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469; *Maderia v. Raymond etc. Co.*, 139 Cal. 128, 72 Pac. 915; *Johnston v. Callahan*, 146 Cal. 212, 79 Pac. 870.

So in the following decisions of other states: *Golden etc. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98; *St. Croix etc. Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497; *Oregonian Ry. Co. v. Wright*, 10 Or. 162; *Hays v. Crutcher*, 10 Idaho, 260, 77 Pac. 620; *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239; *Williams v. Boise etc. Co.*, 11 Idaho, 233, 81 Pac. 646; *Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384; *In re Paige*, 12 Idaho, 410, 86 Pac. 273; *Rumney etc. Co. v. Detroit etc. Co.*, 19 Mont. 557, 49 Pac. 395; *State v. Millis*, 19 Mont. 444, 48 Pac. 773; *Beach v. Spokane etc. Co.*, 25 Mont. 379, 65 Pac. 111; *Cornish v. Floyd-Jones Co.*, 26 Mont. 153, 155, 66 Pac. 839; *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121; *McCausland v. Lamb*, 7 Nev. 238; *Neil v. McDaniel*, 4 Nev. 436; *State v. Wallin*, 6 Nev. 280; *Goose River Bank v. Gilmore*, 3 N. D. 188, 54 N. W. 1032; *Walling v. Bown*, 9 Idaho, 740, 76 Pac. 318, 2 Ann. Cas. 720; *Farrell v. Oregon Gold Co.*, 31 Or. 463, 49 Pac. 876; *Tatum v. Massie*, 29 Or. 140, 44 Pac. 494; *State v. Court*, 28 Mont. 227, 72 Pac. 613.

The insufficiency of the evidence, and rulings of the trial court thereon, and a variance between pleading and proof, can be reviewed by bill of exceptions alone. *Lindsey v. Lewis (Colo.)*, 112 Pac. 538.

A judgment must be affirmed in a case where none of the errors as-

signed can be reviewed without a statement, and there is none. *McDonald v. Van Houten*, 59 Wash. 593, 110 Pac. 428. So where no appeal is taken from the new trial order, and the record presented for filing discloses that there was no statement on appeal or bill of exceptions ever settled or filed, the only thing the appellate court can consider is the judgment-roll, and if the irregularity or error does not appear on the face thereof, the judgment must be affirmed. *Kirman v. Johnson*, 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057; *Williams v. Rice*, 13 Nev. 234; *Nesbitt v. Chisholm*, 16 Nev. 39; *Robinson v. Benson*, 19 Nev. 331, 10 Pac. 441; *Reinhart v. Company "D,"* 23 Nev. 369, 47 Pac. 979; *Adams v. Rogers*, 31 Nev. 163, 102 Pac. 699.

<sup>10a</sup> See cases cited in the previous note, and in notes cited in the following section. The principle is the same, whether the rule is stated one way or another. To say that on an appeal on the judgment-roll alone nothing will be considered which does not appear there is the same as to say that matters not presented on the face of the judgment-roll cannot be considered unless embodied in a statement or bill of exceptions; or, that a certain matter is not, by law, made a part of the judgment-roll, and therefore it cannot be reviewed unless embodied in a statement or bill of exceptions.

<sup>11</sup> *Putnam v. Lamphier*, 36 Cal. 151; *Jones v. City of Petaluma*, 36 Cal. 230; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344.

pleadings can be reviewed.<sup>12</sup> So if the findings do not support the judgment, the remedy is to appeal from the judgment on the judgment-roll.<sup>12a</sup>

It is common to speak of the judgment-roll as something distinct from the statement on appeal or bill of exceptions. The terms are used in this way even in statutes and decisions. But as will be shown in the chapters in relation to statements on appeal and bills of exceptions, those documents are in reality parts of the roll. There is a certain convenience, however, in the above-mentioned use of the terms, and as it cannot result in any appreciable obscurity it will be followed here. Accordingly, it is proposed to consider separately the judgment-roll, statement on appeal, and bills of exceptions.<sup>13</sup>

**§ 230. What Constitutes the Judgment-roll.**<sup>1</sup>—The papers which constitute the judgment-roll are designated by the statute. The provision of the statute of 1851 in regard to the matter was as follows:<sup>1a</sup>

“Sec. 203. Immediately after entering the judgment the clerk shall attach together and file the following papers, which shall constitute the judgment-roll.

“*First.* In case the complaint be not answered by any defendant, the summons with the affidavit or proof of service, and the complaint, with a memorandum indorsed on the complaint that the default of the defendant in not answering was entered, and a copy of the judgment.

“*Second.* In all other cases the summons, pleadings, and a copy of the judgment, and any orders relating to a change of parties.

In 1862 the section was amended, but the only change was in the second subdivision, which, after the amendment, read as follows:

<sup>12</sup> *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Shepard v. McNeil*, 38 Cal. 72.

<sup>12a</sup> Unless relief is asked for under the provisions of sections 663 and 663a, California Code of Civil Procedure.

The rule that errors which appear on the face of the judgment-roll may be reviewed without a statement or bill of exceptions has been applied in the following cases: *Cornelius v. Ferguson*, 16 S. D. 113, 91 N. W. 460; *S. C.*, 17 S. D. 481, 97 N. W.

388, where it was held that a finding that a tax deed, void on its face, where a copy thereof is made a part of the finding, may be reviewed on appeal though there is no bill of exceptions on motion for new trial.

<sup>13</sup> *Rush v. Casey*, 39 Cal. 339; *Shepard v. McNeil*, 38 Cal. 72.

<sup>1</sup> See section 265, *post*. Under the Oregon Code the “record” is the judgment-roll. *Tustin v. Gaunt*, 4 Or. 303.

<sup>1a</sup> Laws of 1851, p. 82.

<sup>2</sup> Laws of 1862, p. 119.

*"Second.* In all other cases the summons, pleadings, verdict of the jury, or finding of the court, and all bills of exception taken and filed in said action, and a copy of the judgment, and any orders relating to a change of the parties."

In 1866 the section was again amended, but the only change was in the second subdivision, which, after the amendment, read as follows:\*

*"Second.* In all other cases the summons, pleadings, verdict of the jury, or finding of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties."

The section as amended in 1866 stood until the adoption of the Code of Civil Procedure. As first enacted section 670 of the code was substantially the same as section 203 of the old Practice Act, as amended in 1866, except that it omitted the word "summons" from the second subdivision. In 1874 section 670 was amended, but the only change made was in the second subdivision, which after such amendment read as follows:

"2. In all other cases the pleadings, a copy of the verdict of the jury, or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision."

In 1876 the section was amended so as to read as follows:

"Sec. 670. Immediately after entering the judgment the clerk must attach together and file the following papers, which constitute the judgment-roll:

"1. In case the complaint be not answered by any defendant the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment.

"2. In all other cases the pleadings, a copy of the verdict of the jury, or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating

\* Laws of 1865-66, p. 846.

to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision."

In 1895 the section received material amendment,<sup>2a</sup> and again in 1907,<sup>2b</sup> and now reads as follows:

"Sec. 670. Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:—

"1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons;

"2. In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service, on such defendant, and if the service on such defaulting defendant be by publication

<sup>2a</sup> By the amendment of 1895 (Stats. 1895, p. 45) the word "and" before "the complaint," in subdivision 1, was omitted; the article "a" before "change of parties," in the second subdivision, was changed to "the," and the word "upon" before "such defendant," in the same subdivision, was changed to "on"; and the following additions were made: After "copy of judgment," in the first subdivision, the clause, "and in case where the service so made be by publication, the affidavit for publication, and the order directing the publication of summons, must also be included." After "in this subdivision," at the end of the second subdivision, the clause, "and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the

order directing the publication of the summons in such cases must also be included."

<sup>2b</sup> Stats. 1907, p. 720.

Corresponding provisions in other codes are as follows:

*Arizona*: Section 1443, Revised Statutes: "1. In case the complaint be not answered by any defendant, the summons with the return of service, and the complaint, with a memorandum indorsed on the complaint that the default of the defendant in not answering was entered, and a copy of the judgment. 2. In all other cases the summons, pleadings and a copy of the judgment, and any orders relating to a change of parties."

*Idaho*: Section 4455, Revised Code. Same as the California provision.

then the affidavit for publication, and the order directing the publication of the summons."

No further change has been made up to the present time.

The foregoing shows the various amendments of the general section in relation to the contents of the judgment-roll. But there

prior to last two amendments. (See text.) And see as to judgment-roll on writ of review, section 4971; in proceedings for dissolution of corporation, section 5191; in controversy submitted without action, section 5069.

*Montana:* Section 6806, Revised Codes (section 1196, Code of Civil Procedure). Subdivision 1, same as the like numbered subdivision of the California section prior to the 1895 amendment, and as the same subdivision of the Idaho section. (See text.) Subdivision 2 is as follows:

"In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, all orders, matters, and proceedings deemed excepted to without bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of service of it upon such defendant, must also be added to the other papers mentioned in this subdivision."

*Nevada:* Section 3300, Cutting's Compiled Laws (section 205, Civil Practices). Subdivision 1 is identical with the like numbered subdivision of the sections of the above-noted states. Subdivision 2: In all other cases "the summons, pleadings, and a copy of the judgment, and any orders relating to a change of parties."

*North Dakota:* Section 7081, Revised Codes. In part as follows: "1. In case the complaint is not answered by any defendant the summons and complaint or copies thereof, the affidavit for service of summons by publication, if any, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

"2. In all other cases, the summons, pleadings or copies thereof, the verdict, decision or report, the offer of the defendant, a copy of the judgment, the statement of the case, if any, and all orders and papers in any way involving the merits and necessarily affecting the judgment."

*Oklahoma:* Section 5939, Compiled Laws of 1909, is as follows: "The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account or the copies of papers attached to the pleadings, be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded."

*Oregon:* Section 208, Lord's Oregon Laws. Partly as follows:

"1. If the complaint has not been answered by any defendant, he (the clerk) shall attach together in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment;

"2. In all other cases, he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to a change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits, and necessarily affecting the judgment;

"3. In all cases, the clerk shall attach upon the outside of the judgment-roll, a blank sheet of paper, upon which he shall indorse the name of the court, the term at which the judgment was given, the names of the parties to the action, and the title thereof, for whom judgment was given, and the amount or nature

are other provisions bearing upon the subject. Thus it is provided by section 958 of the Code of Civil Procedure<sup>4</sup> that the judgment of the supreme court given on appeal from a judgment shall be annexed to the judgment-roll in the court below. So statements on appeal under the old Practice Act were to be annexed to the roll.<sup>5</sup> So the *remittitur* from the supreme court is to be annexed to the

thereof, and the date of its entry and docketing."

*South Dakota:* Section 319, Code of Civil Procedure, provides as follows:

"Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after filing the judgment shall attach together and file the following papers, which shall constitute the judgment-roll:

"1. In case the complaint be not answered by any defendant the summons and complaint, or copies thereof, proof of service, proof that no answer has been served, the report if any, and the judgment.

"2. In all other cases the summons, pleadings, or copies thereof, and the judgment, with any decision, verdict or report, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment."

*Utah:* Section 3197, Compiled Laws, provides that the following shall constitute the judgment-roll:

"1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment.

"2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court or referee, all bills of exception taken and filed, all orders, matters and proceedings deemed excepted to without a bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by de-

fault, the summons with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision."

*Washington:* Section 442, Rem. & Bal. Code (section 5126, Bal. Code), is partly as follows:

"1. If the complaint has not been answered by any defendant, and no pleading has been filed by an intervenor, he shall attach together, in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment;

"2. In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment."

*Wyoming:* Section 4628, Compiled Statutes, provides that "the clerk shall make a complete record of every cause, as soon as it is finally determined, unless such record, or some part thereof, is waived"; and section 4630 provides:

"The records shall be made up from the petition, the process, the return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account, or the copies of papers attached to the pleadings are voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely; and evidence must not be recorded."

<sup>4</sup> See section 358 of old Practice Act. Laws of 1851, p. 108.

<sup>5</sup> See section 252, *post*.



judgment-roll.<sup>5a</sup> And there are special provisions in relation to the judgment-roll in certain proceedings.<sup>6</sup>

The roll consists of the papers designated by statute and of no others.<sup>6a</sup> This principle is abundantly illustrated by the decisions. Thus in *Hahn v. Kelly*,<sup>7</sup> decided prior to the amendments of 1895, it was held that the affidavit and order for publication of summons constituted no part of the roll, and the court said:

"In our judgment, it would have added to the completeness of the record to have made the proof of service by publication include also the affidavit of the party, and the order of court directing publication to be made, for in point of law they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

<sup>5a</sup> Section 958, California Code of Civil Procedure, quoted in section 293, *post*.

<sup>6</sup> As to the judgment-roll in *certiorari*, see section 1077, California Code of Civil Procedure; *Reynolds v. County Court*, 47 Cal. 604; and *Rauer v. Justice's Court*, 115 Cal. 84, 46 Pac. 870; as to the roll in proceedings for the confession of judgment, see section 1134 of the same code; in proceedings for submitting a controversy without action, see section 1139, *Id.*; in proceedings for the dissolution of corporations, see section 1233, *Id.*; in *mandamus*, *Gregg v. Pemberton*, 53 Cal. 251.

<sup>6a</sup> In the case of *Reynolds v. Harris*, 8 Cal. 617, decided upon the statute of 1851, it was held the findings of the court below could be considered on appeal, although not embodied in a statement. This is equivalent to saying (it was not said) that the findings constituted a portion of the judgment-roll. At that time the statute did not specify the "findings" or decision among the papers declared to constitute the roll. And unless the decision can be interpreted to mean that the findings were a portion of the "record" in some other way than as part of the judgment-roll, or by means of a statement, it is in conflict with the principle above stated that only those papers are parts of the roll which are declared to be so by statute. The de-

fect in the statute upon which *Reynolds v. Harris* was decided was remedied by the amendment of 1862, above quoted, and the principle of that case has not been subsequently asserted. On the contrary, as will appear from the cases cited in the text, the authorities are the other way.

<sup>7</sup> 34 Cal. 391, 94 Am. Dec. 742; and see in this connection, *Sharp v. Daugney*, 33 Cal. 505; and the following in support of the rule: In re *Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220; *La Fetra v. Gleason*, 101 Cal. 246, 35 Pac. 765; *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; and after amendment: *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698; *San Diego Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299; *McHatten v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036; *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Boyer v. Pacific etc. Co.*, 1 Cal. App. 54, 81 Pac. 671.

Proof of service, where service was by publication, as well as the affidavit and order for publication, was in Oregon held to be a proper part of the judgment-roll. *Neff v. Pennoyer (Or.)*, Fed. Cas. No. 13,083, 3 Saw. 274.

So, prior to the amendment of 1907, it was held, upon the same principle, that orders striking out a pleading,<sup>8</sup> or a portion thereof,<sup>9</sup> are not parts of the judgment-roll. And the same has been held with respect to orders refusing to strike out a pleading,<sup>10</sup> or a portion thereof,<sup>11</sup> as well as the motion therefor.<sup>12</sup> It is to be noted that the amendment does not cover the last two items, and, upon principle, they are perhaps still to be regarded as not a part of the roll. So the affidavit and notice of motion to strike out a pleading are neither a part of a judgment-roll.<sup>13</sup> So neither the notice of

<sup>8</sup> *Abbott v. Douglass*, 28 Cal. 205; *Dimick v. Campbell*, 31 Cal. 238; *De Pedorena v. Hotchkiss*, 95 Cal. 636, 30 Pac. 787; *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92; *Foley v. Foley*, 120 Cal. 33, 85 Am. St. Rep. 147, 52 Pac. 122; *Orange Growers' Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469.

<sup>9</sup> *Sutter v. San Francisco*, 36 Cal. 112; *Morris v. Angle*, 42 Cal. 236; *N. S. C. Co. v. Kidd*, 43 Cal. 180; *Feeley v. Shirley*, 43 Cal. 369, 12 *Morr. Min. Rep.* 132; *Douglass v. Dakin*, 46 Cal. 49; *Sutton v. Stephan*, 101 Cal. 545, 36 Pac. 106; *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; and see *Spence v. Scott*, 97 Cal. 181, 31 Pac. 52, 939, where it was held that such a question could not be presented on appeal without a bill of exceptions. See section 229, *ante*.

<sup>10</sup> *Strathern v. Dakin*, 63 Cal. 478; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826.

The rule in Colorado was against the ruling, whether granting or denying the motion. *Brink v. Posey*, 11 Colo. 521, 19 Pac. 467. In Montana, in the early case of *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588, it was held that inasmuch as section 290, Code of Civil Procedure, provided that an order striking out a motion was deemed excepted to without an express exception, it might be reviewed without a formal bill of exceptions; but this was not holding that it could be reviewed without a record; and this distinction was clearly drawn in the case of *Kleinschmidt v. McDermott*, 12 Mont. 309, 30 Pac. 393, where it was held that the fact that a re-

viewable error was deemed excepted to did not preclude the necessity of a record, and if the error did not appear on the face of the judgment-roll it must be incorporated in a statement or bill of exceptions. The order striking out a part of a pleading, under the Montana practice, was merely made apparent on the face of the judgment-roll, that is to say, upon the face of the pleadings; hence, a bill of exceptions was not necessary. Whereas a ruling upon evidence or an instruction could not be brought up otherwise than by bill or statement, although the latter was deemed excepted to under section 290 of the code. See the cases cited in the two above noted. See, also, *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449, and cases there cited, where the same rule of practice with respect to a ruling upon a motion to strike out was upheld.

<sup>11</sup> See cases cited in note 9a, above.

<sup>12</sup> *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826.

<sup>13</sup> *Dimick v. Campbell*, 31 Cal. 238; *Morris v. Angle*, 42 Cal. 236; *Douglass v. Dakin*, 46 Cal. 49; *Orange Growers' Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469. Also, *Graham v. Linehan*, 1 Idaho, 780; *Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384.

As to the necessity of the incorporation of affidavits used in the trial court in support of motions in general in a statement or bill of exception, see section 264, *post*. Affidavits in support of a new trial motion must be incorporated in a bill of exceptions in certain cases (see section 140, *ante*, and section 264, *post*), but in all cases in either a bill or statement. They are never a part of the judg-

motion to dismiss an action<sup>11</sup> nor the order made on such motion is part of the roll.<sup>12</sup> So neither the notice of motion for judgment on the pleadings<sup>13</sup> nor the order made upon such motion<sup>14</sup> is part of the roll. So the notice of the overruling of a demurrer is not a part of the roll.<sup>15</sup> So before the amendment of 1866 an order sustaining or overruling a demurrer was not a part of the roll.<sup>16</sup> So a stipulation that the plaintiff take judgment on certain conditions is not part of the roll.<sup>17</sup> Stipulations, generally speaking, are not a part of the roll;<sup>17a</sup> but if the stipulation takes the place in the record of any instrument or paper which is properly a part of

ment-roll. *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Anderson v. Sloan*, 1 Colo. 33; *Berry v. Smith*, 2 Okl. 345, 35 Pac. 576; *Perego v. Dodge*, 9 Utah, 3, 33 Pac. 221.

Nor are the minutes of the court a part of the judgment-roll so as to dispense with the necessity for a statement on an appeal from an order on motion for new trial made on the minutes. *Perego v. Dodge*, 9 Utah, 3, 33 Pac. 221; *In re Paige*, 12 Idaho, 410, 86 Pac. 273.

And it is the same with respect to affidavits for continuances. *Interstate etc. Co. v. Patton*, 21 Colo. 503, 42 Pac. 673; *Everett v. Buchanan*, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31; *State v. Wallin*, 6 Nev. 280.

And an affidavit to support a motion to sustain or dissolve an attachment. *Bowring v. Bowring*, 4 Utah, 185, 7 Pac. 716.

And affidavits purporting to show errors in the impanelment of the jury. *Crowley v. Croesus etc. Co.*, 12 Idaho, 530, 86 Pac. 536.

Also an affidavit to set aside or open a judgment. *Whidby etc. Co. v. Nye*, 5 Wash. 301, 31 Pac. 752.

The practice in this respect, founded as it is upon statutory provisions, which differ essentially on many points, is not uniform. Thus, in Nevada it was held in *Weinrich v. Porteous*, 12 Nev. 102, that the proper practice in the case of appeals from orders based on affidavits was to attach the affidavits to the order, and identify by a certificate of the clerk of the court or the attorneys. See section 3432, *Cutting's Compiled Laws* (section 337, *Civil Practice*). A similar rule existed in South

Dakota, in section 5217, *Compiled Laws*. See *Bailey v. Scott*, 1 S. D. 337, 47 N. W. 286.

<sup>11</sup> *Morris v. Angle*, 42 Cal. 236; *Bacon v. Robson*, 53 Cal. 399.

<sup>12</sup> *Stoddard v. Burge*, 53 Cal. 394.

<sup>13</sup> *Douglass v. Dakin*, 46 Cal. 49.

<sup>14</sup> *McAbee v. Randall*, 41 Cal. 136; *Douglass v. Dakin*, 46 Cal. 49.

<sup>15</sup> *Catanich v. Hayes*, 52 Cal. 338; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899.

<sup>16</sup> *Abadie v. Carillo*, 32 Cal. 172. It has been otherwise since 1866.

A demurrer and the action of the court thereon is a part of the record. *Maricopa Co. v. Rosson*, 4 Ariz. 335, 40 Pac. 314; *State v. McQuaide*, 12 Wash. 554, 41 Pac. 897.

<sup>17</sup> *Spinetti v. Brignardello*, 53 Cal. 281; and look at *Hayden v. Hayden*, 46 Cal. 332; *People v. Hawes*, 41 Cal. 632; *Ritter v. Mason*, 11 Cal. 214.

See, also, *Filley v. Cody*, 4 Colo. 542. The parties may stipulate that a designated paper or document or instrument may be a part of the record (*Grete v. Knott*, 2 Idaho, 18 (13), 3 Pac. 25); or that a review may be had upon a defective record (*Crosby v. North Bonanza Co.*, 23 Nev. 70, 42 Pac. 583); but they cannot agree that "this stipulation shall be taken and considered as a bill of exceptions and record" upon which the appellate court may take jurisdiction and review the case. *Molandin v. Colorado etc. Co.*, 3 Colo. 173. <sup>17a</sup> *Spreckels v. Ord*, 72 Cal. 86, 13 Pac. 158; *San Francisco Savings Union v. Myers*, 76 Cal. 624, 18 Pac. 686; *Siebe v. Hendy Machine Co.*, 86 Cal. 390, 25 Pac. 14.

the judgment-roll, such stipulation becomes a part of the judgment-roll, and should be incorporated therein. Thus a stipulation that an answer to an original complaint shall be the answer to an amended complaint is a part of the pleadings, and when attached to the particular pleading to which it refers becomes a necessary part of the judgment-roll.<sup>17b</sup> So, where the stipulation takes the place of findings as an agreed statement of facts, it is a part of the roll.<sup>17c</sup> On the other hand, if the stipulation takes the place of only a portion of the testimony, it is not a part of the roll, and must be incorporated in a bill of exceptions.<sup>17d</sup> On the same principle, it has been held that the report of a referee is not the report which is made a part of the judgment-roll by the provisions of the section under consideration, unless it be a report on the whole case.<sup>17e</sup> Unless it is a report on the whole case, it is nothing more nor less than a report of the testimony upon which the court bases its findings, and, as was said in *Harper v. Minor*,<sup>18</sup> "All between that [the findings] and the pleadings drop out of the case, and have no place in the transcript on appeal from the judgment unless brought in by a statement on appeal." A memorandum of costs

<sup>17b</sup> *Kent v. San Francisco Savings Union*, 130 Cal. 401, 62 Pac. 620.

<sup>17c</sup> *Conway v. Supreme Council*, 137 Cal. 384, 70 Pac. 223. But the stenographer's or referee's notes cannot be made a part of the judgment-roll by stipulation. *Merchants' Nat. Bank v. McKinney*, 6 S. D. 58, 60 N. W. 162.

<sup>17d</sup> *Siebe v. Hendy Machine Co.*, 86 Cal. 390, 25 Pac. 14; and upon the general principle, see *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Muller v. Rowell*, 110 Cal. 318, 42 Pac. 804; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109.

Matters of evidence not properly brought up cannot be considered on stipulation merely. *Ross v. Duggan*, 5 Colo. 85; *McKenzie v. Ballard*, 14 Colo. 426, 24 Pac. 1; and see *Klimer v. Schnorf*, 3 Utah, 442, 24 Pac. 909. Nor does a stipulation as to the testimony that is to be considered by the trial judge make such testimony a part of the record on appeal. *Howard v. Ross*, 3 Wash. 292, 28 Pac. 526.

<sup>17e</sup> Differently expressed, such a report which will serve, as findings,

to sustain a final judgment. *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021; *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 Pac. 85. See, also, *Harris v. S. F. S. R.*, 41 Cal. 393; *Johnston v. Dopkins*, 6 Cal. 83.

The finding of a referee mentioned in section 6806, Revised Codes of Montana (section 1196, Code of Civil Procedure), is the "finding" upon the whole issue designated in section 6781 (section 1140, Code of Civil Procedure). *Murphy v. Patterson*, 24 Mont. 575, 584, 63 Pac. 375. And if the case is turned over to a referee merely to take the testimony, and exceptions taken to the report, such exceptions must be incorporated in a bill of exceptions. *Kleinschmidt v. Iler*, 6 Mont. 122, 9 Pac. 901.

The referee's report, even upon the whole case, is not always a part of the judgment-roll. See note 3b, *supra*. And see *Osborn v. Graves*, 11 Or. 526, 6 Pac. 227; *Van Bibber v. Fields*, 25 Or. 527, 36 Pac. 526; *Trummer v. Konrad*, 32 Or. 54, 51 Pac. 447.

<sup>18</sup> 27 Cal. 107. And see cases cited in notes 25a, 25b, and 25c, below.

is not a part of the judgment-roll.<sup>19</sup> Nor is an affidavit to open a default;<sup>19a</sup> nor any of the proceedings relating to the appointment of a *guardian ad litem*;<sup>19b</sup> nor is the appearance of an attorney;<sup>19c</sup> nor an order setting aside a default;<sup>19d</sup> nor is an order allowing an amendment to a pleading;<sup>19e</sup> nor are miscellaneous affidavits and other documentary matter printed in the transcript;<sup>19f</sup> nor are miscellaneous minute entries, the usual purpose of which is for the guidance of the court in ordering judgment, and the clerk in entering the same;<sup>19g</sup> nor is the testimony,<sup>19h</sup> or the instructions,<sup>19k</sup> un-

<sup>19</sup> Kelly v. McKibben, 54 Cal. 192.

<sup>19a</sup> Doerfler v. Schmidt, 64 Cal. 265, 30 Pac. 816.

<sup>19b</sup> Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754.

<sup>19c</sup> Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026.

A special appearance by an attorney is not a part of the roll, and must be brought up in a statement or bill, and not under the certificate of the clerk. See Syndicate etc. Co. v. Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

<sup>19d</sup> De Pedrorrena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361.

<sup>19e</sup> Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853. Also Borden v. Lynch, 34 Mont. 503, 87 Pac. 609.

<sup>19f</sup> La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765.

Affidavits on motion for the appointment of a receiver form no part of the roll. Kennedy etc. Co. v. Keyes etc. Co., 58 Wash. 499, 109 Pac. 56.

<sup>19g</sup> Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109; Knowles v. Baldwin, 125 Cal. 224, 57 Pac. 988; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572.

Also Putnam v. Putnam, 3 Ariz. 182, 24 Pac. 320.

<sup>19h</sup> Estate of Arnaz, 45 Cal. 259; Tillman v. Averett, 82 Cal. 576, 23 Pac. 875; Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225; Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717.

The evidence is not a part of the record unless embodied in a bill of exceptions, case-made, or statement.

Blatchley v. Coles, 6 Colo. 82; Learned v. Tritch, 6 Colo. 579; Bergundthal v. Bailey, 15 Colo. 257, 25 Pac. 86; Miller v. Thorpe, 4 Colo. App. 559, 36 Pac. 891; Gress v. Evans, 1 Dak. 387, 46 N. W. 1132; Higley v. Gilmer, 3 Mont. 433; Ladd v. Higley, 5 Or. 296; Mitchell v. Powers, 17 Or. 491, 21 Pac. 451; Merchants' National Bank v. McKinney, 6 S. D. 58, 60 N. W. 162; Foley-Wadsworth Co. v. Porteous, 7 S. D. 34, 63 N. W. 155; Meeker v. Gardella, 2 Wash. Ter. 355, 7 Pac. 889; and see Daniels v. Andes Ins. Co., 2 Mont. 500; Blessing v. Sias, 7 Mont. 103, 14 Pac. 663; Conklin v. Cullen, 25 Mont. 214, 64 Pac. 502.

The rule is not otherwise as to documentary evidence, which should be embodied in a statement or bill. Cook v. Hughes, 1 Colo. 51; Fisher v. Kelly, 26 Or. 249, 38 Pac. 67; Funk v. Stevens (Or.), 109 Pac. 133; Keady v. United Ry. Co. (Or.), 108 Pac. 197. Also, the record of justice's court used at the trial. Craig v. Smith, 10 Colo. 220, 15 Pac. 337.

A transcript of the reporter's notes made for the purpose of showing errors must be brought into the record by a bill or statement. Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032.

If the evidence is attached to the report of a referee, however, so as to be a part thereof, it may be brought up, along with such report, as a part of the judgment-roll, and no statement or bill is required. Bash v. Culver etc. Co., 7 Wash. 122, 34 Pac. 462; Healy v. Seward, 5 Wash. 319, 31 Pac. 874.

Nor are depositions a part of the record. They must be incorporated

less in criminal appeals where provision is made for their incorporation in the transcript as a part of the judgment-roll after identification and indorsement by the judge of the trial court;<sup>191</sup>

in a statement or bill. *Likens v. Cain*, 4 Wash. 307, 30 Pac. 80.

And the same may be said of a motion to suppress depositions. *Craig v. Young*, 2 Colo. 112.

<sup>190</sup> *Paris v. Rayner*, 76 Cal. 647, 18 Pac. 788; *Matthews v. Jones*, 92 Cal. 563, 28 Pac. 597.

In support of the rule as to instructions are the following decisions: *Banks v. Hoyt*, 11 Colo. 399, 18 Pac. 448; *Brink v. Posey*, 11 Colo. 521, 19 Pac. 467; *Witcher v. Watkins*, 11 Colo. 548, 19 Pac. 540.

Where, however, as in the Montana code, instructions are made a part of the judgment-roll, either expressly or by implication, the rule is, of course, otherwise. See *Wastl v. Montana etc. Co.*, 24 Mont. 159, 61 Pac. 9.

The rule applies to both civil and criminal cases. *State v. Lucey*, 24 Mont. 295, 61 Pac. 994. See note 191.

<sup>191</sup> The instructions, under the provisions of section 1207, California Penal Code, are a part of the judgment-roll in criminal cases. That section provides as follows:

"Sec. 1207. When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, . . . and must, within five days, annex together and file the following papers, which constitute a record of the action:—

"1. The indictment or information, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The written instructions given, modified, or refused, with the indorsements thereon, and the certified transcript of the charge of the court; and

"4. A copy of the judgment."

Under sections 1093 and 1127 of the same code, provisions are made for both oral and written instructions, and for the certification of the latter by the reporter. Under these provisions the supreme court has held that the instructions are a part of the judgment-roll, but only when

properly indorsed and authenticated by the judge of the trial court. That is, the written instructions are to be so indorsed, and the transcript of the oral charge, certified by the reporter, is to be authenticated by the judge as correct. Unless so indorsed and authenticated they must be incorporated in the bill of exceptions. *People v. Cox*, 76 Cal. 281, 18 Pac. 332; *People v. January*, 77 Cal. 179, 19 Pac. 258; *People v. Von*, 78 Cal. 1, 20 Pac. 35; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Rogers*, 81 Cal. 209, 22 Pac. 592; *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *People v. Clark*, 106 Cal. 32, 39 Pac. 53; *People v. Gibson*, 106 Cal. 458, 39 Pac. 864; *People v. Ludwig*, 118 Cal. 328, 50 Pac. 426; *People v. Padilla*, 143 Cal. 158, 76 Pac. 889; *People v. Cole*, 127 Cal. 545, 59 Pac. 984.

Authentication by the judge is essential. Neither the clerk nor the reporter can give the necessary verity to instructions that are without the authentication of the judge. Unless so indorsed and authenticated, as above suggested, the instructions should be embodied in a bill of exceptions. But if properly indorsed and authenticated, they may be printed in the transcript as a part of the judgment-roll, without being incorporated in a bill of exceptions. If they appear in both places, and there is a discrepancy, the copy in the judgment-roll, if properly indorsed and authenticated, will prevail. *People v. Clark*, 106 Cal. 32, 39 Pac. 53; *People v. Gibson*, 106 Cal. 458, 39 Pac. 864; *People v. Cole*, 127 Cal. 545, 59 Pac. 984. If the instructions are oral and have not been written out and authenticated by the judge, the proper place for them is in the bill of exceptions. *People v. Gibson*, 106 Cal. 458, 39 Pac. 864; *People v. Cole*, 127 Cal. 545, 59 Pac. 984. The re-

nor is proof of service of an amended pleading;<sup>19m</sup> nor a bill of particulars;<sup>19n</sup> nor a notice of intention to move for a new trial;<sup>19p</sup> nor the motion itself;<sup>19q</sup> nor are findings, when findings are not required, as where the judgment is by default;<sup>19r</sup> nor is proof of service of a notice of decision;<sup>19s</sup> nor proof of service of notice of appeal;<sup>19t</sup> nor are rules of court;<sup>19u</sup> nor is the opinion of the court, when not a statement of facts.<sup>19v</sup>

porter's notes are but *prima facie* evidence of the oral charge, and it is the duty of the judge, in settling the bill of exceptions, wherein appear a transcript of his oral instructions, to insert what he actually said, if the copy provided by the reporter is inaccurate or erroneous. *People v. Cox*, 76 Cal. 281, 18 Pac. 332.

An appeal in a criminal case will be dismissed when the judgment is not incorporated in the record as a part of the judgment-roll. *People v. Lenon*, 77 Cal. 308, 19 Pac. 521.

Except on an appeal from a judgment of conviction, the code makes no provision for a judgment-roll in criminal cases. It has been held, therefore, that the minutes could not be used on appeal from orders sustaining demurrers to indictments unless incorporated in a bill of exceptions. *People v. Long*, 121 Cal. 494, 53 Pac. 1097.

A similar provision is to be found in the Montana code. See sections 2070, 2176, and 2229, Penal Code. Also, *State v. Lucey*, 24 Mont. 295, 61 Pac. 994.

<sup>19m</sup> *Riverside Co. v. Stockman*, 124 Cal. 222, 56 Pac. 1027; *Canadian etc. Co. v. Clarita etc. Co.*, 140 Cal. 672, 74 Pac. 301; and see *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40.

<sup>19n</sup> *Paris v. Raynor*, 76 Cal. 647, 18 Pac. 788; *Edelman v. McDonell*, 126 Cal. 210, 58 Pac. 528; *Fryer v. Breeze*, 16 Colo. 323, 26 Pac. 817.

<sup>19p</sup> See *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; and see sections 14, 151 and 168, *ante*, for a discussion of the subject of the place of the notice in the record. A notice of intention printed in the transcript will not be permitted to contradict the recitals of the statement or bill of exceptions. *Mendocino Co. v. Peters*, 2 Cal. App. 24, 82 Pac. 1122, citing *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 202; *Mon-*

*terey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700; *Nye v. Marysville*, 97 Cal. 461, 32 Pac. 530.

Also *Perego v. Dodge*, 9 Utah, 3, 33 Pac. 221; *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124.

See, also, *Carr v. Closser*, 27 Mont. 94, 69 Pac. 560; *S. C.*, 25 Mont. 149, 63 Pac. 1043.

<sup>19q</sup> *Tietjen v. Sneed*, 3 Ariz. 195, 24 Pac. 324; *Maricopa Co. v. Osborn*, 4 Ariz. 331, 40 Pac. 313; *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Oregonian Ry. Co. v. Wright*, 10 Or. 162; *Murrin v. Ullman*, 1 Wyo. 36; *Geer v. Murrin*, 1 Wyo. 37; *Jenkins v. Territory*, 1 Wyo. 317; *Garbanati v. Commissioners*, 2 Wyo. 257; *Johns v. Adams*, 2 Wyo. 194; *Perkins v. McDowell*, 3 Wyo. 328, 23 Pac. 71; *Seibel v. Bath*, 5 Wyo. 409, 40 Pac. 756; *Rubel v. Willey*, 5 Wyo. 427, 40 Pac. 761; *Thompson v. Backenstos*, 1 Or. 17; *Boulter v. State*, 6 Wyo. 66, 42 Pac. 606; *Freeburgh v. Lamoureux*, 12 Wyo. 41, 73 Pac. 545.

<sup>19r</sup> *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, 37 L. R. A. 626; *Thomson v. Thomson*, 121 Cal. 11, 53 Pac. 403; and see *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567.

<sup>19s</sup> *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899.

<sup>19t</sup> *Peck v. Agnew*, 126 Cal. 607, 59 Pac. 125; but see section 265, *post*.

<sup>19u</sup> Rules of court must appear in the record or they will not be considered. *Walla Walla etc. Co. v. Budd*, 2 Wash. Ter. 336, 5 Pac. 602; *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81. And they must be brought up in the statement or bill of exceptions, as any other documentary record not made a part of the judgment-roll by statute.

<sup>19v</sup> *King Co. v. Hill*, 1 Wash. 63, 23 Pac. 926; *Cornish v. Floyd-*

Pleadings are always a necessary part of the record, and are made a part of the judgment-roll in all codes,<sup>19w</sup> along with the summons, verdict or decision, and judgment.<sup>19x</sup>

Bills of exceptions are part of the roll,<sup>20</sup> as also were statements on appeal under the old Practice Act.<sup>21</sup> So orders in relation to a change of parties are parts of the roll.<sup>22</sup> So the "summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendants in not answering was entered," constitute part of the roll.<sup>23</sup> So the findings of a referee are part of the roll.<sup>24</sup> So an interlocutory judgment is part of the roll, such document being included in the term "judgment" as used in the section.<sup>25</sup>

Jones, 26 Mont. 153, 66 Pac. 838; Menard v. Montana etc. Co., 22 Mont. 340, 56 Pac. 592; Butte etc. Co. v. Societe etc., 23 Mont. 177, 75 Am. St. Rep. 505, 53 Pac. 111; Phillips v. Coburn, 28 Mont. 45, 72 Pac. 291. A letter from the judge stating the reasons for his action is not a part of the judgment-roll. Morrow v. Letcher, 10 S. D. 33, 71 N. W. 139.

<sup>19w</sup> See Dobson v. Owens, 5 Wyo. 85, 37 Pac. 471.

<sup>19x</sup> See 3b, *supra*.

<sup>20</sup> See section 255, *post*; and see Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907; and Klauber v. San Diego etc. Co., 98 Cal. 105, 32 Pac. 876, and see cases; and see note 25f, below.

<sup>21</sup> See section 252, *post*. But statements on motion for new trial are not. Powell v. May, 29 Mont. 71, 74 Pac. 80.

<sup>22</sup> Tormey v. Pierce, 49 Cal. 306; and see note 25f, below. And see Beck v. Holland, 28 Mont. 460, 72 Pac. 972.

<sup>23</sup> Maud v. Wear, 55 Cal. 25; Barney v. Vigoureaux, 75 Cal. 376, 17 Pac. 433. As to proof of service of summons, Brettell v. Deffenbach, 6 S. D. 21, 60 N. W. 167.

Also Vermont etc. Co. v. McGregor, 5 Idaho, 510, 51 Pac. 104; Applington v. G. V. B. M. Co., 6 Idaho, 216, 55 Pac. 241.

The writ with officer's return thereon is also a part of the record. Golden Terra etc. Co. v. Smith, 2 Dak. 377, 11 N. W. 98; St. Croix etc. Co. v. Pennington, 2 Dak. 467,

11 N. W. 497; Johns v. Marion Co., 4 Or. 46.

<sup>24</sup> Thompson v. Patterson, 54 Cal. 542; but see note 17e, *supra*.

<sup>25</sup> Packard v. Bird, 40 Cal. 378.

But interlocutory orders in general, and orders that are nonappealable, must go into a bill of exceptions, or statement. Graham v. Linehan, 1 Idaho, 780. See chapter 44, as to the office of the old statement on appeal.

An order on motion for change of venue is not a part of the record (Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71), unless made so by special statute. See Bookwalter v. Conrad, 14 Mont. 62, 35 Pac. 226; Sharman v. Huot, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558.

So as to motions for continuance (Barber v. Briscoe, 8 Mont. 214, 19 Pac. 589; Borden v. Lynch, 34 Mont. 503, 87 Pac. 609), and a motion to dismiss (Rutter v. Shumway, 16 Colo. 95, 26 Pac. 321), and for nonsuit (Kleinschmidt v. McAndrews, 4 Mont. 8, 2 Pac. 286; S. C., 4 Mont. 223, 5 Pac. 281; Rooney v. Tong, 4 Mont. 596, 1 Pac. 720; Rooney v. Tong, 4 Mont. 597, 2 Pac. 312), and attachment. Syndicate etc. Co. v. Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

So proceedings on motion in arrest of judgment must be included in a bill, and are not a part of the record otherwise. Thompson v. Backenstos, 1 Or. 17. *Contra*: Daniels v. Denver, 2 Colo. 669.

But an order upon an injunction may be considered on review with-



If the complaint is not answered, proof of service of summons is a necessary part of the judgment-roll of a judgment against the

out a bill of exceptions. *Bluebird etc. Co. v. Murray*, 9 Mont. 468, 23 Pac. 1022.

An order denying a motion to quash a *mandamus* is not a part of the roll. *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50.

An order refusing to dismiss an appeal from a justice court is not an order involving the merits, and is not a part of the judgment-roll. *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627.

But an order consolidating two cases is such an order as requires to be incorporated in the judgment-roll. *Spencer v. Forcht*, 14 S. D. 145, 84 N. W. 765.

A transcript of the evidence is not an order "involving the merits." *Wood v. Nissen*, 2 N. D. 26, 49 N. W. 103.

A motion to set aside a judgment is not a part of the judgment-roll. *Miller v. Seybert*, 4 Colo. 352. Where, on such a motion, only its regularity is in question, the reasons assigned need not be set out in a statement or bill of exceptions, however, since the judgment-roll is all the record required. *Anderson v. Sloan*, 1 Colo. 33; *Seattle etc. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567.

Motions relating to costs and the taxation of cost bills must be presented by bill of exceptions. *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021; *Granite Mtn. Co. v. Weinstein*, 7 Mont. 440, 17 Pac. 113; *Howard v. Richards*, 2 Nev. 128, 90 Am. Dec. 520; *McFadden v. Elsworth etc. Co.*, 8 Nev. 57. In the Montana case, however, it was held that the order itself, when properly authenticated by the clerk, might be brought up without a bill of exceptions.

A record as to the dismissal of an appeal in an intermediate court is not a part of the record. *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321; *Swenson v. Girard etc. Co.*, 4 Colo. 475; *Wike v. Campbell*, 5 Colo. 126; *Swope v. Smith*, 1 Okl. 283, 33 Pac. 504; but see *Plunket v. Evans*, 2 S. D. 434, 50 N. W. 961.

Motions, in general, can be presented to the appellate court for review only by a bill of exceptions or case-made. And the same may be said of affidavits, evidence, instructions, and other preliminary proceedings. Only the petition, answer, reply, demurrers, process, order, and judgment (in Oklahoma) are properly made a part of the record otherwise. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Kingfisher v. Pratt*, 4 Okl. 284, 43 Pac. 1068; *Black v. Kuhn*, 6 Okl. 87, 50 Pac. 80; *Board v. Harvey*, 5 Okl. 468, 49 Pac. 1006; *Lookabaugh v. Vance*, 6 Okl. 358, 49 Pac. 65; *Territory v. Caffrey*, 8 Okl. 193, 57 Pac. 204; *Caffrey v. Overholser*, 8 Okl. 202, 57 Pac. 206; *Menten v. Shuttee*, 11 Okl. 381, 67 Pac. 478; *McCoy v. McCoy*, 27 Okl. 371, 112 Pac. 1040; *Singleton v. Kennamer*, 27 Okl. 564, 112 Pac. 1026.

As above shown, nonappealable orders must be brought up for review in a statement or bill of exceptions. Generally speaking, such orders must be excepted to, and exceptions cannot be reviewed otherwise than in a bill or statement on appeal. *Patrick v. Weston*, 21 Colo. 73, 39 Pac. 1083; *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321; *Burnell v. Wachtel*, 4 Colo. App. 556, 36 Pac. 887; *Kirkwood v. School District*, 45 Colo. 368, 101 Pac. 343.

Applying the rule to the judgment itself, the supreme court of Colorado, in *Schuch v. Hartshorn*, 48 Colo. 351, 109 Pac. 1110, said: "While the judgment is a part of the record, the exceptions to the judgment in the form of an addendum thereto are not, and can only be made so by including them in the bill of exceptions. 'Exceptions to the rulings and decisions of the court can be brought into the record only by bill of exceptions allowed, signed, and sealed by the judge. Where a cause is heard by the court, an exception to the final judgment is necessary to authorize the appellate court to review the judgment upon the facts, or upon the law as ap-

defendant who failed to answer.<sup>25a</sup> The "decision" or findings of the court are a part of the judgment-roll; <sup>25b</sup> so also is the verdict.<sup>25c</sup> Generally speaking, where the judgment is by default, the judgment-roll consists of the complaint, the summons, proof of the latter, the memorandum of default indorsed on the complaint, and a copy of the judgment.<sup>25d</sup> If the judgment is not by default, the judgment-roll consists of the pleadings, a copy of the verdict of the jury or the findings of the court or referee, and a copy of the judgment.<sup>25e</sup> If there is a bill of exceptions, it should also be included, for, as above stated, such paper is a part of the judgment-roll, although designated independently; <sup>25f</sup> and orders striking out pleadings, orders on demurrers and relating to a change of the parties, if there are such, are parts of the judgment-roll. An order of substitution of parties comes within this last definition.<sup>25g</sup>

plied to the facts; but the exception must be made a part of the record in the manner prescribed by law, otherwise it cannot be noticed.' *Burnell v. Wachtel*, 4 Colo. App. 556, 557, 36 Pac. 887." And see *Colorado etc. Co. v. Maxwell etc. Co.*, 22 Colo. 71, 72, 43 Pac. 556; *French v. Guyot*, 30 Colo. 222, 70 Pac. 683; *Erie etc. Co. v. Gearing*, 43 Colo. 181, 95 Pac. 300.

Motions, rulings thereon, and exceptions thereto can be preserved for review only by a bill of exceptions or case-made. *Green v. Yeager*, 23 Okl. 128, 99 Pac. 906; and see *McCarthy v. Bentley*, 16 Okl. 19, 83 Pac. 713.

<sup>25a</sup> *Barney v. Vigoureaux*, 75 Cal. 376, 17 Pac. 433; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089; and see note 25d, below.

<sup>25b</sup> *Kimball v. Stormer*, 65 Cal. 116, 3 Pac. 408. Also *Colonial etc. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108.

Also *Colonial etc. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108; *Dodd v. Bowles*, 3 Wash. Ter. 383, 19 Pac. 156.

*Contra*: *Imperial etc. Co. v. Barstow*, 5 Nev. 252; *Alderson v. Gilmore*, 13 Nev. 84; *Hanson v. Chiatovich*, 13 Nev. 395; *Simpson v. Ogg*, 18 Nev. 28, 1 Pac. 827; *Boyd v. Anderson*, 18 Nev. 348, 4 Pac. 497; *Poujade v. Ryan*, 21 Nev. 449, 33

Pac. 659; *Beck v. Thompson*, 22 Nev. 109, 36 Pac. 562; *Streeter v. Johnson*, 23 Nev. 194, 44 Pac. 819; *Nesbitt v. Chisholm*, 16 Nev. 39; *Bowker v. Goodwin*, 7 Nev. 135, 10 Morr. Min. Rep. 149; *Corbett v. Job*, 5 Nev. 201; *Western etc. Co. v. Nevada etc. Co. (Nev.)*, 110 Pac. 1129; *Beck v. Lodge*, 18 Nev. 246, 2 Pac. 390; *Thomas v. Blaisdell*, 25 Nev. 223, 58 Pac. 903; *Burback v. Rivers*, 20 Nev. 81, 16 Pac. 430; *Smith v. Wells*, 29 Nev. 415, 91 Pac. 315; *Adams v. Rogers*, 31 Nev. 163, 102 Pac. 699. (Note: Section 3300, *Cutting's Compiled Laws*, omits to make the findings a part of the judgment-roll. See note 3b, section 230, *ante*.)

<sup>25c</sup> *Goldman v. Rogers*, 85 Cal. 574, 24 Pac. 782.

Also *Bashford v. Kendall*, 2 Ariz. 6, 7 Pac. 176.

Also special verdicts. *Atchison etc. Co. v. Johnson*, 3 Okl. 41, 41 Pac. 641.

<sup>25d</sup> *O'Shea v. Wilkinson*, 95 Cal. 454, 30 Pac. 588. See, also, *Bickford v. Kirwin*, 30 Mont. 1, 75 Pac. 518.

<sup>25e</sup> *Weeks v. Gold Mining Co.*, 73 Cal. 599, 15 Pac. 302; *Willey v. The Benedict Co.*, 145 Cal. 601, 79 Pac. 270.

<sup>25f</sup> But not in California. See note 4, section 255, *post*.

<sup>25g</sup> *Crim v. Kessing*, 89 Cal. 486, 23 Am. St. Rep. 491, 26 Pac. 1074.

The clerk is directed to attach together the papers constituting the judgment-roll. But his failure to attach them together does not prevent there being a "roll." The papers designated constitute the roll whether attached together or not.<sup>26</sup> And if the clerk attaches together papers not designated by the statute, that does not make them a part of the roll, but they are to be disregarded.<sup>27</sup>

The judgment-roll must be filed before an appeal is taken<sup>27a</sup> and should be duly certified by the clerk.<sup>27b</sup>

A pleading which is "stricken out" still remains a part of the judgment-roll. In this regard Shafter, J., delivering the opinion of the majority of the court in *Abbott v. Douglass*,<sup>28</sup> said: "The answer, notwithstanding the order striking it out, is entitled to its position in the judgment-roll. The phrase 'struck out,' as applied to a pleading, is figurative only. An order sustaining a demurrer to a pleading defeats or suspends for the time being its legal effect in the action, and a successful motion to strike out an answer does no more. In either event the pleading as a document remains in official custody, and, among others, for the purpose of ulterior proceedings in the court that made the order, or for the purpose of handy review in the court of errors. Further, the Practice Act requires peremptorily that whenever an answer has been put in that it shall constitute a part of the judgment-roll, no matter how

<sup>26</sup> *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Lumley*, 34 Cal. 611.

<sup>27</sup> *Sharp v. Daugney*, 33 Cal. 505.

As to the disposition of papers which improperly appear in the judgment-roll, the rule is not uniform. Some courts merely "disregard" them, or decline to consider them; while others strike them out. The result is necessarily the same in either case. See note 11, section 264, *post*, as to unidentified affidavits; and see *Rich v. French*, 3 Idaho, 727, 35 Pac. 173; *Bank v. Irvine*, 2 Mont. 554; *Carr v. Closser*, 25 Mont. 149, 63 Pac. 1043; *Beach v. Spokane etc. Co.*, 25 Mont. 367, 65 Pac. 106; *Beck v. Thompson*, 22 Nev. 109, 36 Pac. 562; *Streeter v. Johnson*, 23 Nev. 194, 44 Pac. 819; *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231; *Groveley v. Holland*, 14 Nev. 320; *Reinhart v. Co. D*, 23 Nev. 369, 47 Pac. 979.

In *Kranich v. Helena etc. Co.*, 26 Mont. 379, 71 Pac. 672, 68 Pac. 408, quoting from the case of *Beach v.*

*Spokane etc. Co.*, *supra*, the court said: "None of the properly authenticated and certified papers authorized or required to be furnished to this court upon appeals ought ever to be stricken out when presented in conformity with the rules. Their place is in the record. Their effect is properly a matter for determination upon consideration of the case upon the entire record. . . ."

<sup>27a</sup> *Greenly v. Hopkins*, 7 S. D. 561, 64 N. W. 1128; *Dyea Electric Co. v. Easton*, 14 S. D. 520, 86 N. W. 23; *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001.

<sup>27b</sup> *Hardy v. Purington*, 6 S. D. 382, 61 N. W. 158.

<sup>28</sup> 28 Cal. 295. See, also, *Davis v. Honey Lake W. Co.*, 98 Cal. 415, 33 Pac. 270, where it was held that a demurrer, though stricken out, was a part of the judgment-roll.

Also, *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

the court may deal with it on demurrer or on motion to strike out or find on trial as to the truth of its averments."

So a pleading that has been superseded by an amended pleading is nevertheless a part of the judgment-roll. This was held in *Redington v. Cornwell*,<sup>29</sup> where the original complaint gave place to three amended complaints, *seriatim*, the court saying:

"It has been said in a number of cases that an amended pleading supersedes the original; but I think a careful examination of those cases will show that it was only intended to *decide* that the amended pleading superseded the original for certain specified purposes, and only to the extent of the amendment. Beyond this whatever may have been said is mere *dictum*. But in none of the cases has it been even said that the original is not a part of the judgment-roll, nor has it been decided that an original complaint is superseded for the purpose of showing when the action commenced, and whether or not a new and different cause of action was introduced by the amendment. For the purpose of determining these questions, and perhaps others that may arise, which often become material on appeal, the amended complaint can by no possibility supersede the original."

This rule does not apply to the judgment, however. There can be but one judgment in a judgment-roll, and if there are two bound up in the judgment-roll, the later in point of time will be considered the judgment. The presence of the other will not impair the validity of the record. It will be merely disregarded.<sup>30</sup>

There is no "judgment-roll," strictly so called, in probate proceedings, but it has been held that when such proceedings are so akin to those of a civil action as to necessitate such "papers" as are declared by section 670 to constitute a "judgment-roll," they may be held to constitute the judgment-roll referred to in section 661, Code of Civil Procedure, which is the same roll that is used on appeal from the judgment in a civil action, by the section last

<sup>29</sup> 90 Cal. 49, 27 Pac. 40; and see, also, *Dougall v. Schulenburg*, 101 Cal. 154, 35 Pac. 635. See section 58, *ante*.

The reverse of this rule was held in *Raymond v. Thexton*, 7 Mont. 299, 17 Pac. 258.

<sup>30</sup> *Colton L. & W. Co. v. Schwartz*, 99 Cal. 278, 33 Pac. 878. It was here suggested, as a reason for dis-

regarding the earlier judgment, that it might have been set aside as inadvertently entered, and as the order setting it aside and directing the entry of the second judgment would not be a part of the judgment-roll, the absence of such an order from the record would be amply accounted for. See *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572.

cited made a part of the record on appeal from a new trial order.<sup>21</sup> And in *Miller v. Lux*,<sup>22</sup> an appeal from a decree settling an account, it was held that "the petition and account, and the written objections filed to it, are the pleadings which the clerk of the court is required to attach to a copy of the judgment, and these constitute the judgment-roll."

The "judgment-roll" is a creature of statute, and in the absence of a statute prescribing what shall constitute it, as in the case of certain final orders, the record includes all the papers and documents filed in the trial court and considered thereby.<sup>22a</sup>

In the succeeding chapters the different parts of the judgment-roll will be more fully considered, so far as their office of serving as a record on appeal is concerned. Pleadings, however, will be omitted, as they furnish sufficient matter to fill a separate treatise, and would swell this one to too great an extent.

<sup>21</sup> In *re Ryer*, 110 Cal. 556, 42 Pac. 1082. As to the rule in Montana see *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

<sup>22</sup> 100 Cal. 609, 35 Pac. 345, 639; and see *Estate of Page*, 57 Cal. 238.

<sup>22a</sup> See *Ankeny v. Fairview etc. Co.*, 10 Or. 390. It has been held that all the records of the trial court, whether strictly a part of the

judgment-roll or not, might be considered by that court in connection with a new trial motion, but, as a matter of course, on the appeal only those parts which are comprised within the statutory judgment-roll can be considered, unless they are incorporated in a statement or bill of exceptions. *Marshall v. Golden Fleece etc. Co.*, 16 Nev. 156.

## CHAPTER XXXIX.

## RECORD ON APPEAL FROM THE JUDGMENT—THE JUDGMENT.

§ 231. **Recitals in the Judgment.**—As already shown, the judgment to be appealed from is that entered by the clerk in the judgment-book,<sup>1</sup> a copy of which is annexed to and forms part of the judgment-roll. No particular form for the judgment is prescribed by the code. The ordinary course is to recite the mode of trial, or the facts showing the authority of the clerk to enter the judgment, as, for example, that the action was tried by a jury, and a certain verdict rendered, or that it was tried by the court without a jury and findings were filed, or that the time to plead has expired, and no pleading has been filed, or the like, and then to add the judgment, viz., that by virtue of the premises and of the law in such case made and provided, it is ordered, adjudged and decreed, etc. So the entry in the minutes of an order made by the court will frequently recite that certain steps have been taken in the cause, as, for example, that the motion was made upon certain papers, or that counsel appeared and argued the motion, or failed to appear, or the like. Such recitals, which are in some cases fuller than in others, are not required by the statute, and consequently are not essential to the validity of the judgment<sup>2</sup> or order. And on this ground many practitioners doubt whether the supreme court can notice them if made. It is certain, however, that there are many cases in which the court has acted on the information furnished by such recitals. If the course taken in the cases referred to was proper, it follows that recitals in a judgment or order constitute to some extent a record on appeal, and therefore should receive consideration in this place. It will not be necessary, however, to consider their effect where the judgment is attacked collaterally; except to suggest that when so attacked the record is conclusively presumed to be correct.<sup>2a</sup> All that will be attempted is to show their effect upon appeal.

<sup>1</sup> See section 183, *ante*.

<sup>2</sup> *Green v. Swift*, 50 Cal. 454.

<sup>2a</sup> In *Lyons v. Roach*, 84 Cal. 27, 23 Pac. 1026, it was pointed out that the main difference between col-

lateral and direct attacks is that in the former the record alone can be inspected, and is conclusively presumed to be correct; while on direct attack the true facts may be shown.

As above stated, there are many cases in which the court has acted on information contained in recitals in a judgment or order. Thus in *Mahoney v. Wilson*,<sup>2</sup> where the order overruling a demurrer recited that it was made upon consent, the supreme court declined to examine the points made by the demurrer. So in *Spinetti v. Brignardello*<sup>4</sup> it was held that a recital in the judgment appealed from that it was made "on reading and filing the stipulation of the respective parties" was equivalent to a recital that it was by consent, and for that reason the court refused to consider the points made on demurrer to the complaint, and affirmed the judgment with ten per cent damages. In *Abbott v. Douglass*<sup>5</sup> the judgment was by default. There was no statement, and therefore the court held that it was confined to the judgment-roll proper. The judgment appearing in the roll contained the following recital: "In this case witnesses were sworn and examined for plaintiff and defendants. The court after due consideration, and being fully advised in the premises, ordered that the answer of C. D. Douglass, one of the defendants herein, be and the same is hereby stricken out; and that thereupon the default of said Douglass be entered, and that the plaintiff, H. J. Abbott, have judgment against said defendant C. D. Douglass for the sum of three thousand dollars, and his costs of suit as prayed for in the complaint." This recital was

and thus the judgment itself, on appeal, may be reversed or modified. In *Ex parte Acock*, 84 Cal. 50, 23 Pac. 1029, it was held that the facts stated in a judgment for contempt were conclusive on an attack by application for *habeas corpus*.

In the later case of *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220, the court said with reference to the same point:

"The recitals in a judgment are the court's records of its own acts, and although, upon a direct appeal, the jurisdiction of the court is not to be established by its mere assertion in the judgment that it had acquired jurisdiction, yet if such recital finds support in other parts of the record, which under any condition of facts could exist, it will be presumed, in the absence of any contrary showing, that such condition of facts existed."

And see *Eichhoff v. Eichhoff*, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24, as to presumptions in an equity suit brought to attack the

validity of a judgment. Such a suit, though not a direct attack in the same sense as an appeal, is not a collateral attack, and an issue may be formed as to service of process. (See *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698, where it was held that an appeal was a direct attack.)

See, also, *Dowling v. Cramerford*, 99 Cal. 204, 33 Pac. 853, where a similar presumption as was indulged in the case of *Siehler v. Look*, above quoted, was held to follow recitals as to service of amended complaint and summons. Also *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523; *Riverside Co. v. Stockman*, 124 Cal. 222, 56 Pac. 1027.

Also *O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20, 257; *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672; *Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114.

<sup>2</sup> 15 Cal. 42.

<sup>4</sup> 53 Cal. 281.

<sup>5</sup> 28 Cal. 295.

held to show that the answer was stricken out after trial on the merits; and the court, being of opinion that under no circumstances could such a proceeding be proper, reversed the judgment. In *Lyons v. Roach*,<sup>5a</sup> where defective service of summons was relied upon to escape the effect of a default, the appeal being upon the judgment-roll, without a statement or bill of exceptions, the judgment recited that defendant appeared by attorney, etc. The court held that this recital must be taken as true in the absence of a showing to the contrary, saying:

"The code does not require such appearance to be made part of the judgment-roll; and as appellant appeals upon the judgment-roll alone, which shows nothing contradictory or inconsistent with said recital, it must be taken as at least *prima facie* true."

And in *Davis v. Lezinsky*,<sup>5b</sup> where the recitals in the judgment showed that "the cause was tried upon the papers and records on file, together with the statements made by the respective parties," the appeal being upon the judgment-roll, and the appellant contending that the judgment was upon the pleadings, and that no evidence was adduced, it was held that the recitals sufficiently sustained the judgment, although there was a further recital to the effect that no evidence was offered, the presumption being that there was sufficient evidence in the statements of the parties and the papers and documents on file to support the judgment, and that in the absence of a bill of exceptions, it must be presumed that the court meant that no other evidence was introduced except the statements of the parties and the papers and records. And so in many other cases.<sup>6</sup>

If the foregoing cases were correctly decided, it follows that in some cases the appellate court may look to the recitals in a judgment or order for information as to what occurred in the court below. But such recitals are *prima facie* evidence only of the facts stated in them,<sup>7</sup> and are evidence of facts only.<sup>7a</sup> Recitals by the

<sup>5a</sup> 84 Cal. 27, 23 Pac. 1026.

<sup>5b</sup> 93 Cal. 126, 28 Pac. 811.

<sup>6</sup> See *Meredith v. Santa Clara Min. Co.*, 60 Cal. 617; *Dickinson v. Van Horn*, 9 Cal. 207; *Leese v. Clarke*, 28 Cal. 26; *Agard v. Valencia*, 39 Cal. 293; *Doll v. Good*, 38 Cal. 287; *McKinley v. Tuttle*, 34 Cal. 235; *Lawrence v. Collier*, 1 Cal. 37; *Ehrlich v. Ewald*, 51 Cal. 172; *Weeks v. Gold Mining Co.*, 73 Cal. 599, 15 Pac. 302; *Derby v. Jackman*, 89 Cal. 1, 26

Pac. 610; and see *Fleitas v. Cochrem*, 11 Otto, 301, 25 L. ed. 954.

For instances of construction of recitals see *Munch v. Williamson*, 24 Cal. 167; *Green v. Swift*, 50 Cal. 454; *Borkheim v. N. B. & M. Ins. Co.*, 38 Cal. 623.

<sup>7</sup> *Leese v. Clark*, 28 Cal. 26; *Simmons v. Treshour*, 118 Cal. 100, 50 Pac. 312.

<sup>7a</sup> In *Madera Co. v. Raymond G. Co.*, 139 Cal. 128, 72 Pac. 915, it was



clerk as to the legal effect of prior proceedings may be disregarded.<sup>8</sup> But it has been held that recitals may be *prima facie* evidence of the facts from which other facts may be presumed.<sup>9a</sup>

And there are some things of which recitals in a judgment are not sufficient evidence. Thus it would seem that a recital that summons was served cannot (upon appeal) make up for the absence of the summons from the judgment-roll.<sup>9</sup> It is otherwise, however, if the attack upon the judgment and its recitals is collateral, and not

held that where the appeal is on the judgment-roll alone recitals in the judgment with respect to the facts would seem to be conclusive.

<sup>8</sup> *Leese v. Clarke*, 28 Cal. 26.

<sup>9a</sup> See *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138; *County Bank v. Jack*, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705.

A mere inference cannot successfully contradict a recital in a judgment or decree that certain things were duly and regularly done. *Las Vegas etc. Co. v. Trust Co.*, 15 N. M. 634, 110 Pac. 856.

<sup>9</sup> This seems to have been one ground of the decision in *McKinlay v. Tuttle*, 42 Cal. 570, although the main ground seems to have been that the complaint was never amended as to the appellants. The case seems inconsistent with *Lick v. Stockdale*, 18 Cal. 219, although in that case the recital appears to have been in the *finding*. *Lick v. Stockdale* was cited as authority in *Meredith v. Santa Clara Min. Co.*, 60 Cal. 617. The principle enunciated in *McKinlay v. Tuttle* has been consistently followed, and no doubt expresses the true rule. In *Yolo Co. v. Knight*, 70 Cal. 430, 11 Pac. 662, it was held that recitals in the judgment that the summons was duly served would not be accepted as a substitute for the summons and the proof of service on direct attack by appeal. "In determining that question [jurisdiction], recitals which may be found in the judgment cannot be regarded, for the question is, whether the record sustains the judgment." In *Whitney v. Daggett*, 108 Cal. 232, 41 Pac. 471, where there was a collateral attack

upon the judgment, it was held that recitals in the judgment as to service of summons were *prima facie* true when the attack is direct, as upon appeal, and although the record was silent as to service, aside from such recital in the judgment, and the rule demands that jurisdiction must affirmatively appear in the record, yet such a judgment would not be void, but proof of failure of jurisdiction must be offered. "In such case, however, the recital in the judgment is only *prima facie* evidence of service, when, as in this case, the judgment is directly attacked, and is never conclusive except where the attack is collateral." And in *Houghton v. Tibbets*, 126 Cal. 57, 58 Pac. 318, where there was a direct attack by appeal, the court said: "It is requisite that the record should show jurisdiction of the court against whom the judgment was rendered, and, as was said in *McKinlay v. Tuttle*, 42 Cal. 570: 'In determining that question, recitals which may be found in the judgment cannot be regarded, for the question is whether the record sustains the judgment. Such recitals, therefore, will not be accepted as a substitute for the summons and the proof of service; and, indeed, it would be as illogical so to do as to receive such recitals in the stead of the allegations of the pleadings.' See, also, *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220; *County of Yolo v. Knight*, 70 Cal. 430, 11 Pac. 662."

And see *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *People v. Davis*, 143 Cal. 673, 77 Pac. 651; also *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138; *County Bank v. Jack*, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705.

direct, as upon appeal. As heretofore suggested, this is well settled.<sup>9a</sup>

And recitals of the testimony cannot show that the verdict or other decision of fact was not sustained by the evidence. For the statute prescribes that the verdict or other decision of fact is to be attacked by statement or bill of exceptions with proper specifications; and recitals of the evidence in the judgment or findings cannot take the place of the statement or bill of exceptions.<sup>10</sup>

As gathered from the cases, the rule would seem to be that, if the attack is collateral, recitals in the judgment are to be taken as absolutely true. If, on the other hand, the attack is direct, as by appeal, the facts contained in such recitals are to be accepted as *prima facie* true only, subject to be controverted by an adverse showing elsewhere in the record; and if the facts recited are jurisdictional, or if they are required to be independently set forth, the recital cannot be accepted as a substitute for those facts. The question of their verity does not arise. They must simply be disregarded. There are inconsistencies in the decisions, but this is believed to be a fair statement of the general rule.<sup>10a</sup>

<sup>9a</sup> In *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601, following the earlier decisions in *Carpentier v. Oakland*, 30 Cal. 439, *Drake v. Duvenick*, 45 Cal. 455, *Crim v. Keasing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074, and others, the supreme court held that recitals in the judgment of foreclosure of a mortgage as to service of summons, if uncontradicted elsewhere in the record, must be deemed to be true, as importing absolute verity, when such judgment is attacked by motion on the ground of want of jurisdiction over the premises or over the person of the mortgagor.

<sup>10</sup> See *Pico v. Cuyas*, 47 Cal. 174; *Rice v. Inskeep*, 34 Cal. 224; *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 202; and see section 242, subdivision 2, *post*.

Some doubt is thrown upon this position, by *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696, where it seems to have been practically held that the recitals of a judgment might sometimes preclude the necessity of statements or bills of exceptions, since it held that the cases of *Abbott v. Douglass* and *Derby v. Jackman*, above cited, were not in point on the

question there presented, viz., the necessity of a bill of exceptions, since the recitals in the judgment were said to sufficiently set forth everything that could have been incorporated in a bill.

But the rule stated in the text is the one which has the support of the better authority.

<sup>10a</sup> Decisions of other states disclose no material departure from the rule as outlined in the text. In *French v. Ajax etc. Co.*, it was held that a recital in the judgment to the effect that defendant was "personally served" was not conclusive on an appeal from an order denying a motion to vacate the judgment, and permit a defense on the merits, the attack not being collateral, and the court not having certified due and legal service.

In *Knapp v. Wallace*, 50 Or. 348, 126 Am. St. Rep. 742, 92 Pac. 1054, the rule was expressed that if the record is silent as to service, or if, in the absence of a return, there is a recital in the judgment of due service, upon collateral attack jurisdiction will be conclusively presumed; but where the record contains proof of service, a recital in the judgment must be con-

Recitals in an order on motion for new trial as to the ground upon which the action of the court was based are immaterial.<sup>11</sup>

sidered as merely referring to such return.

But in *State v. Wheeler*, 43 Wash. 183, 86 Pac. 394, it was held that a judgment containing recitals of proper service is not for that reason impervious to collateral attack, where it clearly and affirmatively appears from the record itself that no service was made.

Where a judgment of a court of record contains a finding that personal service was made upon the defendant, it cannot be attacked collaterally. *Crist v. Cosby*, 11 Okl. 635, 69 Pac. 885.

Where the court had jurisdiction of the subject matter and the judgment recited due service, with nothing in the record to the contrary, it was

held that the judgment could not be collaterally attacked. *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462. But a judgment may be collaterally attacked, though reciting jurisdiction, if want thereof affirmatively appears on the face of the whole record. *Id.*

Where the return is inconsistent with recitals in the judgment, the former must control. Hence a recital showing proper service will not aid an official return which shows a want of such service. *Stubbs v. McGillis*, 44 Colo. 138, 130 Am. St. Rep. 120, 96 Pac. 1005, 18 L. R. A., N. S., 405.

<sup>11</sup> *Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075; *Boin v. Spreckels*, 155 Cal. 612, 102 Pac. 937; and see section 231, *ante*.

## CHAPTER XL.

### RECORD ON APPEAL FROM THE JUDGMENT—THE VERDICT.

- § 232. The verdict is a part of the judgment-roll.
- § 233. Difference between a general and a special verdict—When a special verdict may be rendered or directed.
- § 234. Special verdict in an equity case.
- § 235. A verdict must be within the issues, must support the judgment, and not be uncertain or contradictory.
- § 236. Effect of verdict.

§ 232. **The Verdict is Part of the Judgment-roll.**—As will be perceived from the statute quoted in the preceding section, the verdict was not mentioned in the section prescribing the contents of the judgment-roll, as it stood before 1862. But notwithstanding this omission, it seems to have been considered that the verdict need not be incorporated in the statement.<sup>1</sup> After the amendment of 1862, and ever since then, the verdict has been mentioned among the documents declared to constitute the roll. And as a matter of course the term, as so used, includes general and special verdicts, although the authorities seem to be to the effect that a special verdict in an equity case is of no force until adopted by the judge,<sup>2</sup> and if this be true, it would seem that such a verdict would be a part of the roll if not adopted. A verdict, being part of the record, imports absolute verity, and cannot be contradicted by affidavit.<sup>3</sup>

It is not within the scope of this treatise to give the procedure upon a jury trial.<sup>4</sup> It is here proposed simply to consider the verdict in so far as it relates to proceedings for review.

§ 233. **Difference Between a General and a Special Verdict — When a Special Verdict may be Rendered or Directed.**—The difference between a general and a special verdict is stated in section 624 of the Code of Civil Procedure, which is as follows:

<sup>1</sup> *Reynolds v. Harris*, 8 Cal. 617; as to this case, see note 6a to section 230.

<sup>2</sup> See section 234, *post*.

<sup>3</sup> *Castro v. Gill*, 5 Cal. 40.

<sup>4</sup> See chapter 5 and chapter 10 of this treatise, where the matter is incidentally treated.

"Sec. 624. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law."<sup>1</sup>

The cases in which a special verdict may be rendered or directed are specified in section 625 of the code, which is as follows:<sup>2</sup>

"Sec. 625. In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."<sup>2a</sup>

<sup>1</sup> The section above quoted reproduces section 174 of the act of 1851 (Laws of 1851, p. 78), which was never amended.

<sup>2</sup> This section is the same as section 175 of the old Practice Act, which was enacted in 1854. Laws of 1854, p. 62. Before 1854 the section was as follows:

"Sec. 175. The court may instruct the jury to find a special verdict; when not so instructed, the verdict shall be general."

The power of the court under the above sections is ample, and the court may direct the jury that if they find an issue a certain way they need proceed no further. *Broadus v. Nelson*, 16 Cal. 79.

<sup>2a</sup> This section was amended by the legislature of 1905 (Stats. 1905, p. 56) so as to read as follows:

"Sec. 625. In an action for the recovery of money only, or specific real property, the jury, *unless instructed*

*by the court to render a special verdict*, may in their discretion render a general or special verdict. In all cases the court *must, upon the request in writing of any of the parties*, direct the jury to find a special verdict in writing upon all or any of the issues and in all cases *must* instruct them *upon the request in writing of any of the parties*, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and *must* direct a written finding thereon. The special verdict or finding *must* be filed with the clerk and entered upon the minutes. Where a special finding of fact is inconsistent with the general verdict, the former controls the latter and the court *must* give judgment accordingly."

The changes thus made were nullified by the legislature of 1909, which re-enacted the section as it formerly stood. Stats. 1909, c. 121. The opinion of Chief Justice Beatty in *Plyer v. Pacific etc. Co.*, 152 Cal. 125,

As will be perceived from the sections above quoted, there are cases in which both a general and a special verdict may be rendered.<sup>2b</sup> In such cases the statute provides that if the special is inconsistent with the general verdict, the former controls the latter.<sup>3</sup> It is to be observed, however, in this connection that

92 Pac. 56, contains an exhaustive construction of these amendments.

Corresponding provisions in other codes are as follows: To section 624, defining a general and special verdict: Section 1413, Revised Statutes of Arizona; section 198, Mills' Annotated Code of Colorado; section 4396, Revised Codes of Idaho; section 6757, Revised Codes of Montana (section 1100, Code of Civil Procedure); section 3271, Cutting's Compiled Laws of Nevada (section 176, Civil Practice); section 7033, Revised Codes of North Dakota; section 5804, Compiled Laws of Oklahoma; section 152, Lord's Oregon Laws; section 270, Code of Civil Procedure of South Dakota; section 3162, Compiled Laws of Utah; section 362, Rem. & Bal. Code of Washington (section 5019, Bal. Code); section 4510, Compiled Statutes of Wyoming.

See, also, section 365, Rem. & Bal. Code of Washington (section 5022, Bal. Code).

Corresponding to section 625, California Code of Civil Procedure: Section 1424, Revised Statutes of Arizona; section 199, Mills' Annotated Code of Colorado; section 4397, Revised Codes of Idaho; section 6758, Revised Codes of Montana (section 1101, Code of Civil Procedure); section 3272, Cutting's Compiled Laws of Nevada (section 177, Civil Practice); section 7036, North Dakota; section 5805, Compiled Laws of Oklahoma; sections 153 and 154, Lord's Oregon Laws; section 271, Code of Civil Procedure of South Dakota; section 3163, Compiled Laws of Utah; sections 363 and 364, Rem. & Bal. Code of Washington (sections 5020 and 5021, Bal. Code); section 4511, Compiled Statutes of Wyoming.

<sup>2b</sup> See *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; *Fresno Canal Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132; *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505.

And see other cases cited in the three following notes.

<sup>3</sup> See *Leese v. Clarke*, 20 Cal. 387. See, also, *Vaughn v. California etc. Ry. Co.*, 83 Cal. 18, 23 Pac. 215, where, in an action for damages for injuries alleged to be the result of carelessness, incompetency or misconduct of defendant's employees, and the want of care on the part of defendant in selecting his said employees, the jury found generally in favor of plaintiff, but found specially in favor of defendant upon all the issues involved. On appeal from a judgment upon the general verdict in favor of plaintiff, the supreme court ordered a reversal and a new trial on the ground that the judgment was not supported by a verdict. See, also, *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; *Los Angeles Assn. v. Los Angeles*, 103 Cal. 461, 7 Pac. 375; *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778; *Di Vecchio v. Luchsinger*, 12 Cal. App. 219, 107 Pac. 315.

Also *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295. The test of a fatal inconsistency was stated in this case to be, whether the special findings alleged to be so inconsistent with the general verdict as to nullify the latter, is such as to justify and support a judgment different from that authorized by the general verdict. See, also, *Bradbury v. Idaho etc. Co.*, 2 Idaho, 239 (221), 10 Pac. 620.

The court may not set aside a special verdict and enter judgment on the general verdict. His course must be the reverse, if either must be set aside or disregarded. *Martin v. Butte*, 34 Mont. 281, 86 Pac. 264.

A general verdict is controlled by a special verdict. *Cronk v. Railway Co.*, 3 S. D. 93, 52 N. W. 420; *Everett v. Buchanan*, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31.

Special findings, inconsistent with the general verdict, control. *Willey v. Morrow*, 1 Wash. Ter. 474; *Stewart v.*

if the special verdict does not cover all the material issues, it cannot in most cases be said that there is an inconsistency; for the general verdict may have been induced by the opinion of the jury upon the issue not covered by the special verdict. In such case the general verdict controls.<sup>4</sup>

In the application of this provision, which is merely the rule adopted in the early decisions of the supreme court crystallized into statute, it has been held that judgments are to be rendered upon special verdicts only when the general verdict is inconsistent therewith.<sup>4a</sup> Also, that it is error to refuse to render judgment upon special findings which are inconsistent with the general verdict.<sup>4b</sup>

Whether special issues should be presented to the jury, or a special verdict required, rests in the discretion of the court.<sup>4c</sup>

Walla Walla etc. Co., 1 Wash. 521, 20 Pac. 605; *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 45 Pac. 743, 46 Pac. 407; *Ottison v. Edmunds*, 15 Wash. 362, 46 Pac. 398; *Gerhard v. Worrell*, 20 Wash. 492, 55 Pac. 625; *Mitchell v. Matheson*, 23 Wash. 723, 63 Pac. 564; *Engstrom v. Merriam*, 25 Wash. 73, 64 Pac. 914; *Hovert v. Seattle*, 32 Wash. 330, 73 Pac. 383; *Crowley v. Northern Pacific Co.*, 46 Wash. 85, 89 Pac. 471; *Boucher v. Oregon etc. Co.*, 50 Wash. 627, 97 Pac. 661; *Grant v. Spokane etc. Co.*, 47 Wash. 512, 91 Pac. 55.

If, however, the special verdict is susceptible of two constructions, one of which will support the general verdict, the latter should prevail. *Merrier v. Travelers' Ins. Co.*, 24 Wash. 147, 64 Pac. 158; *McCorkle v. Malory*, 30 Wash. 632, 71 Pac. 186.

And a special finding must be irreconcilably inconsistent with the general verdict to warrant setting the latter aside. *Gaudie v. Northern Lumber Co.*, 34 Wash. 34, 74 Pac. 1009; *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772, 3 Ann. Cas. 647; *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558.

A finding which involves the expression of an opinion upon a legal proposition will not be allowed to control the fact found by a general verdict, or be held to vitiate it. This was the conclusion of the court in *Silsby v. Frost*, 3 Wash. Ter. 388, 17 Pac. 887, but it is clearly of doubtful

propriety. A special verdict involving a legal conclusion is an anomaly, to say the least.

The right to a judgment upon a special finding of facts, where there is a general verdict, is limited to those cases where there is an irreconcilable inconsistency between the two. *Chicago etc. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664.

<sup>4</sup> *McDermott v. Higby*, 23 Cal. 489.

<sup>4a</sup> *Obersteller v. Commercial Co.*, 96 Cal. 645, 31 Pac. 587; *Portland Cracker Co. v. Murphy*, 130 Cal. 649, 63 Pac. 70.

<sup>4b</sup> *Haas v. Whittier*, 97 Cal. 411, 32 Pac. 449.

<sup>4c</sup> *Smith v. Occidental Co.*, 99 Cal. 462, 34 Pac. 84; *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505; *George v. Los Angeles Ry.*, 126 Cal. 357, 77 Am. St. Rep. 184, 58 Pac. 819, 46 L. R. A. 829; and see, also, *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557. Also, *Lufkins v. Collins*, 2 Idaho, 256 (234), 10 Pac. 300. But this discretion must be properly exercised, and is not absolute. *Burke v. McDonald*, 2 Idaho, 679 (646), 33 Pac. 49, 7 Morr. Min. Rep. 325.

Whether a special verdict be directed is in discretion of the court. *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39; *Langness v. Pettigrew*, 5 Dak. 45, 37 N. W. 758; *White v. White*, 34 Or. 141, 50 Pac. 801, 55 Pac. 645; *Swift v.*

Moreover, if the court shall conclude that it is a proper case for special findings, it is the province of the court to determine the particular questions which the jury are to answer, and it has been held that refusal to comply with a request of counsel in this connection is not error.<sup>44</sup>

Where special issues are submitted to a jury and they cannot agree upon them, counsel may waive them and accept a general verdict.<sup>45</sup>

As stated in section 624, above given, a special verdict finds the facts only. It should find the ultimate facts, avoiding mere statements of the evidence on the one hand, and conclusions of law on the other. In this respect special verdicts are similar to the findings of a court sitting without a jury,<sup>46</sup> and their sufficiency is to be determined by the same rules.<sup>47</sup>

In an action of ejectment the following verdict—"We, the jury, in this cause find a verdict in favor of the plaintiff against defendants for the possession of the premises described in the complaint

Mulkey, 14 Or. 59, 12 Pac. 76; Wild v. Oregon etc. Co., 21 Or. 159, 27 Pac. 954; Knahtla v. Oregon etc. Co., 21 Or. 136, 27 Pac. 91; Columbia etc. Ry. Co. v. Hawthorne, 3 Wash. Ter. 353, 19 Pac. 25; Morrison v. Northern Pacific Ry. Co., 34 Wash. 70, 74 Pac. 1064; Bailey v. Tacoma Traction Co., 16 Wash. 48, 47 Pac. 241; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Hart Lumber Co. v. Rucker, 20 Wash. 383, 55 Pac. 320; Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740.

In Idaho the rule as to the construction of section 4397, Revised Codes, was stated in Shaw v. Manville, 4 Idaho, 369, 39 Pac. 559, to the effect that in actions for the recovery of money only, it is within the discretion of the jury to return a general or special verdict, and stipulation of counsel cannot affect this discretion.

<sup>44</sup> American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; and see section 235, note 21, *post*.

<sup>45</sup> Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151.

<sup>46</sup> A special verdict should find all the facts necessary to enable the court to determine by the consideration of the pleadings and verdict alone which party is entitled to a verdict, without

reference to the evidence. Coburn etc. Co. v. Small, 35 Mont. 288, 88 Pac. 953. A special verdict must present all the material facts so that nothing shall remain for the court but to draw from them the conclusions of law. Knickerbocker v. Hall, 3 Nev. 194.

Where counsel stipulate that certain questions shall be presented to the jury, and they are so presented, such questions and the answers thereto constitute a special verdict within the meaning of the code. Estate of Keithley, 134 Cal. 9, 66 Pac. 5.

As to the contents of a special verdict, see Russell v. Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637; Bartow v. Assurance Co., 10 S. D. 132, 72 N. W. 86.

In a general verdict the jury applies the law and pronounces upon all the issues generally. In a special verdict the jury finds the facts only—the judge passes upon their legal effect. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223.

A special verdict is where the jury finds the facts and leaves the judgment to the court. Willey v. Morrow, 1 Wash. Ter. 474.

<sup>47</sup> Breeze v. Doyle, 19 Cal. 101.



herein, and the sum of one hundred and sixty-five dollars damages"—was held to be a general verdict covering all the issues.<sup>7</sup>

The verdict, whether general or special, must be in writing.<sup>8</sup> Section 618, Code of Civil Procedure, requires the verdict to be signed by the foreman, but it was intimated in *Greenberg v. Hoff*<sup>9</sup> that this provision would be met and the verdict sufficiently authenticated if the verdict should be signed by the jury as a whole. In any event, authentication must be either in the one way or the other. There is no third method.

The findings of a referee upon a reference of the whole issue stands as the finding of the court. Upon a reference to report the facts merely, however, the findings reported have the effect of a special verdict, and are to be treated as such.<sup>10</sup>

This section is without application where any verdict rendered would be merely advisory, as in equity proceedings.<sup>11</sup>

**§ 234. Special Verdict in an Equity Case.**—The great preponderance of authority is to the effect that under our system, as under the old chancery practice, the verdict of a jury in an equity case is merely advisory to the judge, and of no force or effect until adopted by him, and if adopted, that it derives its force and effect solely from such adoption. As has been elsewhere shown,<sup>1</sup> the idea of the early judges was that none of the provisions of the Practice Act applied to equity cases. And upon this theory, it was held in many cases that a special<sup>2</sup> verdict in an equity case was merely advisory to the judge.<sup>3</sup> The theory that the provisions

<sup>7</sup> *Hutton v. Reed*, 25 Cal. 478.

<sup>8</sup> Section 618, Code of Civil Procedure.

<sup>9</sup> 80 Cal. 81, 22 Pac. 69; and see *Estate of Keithley*, 134 Cal. 9, 66 Pac. 5.

<sup>10</sup> See sections 644 and 645, Code of Civil Procedure. Also see *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021; *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 Pac. 85.

<sup>11</sup> *Churchill v. Louie*, 135 Cal. 608, 67 Pac. 1052.

<sup>1</sup> See section 7, *ante*.

<sup>2</sup> A general verdict in an equity case is improper. *Wingate v. Ferris*, 50 Cal. 105; *Brandt v. Wheaton*, 52 Cal. 430, 1 Morr. Min. Rep. 145.

<sup>3</sup> *Gray v. Eaton*, 5 Cal. 448; *Dominguez v. Dominguez*, 7 Cal. 424; *Still v. Saunders*, 8 Cal. 281,

287; *Ritter v. Stock*, 12 Cal. 402; *Goode v. Smith*, 13 Cal. 81; *Purcell v. McKune*, 14 Cal. 230; *Phelan v. Ruiz*, 15 Cal. 90. There is a *dictum* to the contrary in *Duff v. Fisher*, 15 Cal. 375. That was a suit for specific performance of a contract. A special verdict was taken, and appears to have been received and recorded without any objection by counsel, but without any formal approval by the judge, who, however, made his decree upon the verdict. The defendant neither made a motion for a new trial nor prepared any statement, but appealed directly to the supreme court, printing all the evidence, etc., in the transcript. The decision of the supreme court affirming the judgment seems to rest mainly on the absence of a motion for new trial. With ref-

of the Practice Act with reference to new trials were not intended to apply to equity cases was definitely repudiated in *Gagliardo v. Hoberlin*,<sup>4</sup> after which it became well settled that the act established one uniform system of procedure which applied, in general, to all cases alike, on whichever side of the court brought.<sup>5</sup> But this has made no change in the doctrine with reference to the advisory character of verdicts in equity cases for two reasons. In the first place, it is hard to completely do away with the consequences of an erroneous theory if it has prevailed to any extent; and, in the second place, it is understood that the Constitution has not given a party the right to have a jury trial upon issues of

erence to the effect to be given to the special verdict, Field, C. J., in the course of the opinion, said:

"As the object of the issue and trial at law, according to the theory of equity proceedings, was to inform the conscience of the court, it followed that the findings were not held conclusive or binding, but the chancellor was at liberty to disregard them entirely and to proceed with the hearing of the case as though no issue had been framed, or to direct the matter to be tried anew before another jury. This general discretion to disregard the findings may be qualified and controlled by statute, 'and in nearly all the states,' observes the learned editor of the American edition of *Adams' Equity*, 'it is at least very doubtful whether a verdict on an issue is not equally binding with that in a suit at law, and subject only to the same revisory power, which is exercised in granting new trials in other cases.' (Adams' Eq. 376, 1855, note; 3 Greenleaf Ev., sec. 261 et seq.) In this state the statute provides the manner in which the verdict of a jury upon an issue submitted to its decision may be reviewed. It is only by a motion for a new trial. The Practice Act applies as well to equitable as to legal actions, so far as its provisions are consistent with the rights and remedies administered in courts of equity. It may be and probably is true that the court, whether sitting in equity or on trial of a common-law action, may of its own motion set aside the verdict of a jury when it is clearly and palpably against the evidence; but when

the court is satisfied with the verdict, the parties can only question its correctness by following the course pointed out by the statute. As in the case at bar no objection was interposed to the findings of the jury, they must be taken as established facts to support the decree. . . . In *Gray v. Eaton*, 5 Cal. 448, an appeal was taken from an order refusing a new trial upon issues framed in an equity suit, and the court held that the application for the new trial was supererogatory, because the judge had not decided upon the verdict, and that if he had it was a matter in his mere discretion to grant or refuse the application, which was not revisable. The statute was evidently not called to the attention of the court, and the decision cannot in consequence be regarded as of any binding authority."

It must be admitted with respect to this case that the passage quoted was not necessary to the decision. Although there was no formal approval of the verdict, the fact that the judge made his decree thereon was undoubtedly an approval sufficient under any view, and the decision must be taken to be simply this: that findings of fact in equity cases, as in others, can be attacked only on motion for new trial. It seems from the case of *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452, 1 Morr. Min. Rep. 683 (quoted in note 11 below), that Judge Field who wrote the opinion in *Duff v. Fisher* does not regard it as making against the advisory theory.

<sup>4</sup> 18 Cal. 394.

<sup>5</sup> See section 7, *ante*.

fact in an equity cause, and this is regarded as a reason, if a jury trial is nevertheless accorded him, why the verdict should not bear the usual characteristics of a valid verdict.<sup>5a</sup> The following are some of the leading cases in regard to it:

In *Bates v. Gage*<sup>6</sup> only *a part* of the issues were submitted to the jury, and it was held that a notice of intention to move for a new trial, given before the remaining issues were disposed of, was premature, and *McKinstry, J.*, delivering the opinion, said: "A portion of the issues raised by the pleadings were submitted to the jury. The verdict was but advisory, so that all the issues were determined by the court. In an equity case where all the issues are not passed on by the jury, the trial is not terminated when the verdict is rendered, and a special verdict is to be regarded as a portion of the findings of the court."<sup>7</sup> In *Freeman v. Stephenson*<sup>8</sup> the judge disregarded the verdict, and found the facts differently. The supreme court affirmed the judgment, saying: "In an equity case where the court has taken the advice of a jury as to specific issues, and then, as here, finds on the same issues differently from the jury, the finding of the court determines the fact." So in *Stockman v. Riverside L. & I. Co.*,<sup>9</sup> where certain findings of the judge were contrary to the special verdict of the jury, *Ross, J.*, delivering the opinion of the court in bank, said: "It is insisted on behalf of the appellants that, as the findings of the court upon some of the material issues are contrary to the findings of the jury upon the same issues, this court should, notwithstanding a substantial conflict of evidence upon these issues, proceed to weigh the evidence and decide whether it preponderates in favor of the findings of the court or of the jury. To this we cannot assent. The findings of the fact by the court are as conclusive here as they would be if no jury had been

<sup>5a</sup> See *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, 78 Pac. 7; *De Arellanes v. Arellanes*, 151 Cal. 443, 90 Pac. 1059.

<sup>6</sup> 49 Cal. 126. In *Clink v. Thurston*, 47 Cal. 21, it was "conceded for the sake of the argument" that the verdict was merely advisory. *Wakefield v. Bouton*, 55 Cal. 109, does not touch the point, although it is given by the reporter as deciding it.

<sup>7</sup> It is to be observed of *Bates v. Gage*, quoted in the text, that it seems

to rest in part upon the fact that all the issues were not disposed of by the verdict. Now, as has been elsewhere shown (see section 19), it is an established proposition that a trial is not terminated (and consequently that a notice of intention cannot be given) until all the issues are disposed of, whether the case be in equity or at law.

<sup>8</sup> 63 Cal. 499.

<sup>9</sup> 64 Cal. 57, 28 Pac. 116; and see *McLain v. Baker*, 82 Cal. 529, 22 Pac. 1084.

impaneled in the case. The question for us is whether there is sufficient evidence to sustain the findings of the court upon the material issues; and a substantial conflict in the evidence upon such issues is sufficient to sustain a finding either way upon them. It has often been held here that the verdict of a jury in an equity case is but advisory to the court, and in this case it appears to have been the understanding between the parties that it was to be regarded in that light only." In the subsequent case of *Warring v. Freear*,<sup>10</sup> *McKee, J.*, delivering the opinion of the court in bank, said: "Even a special verdict is only advisory to the court. It may be set aside or disregarded or adopted." And in *Johnson v. Powers*<sup>10a</sup> the court said:

"Appellant claims that the court below had no power to set aside the verdict of the jury, and to find the facts. The substituted cross-complaint contains a statement of facts constituting a cause of action in equity. It was a complaint to foreclose a mortgage of personal property given to secure the payment of a promissory note therein set forth. The court was justified in treating the findings of the jury as advisory only."

So in *Fisher v. Zumwalt*,<sup>10b</sup> the court said:

" . . . . The case was in equity. The verdict of the jury was at most only advisory to the court, and the court filed its own findings and decision."

So in *California Electric etc. Co. v. Safe Deposit Co.*,<sup>10c</sup> the court said:

" . . . . The case was in equity, and the verdict of the jury was at most only advisory to the court."

So in *De Arellanes v. Arellanes*,<sup>10d</sup> which was a suit in equity to set aside a deed on the ground of fraud, the court said:

"The trial court, in deciding the case, undoubtedly had the right to find contrary to answers given by the jury to certain questions submitted to it. In actions of this character a party is not entitled to a jury as a matter of right, and if a jury be called in it simply acts in an advisory capacity, the court being compelled to make findings of its own, and in so doing it is free to adopt or reject the findings of the jury, as it deems proper."

And so in numerous other decisions.<sup>10e</sup>

<sup>10</sup> 64 Cal. 54, 28 Pac. 115.

<sup>10a</sup> 65 Cal. 179, 3 Pac. 625.

<sup>10b</sup> 128 Cal. 493, 61 Pac. 82.

<sup>10c</sup> 145 Cal. 124, 78 Pac. 372.

<sup>10d</sup> 151 Cal. 443, 90 Pac. 1059.

<sup>10e</sup> *Freeman v. Stephenson*, 63 Cal. 499; *Sweetser v. Dobbins*, 65 Cal. 529,

The same rule has been laid down by the supreme court of the United States with reference to the Practice Act of Montana, which is similar to that of California.<sup>11</sup>

4 Pac. 540; *Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *Haggin v. Raymond*, 67 Cal. 302, 7 Pac. 721; *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51; *Wallace v. Maples*, 79 Cal. 433, 21 Pac. 860; *Bell v. Marsh*, 80 Cal. 411, 22 Pac. 170; *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 495; *Richardson v. Eureka*, 110 Cal. 441, 42 Pac. 965; *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Scheerer v. Goodwin*, 125 Cal. 154, 57 Pac. 789; *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. 7.

<sup>11</sup> *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452. In this case, Field, J., delivering the opinion, said: "By the organic act of the territory the district courts are invested with chancery and common-law jurisdiction. The two jurisdictions are exercised by the same court, and under the legislation of the territory, the modes of procedure up to the trial or hearing are the same, whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state 'in ordinary and concise language' the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law, and the facts, must proceed from its own judgment respecting them, and not from the judgment of others.

Sometimes in the same action both legal and equitable relief may be sought, as for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages a jury would be required, but upon the propriety of an injunction the action of the court alone could be invoked. The formal distinction in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held, by the supreme court of that state, that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not supported by the evidence. That court only held that the findings, when not objected to in the court below, and the judge was satis-

It must be admitted that the cases cited constitute a strong array of authority, and would in all probability have to be followed on the principle of *stare decisis*. Nevertheless, it is submitted with deference that the advisory theory is unsound in principle and not beneficial in practice. There is certainly nothing in the statute which warrants it. The code contains but one set of provisions in relation to verdicts, and these provisions contain no recognition or suggestion of any difference between verdicts at law and verdicts in equity. The early decisions affirming such a difference were the product of a notion that the provisions of the Practice Act did not apply to equity cases. This notion, as has been shown,<sup>12</sup> was repudiated by the later cases; but the advisory theory still survives, the early cases on the subject having been followed apparently without question. In most of the cases no reason is given, the rule being simply asserted. All that has been or can be urged in its support is the following:

1. It is said that the parties to an equity suit have no right to a trial by jury, but that it is in the discretion of the judge to adopt that mode of trial; and therefore the verdict is of no binding force. The above premise is true; but the premise which is not stated but which is assumed is not true, and consequently the conclusion does not follow. It cannot be maintained that where the parties have no right to a particular mode of trial, and it is in the discretion of the judge to select one of several modes, the decision arrived at through the mode selected is not binding. The futility of the reasoning becomes apparent when it is applied to the other modes of trial provided by the code. The parties to a common-law case have no right to have it tried by the judge without a jury; even where they waive a jury it is in the discretion of the judge to call one.<sup>13</sup> Now, upon the above reasoning, if the judge, in the exercise of his discretion, should see fit to follow the lead of the parties and try the case without a jury, his decision would not be binding; and so if he should not follow their lead but should try the case with a jury, the verdict would not be binding. But hardly anybody would contend that such is the case. So the parties have no absolute right to a trial before referee

fied with them, could not be questioned for the first time on appeal." (The last sentence probably refers to *Duff v. Fisher*, quoted in note 3 above.)

*Basey v. Gallagher*, above quoted, was followed in *Quinby v. Conlan*.  
<sup>14</sup> *Otto*, 424, 26 L. ed. 802.

<sup>12</sup> See section 7, *ante*.

<sup>13</sup> *Doll v. Anderson*, 27 Cal. 24.

but it is in the discretion of the judge to adopt that mode of trial in certain cases. And, upon the reasoning referred to, in case the trial should be before a referee his decision would be merely advisory.<sup>14</sup> But it is well settled that such decision is binding and can be attacked only in the mode pointed out by the statute.<sup>15</sup> There is, therefore, no force in the argument that the verdict is merely advisory, because the parties had no right to a trial by jury, and it was in the judge's discretion to have adopted some other mode of trial.

2. The only other reason that has been or can be alleged in support of the theory is that under the old chancery practice a verdict was merely advisory. This reason is of less force than the other, if that were possible. It is true that, so far as rights are concerned, our system of equity jurisprudence is similar to that administered by the English court of chancery. But so far as concerns the mere procedure, or, in other words, so far as concerns the machinery by which such rights are protected, the two systems are essentially different. Our system of procedure differs from the old chancery system in all important particulars,—in its rules of pleading,<sup>16</sup> in its mode of trial,<sup>17</sup> and in its methods of review.<sup>18</sup> And not only do the two systems differ in the important particulars mentioned, and in minor details, but they differ in the particular under consideration. A chancellor or other equity judge never called a jury *before* him. When he desired a verdict upon any fact a feigned issue was made up and referred to a common-law court

<sup>14</sup> The provision of the code is that "a reference *may* be ordered upon the agreement of the parties," and that "when the parties do not consent the court *may*, upon application of either, or of its own motion, direct a reference" in certain cases. Section 639, California Code of Civil Procedure.

<sup>15</sup> See section 8, *ante*. This does not apply to references to determine matters not put in issue by the pleadings. *Harris v. S. F. S. R.*, 41 Cal. 393.

<sup>16</sup> *Cordier v. Schloss*, 12 Cal. 143; *Goodwin v. Hammond*, 13 Cal. 168; 73 Am. Dec. 574; *Bowen v. Aubrey*, 22 Cal. 566.

<sup>17</sup> As is well known, the evidence in a chancery case was all taken by deposition before a master, while ours is

taken orally in the presence of the judge and jury.

<sup>18</sup> An appeal from the whole decree under the chancery practice took up the whole case, and the appellate court examined the pleadings and evidence as if it were an original hearing (2 Daniell's Chancery Practice, Perkins' ed., 1862, 1863), and rendered the proper decree upon the evidence without regard to the findings of the court below. But under our system the findings of the court below are conclusive in all cases, unless attacked in the mode prescribed by statute (*Duff v. Fisher*, 15 Cal. 375; and see section 244), and if the findings be not sustained by the evidence, the case is sent back to the court below for a new trial.

for trial. Until recently the form of the issue was as follows: "The pretended plaintiff declared that he laid a wager of five pounds with the defendant on the question in dispute, and averred that the fact was as he contended it was, and that he therefore brought his suit for the five pounds; the defendant by his plea admitted the wager, but averred the contrary to be the fact whereupon the issue was joined which was directed to be tried."<sup>19</sup> The feigned issue so made was tried, not according to rules of chancery practice, but according to the rules prevailing in the common-law court.<sup>20</sup> The verdict, therefore, was not only in a different suit but in a different court, proceeding under different rules. Such being the case, it had to be brought into the equity suit by the adoption of the chancellor, until which it had no place in the records of the equity suit, and, as a matter of course, no binding force therein. Under our system, however, the jury is called, in the case to be tried, by the equity tribunal, the case is tried upon the same rules as it would have been had no jury been called, and the verdict is given and recorded *in that case*, and becomes a part of the records thereof.

It is thus seen that the two systems differ not only in their main features, but in the very particular in which it is said they are alike; and in view of this there seems hardly any more reason for following the rules of the old chancery system with respect to verdicts than for following the rules of any other foreign system.<sup>21</sup> The foregoing seems sufficiently to show that there are no reasons for following the old chancery practice in the respect under consideration, and there are strong reasons for not doing so.

(a) The advisory theory requires expensive and cumbrous machinery for no purpose whatever. The jury sit at an expense to the parties of twenty-four dollars a day to give advice to the judge upon a question which he is far more competent to decide than they are, which advice he may and should disregard unless it agrees with his own view.

(b) It introduces a difference in the practice in law and equity cases, and violates the fundamental principle that the system of

<sup>19</sup> See 2 Daniell's Chancery Practice, Perkins' ed., 1099.

<sup>20</sup> See 2 Daniell's Chancery Practice, Perkins' ed., 1101. The court of chancery, however, had power to give special directions concerning the trial

in certain particulars. 2 Daniell's Chancery Practice, Perkins' ed., 1101.

<sup>21</sup> All systems of procedure have some features in common, inasmuch as all are framed for the purpose of facilitating the hearing and decision of disputes between parties.



procedure is exclusive of other systems; that the system was intended to be exclusive is assumed in nearly every decision upon matters of practice. In the language of Cope, J., in *Humiston v. Smith*,<sup>22</sup> "the intention was to adopt a uniform and complete system, and it is impossible to give effect to that intention if parties are at liberty to disregard the course of proceeding pointed out. The system, if it be a system at all, is necessarily exclusive, and the introduction of other remedies would destroy its uniformity, and defeat the purposes of the act." It was in pursuance of this principle that the court repudiated the doctrine of the early cases to the effect that the provisions of the Practice Act did not apply to equity cases. As is elsewhere shown the doctrine that the provisions of the system apply alike to law and equity cases is well settled.<sup>23</sup> In this regard Sawyer, J., delivering the opinion in *Doe v. Vallejo*,<sup>24</sup> said: "We had supposed that the court had so often declined to make any distinction in the practice between cases at law and cases in equity that the question might be considered as settled. Our system does not contemplate any distinction in this respect, and there is no propriety in making any under it." Now, as has been stated, the code contains but one set of provisions in relation to verdicts, and these provisions contain no intimation or suggestion of any difference between verdicts at law and verdicts in equity. And therefore, if the advisory theory is to be upheld, it must be because the system of procedure is not exclusive, and because there is a difference in practice between cases at law and cases in equity.<sup>25</sup>

Nevertheless the practitioner must bear in mind that the great preponderance of authority is in favor of the theory, and that it is unlikely that the court will disturb it.

It is, of course, immaterial that the findings of the court and the verdict of the jury are contradictory, and it is equally immaterial that the latter is unsupported by the evidence, so long as the latter is not subject to that criticism.<sup>25a</sup>

If the verdict be merely advisory, it would not be a part of the judgment-roll unless adopted by the judge. No formal proceed-

<sup>22</sup> 21 Cal. 129. See, also, *Levy v. Getleson*, 27 Cal. 685.

<sup>23</sup> See section 7, *ante*.

<sup>24</sup> 29 Cal. 385.

<sup>25</sup> It is hardly necessary to say that special verdicts in other cases than

cases in equity are binding without any adoption by the judge. See *Allen v. Hill*, 16 Cal. 113; *Wilmington C. & R. Co. v. Dominguez*, 50 Cal. 505.

<sup>25a</sup> See *De Arellanes v. Arellanes*, 151 Cal. 443, 90 Pac. 1059.

ings are required to make such adoption effective, and it may be established as any other fact. Thus, where it appeared from recitals in the findings of fact, and in the judgment, that the findings and conclusions of law were made upon special issues submitted to a jury, and in accordance with the verdict thus found, it was held that such recitals constituted sufficient evidence that the verdict had been adopted by the court, although the word "adopt" was nowhere used in connection therewith.<sup>26</sup> In the same case, having been adopted, the verdict was made a part of the judgment-roll, and as such, the certificate of the clerk that the transcript was a full, true and correct transcript of the issues submitted, the answers thereto, and verdict thereon, was held to be a sufficient proof of the adoption thereof. It was further held that the usual presumption would follow that the verdict had been properly entered in accordance with the requirements of section 628, Code of Civil Procedure. So in *Morrison v. Stone*;<sup>27</sup> where, upon the hearing of defendant's motion for judgment, an order was made "that judgment be entered in accordance with the verdict of the jury rendered herein," and all the special issues submitted, with the answers, or findings, were incorporated in the judgment, together with the general verdict, it was held a sufficient "adoption."

It would seem that there is no incontestable right of trial by jury in probate proceedings,<sup>28</sup> but jury trials are sometimes al-

<sup>26</sup> *Goldman v. Rogers*, 85 Cal. 574, 24 Pac. 782.

<sup>27</sup> 103 Cal. 94, 37 Pac. 142. See, also, *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569.

<sup>28</sup> See *In re Moore*, 72 Cal. 335, 13 Pac. 880; *In re Herteman*, 73 Cal. 545, 15 Pac. 121; *In re Sanderson*, 74 Cal. 199, 15 Pac. 753; *Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235; *In re Westfield*, 96 Cal. 113, 30 Pac. 1104; *Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090. In the first of these cases, the court held that a trial by jury of a contest arising out of the settlement of the account of an administrator was not a matter of right, and the verdict of a jury in such a case was merely advisory, as in an equity proceeding. To the same effect, in a like proceeding in *Estate of Herteman*, *supra*. In *Estate of Sanderson*, *supra*, the court held that a contest over the settlement of the accounts of the

executor did not create "issues of fact" such as require to be submitted to a jury on the request of one of the parties. To the same effect, with reference to a family allowance, in *Leach v. Pierce*, *supra*. In *Shipman v. Unangst*, *supra*, the court held that it is the duty of the probate court to set aside a homestead and fix a family allowance, *ex parte*, and that a jury trial was neither necessary nor proper. The present tendency is to limit trial by jury, and attendant and consequent proceedings to those classes of cases where the code specially prescribes and authorizes issues of fact to be framed. See *In re Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, and cases cited in notes 19, 20 and 21, in section 199, *ante*.

See, also, *Estate of Franklin*, 133 Cal. 584, 65 Pac. 1081; *Estate of Dolbeer*, 153 Cal. 652, 96 Pac. 266,

lowed,<sup>20</sup> and, in view of the rule with respect to cases in equity, the question arises as to the effect of the verdicts in such cases. The tendency is to regard them as verdicts in equity cases; i. e., as advisory, and without effect, until adopted, as in equity cases, and included in the findings of the court.<sup>20</sup> If so, it follows that errors in impaneling the jury are without prejudice.<sup>21</sup>

If verdicts in probate proceedings are thus to be regarded as advisory, as in equity, and require to be adopted before they become effective, the initiation of new trial proceedings before such adoption is premature, as in equity.<sup>22</sup>

**§ 235. A Verdict must be Within the Issues, and must Support the Judgment, and not be Uncertain or Contradictory.**—A verdict must be within the issues. So much of it as is outside the issues must be disregarded.<sup>1</sup> Thus where the verdict was for a certain sum in gold coin, there being nothing in relation to gold coin in the complaint, it was held that so much of the verdict as related to gold coin was outside the issues and void.<sup>2</sup> The proper course in such case is to disregard the "gold-coin clause," and to enter judgment for the amount awarded; it is not proper to send the jury out again.<sup>3</sup>

The verdict must support the judgment, and to this end must dispose of all the material issues.<sup>4</sup> Thus, in an action for claim and delivery, where the complaint prayed possession and damages for detention, and the answer denied all material averments, a ver-

15 Ann. Cas. 207, where it was held that the right of trial by jury in probate proceedings was exclusively statutory and did not exist in the absence of a statute conferring it.

<sup>20</sup> See section 33, *ante*.

<sup>20</sup> See *In re Moore* and *In re Westerfield*, *supra*.

<sup>21</sup> *In re Moore* and *In re Westerfield*, *supra*.

<sup>22</sup> See *James v. Superior Court*, 78 Cal. 107, 20 Pac. 241; and see note 7, *ante*.

<sup>1</sup> See *Pierce v. Schaden*, 62 Cal. 283; *Clanton v. Coward*, 67 Cal. 373, 7 Pac. 787.

<sup>2</sup> *Watson v. S. F. & H. B. R. R. Co.*, 50 Cal. 523.

<sup>3</sup> *Chamberlin v. Vance*, 51 Cal. 75.

<sup>4</sup> *Garlick v. Bower*, 62 Cal. 65;

*Vandeford v. Foster*, 62 Cal. 179;

*Cummings v. Peters*, 56 Cal. 593;

*Thomas v. Lawler*, 53 Cal. 405; *Kiel v. Reay*, 50 Cal. 61; *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115; *Garfield v. K. F. & T. M. Co.*, 17 Cal. 510; *Dermott v. Wallach*, 1 Black (U. S.), 96, 17 L. ed. 50; and see *Woodson v. McCune*, 17 Cal. 298; *People v. Ah Gow*, 53 Cal. 627; *Ma-coleta v. Packard*, 14 Cal. 178; *Biggs v. Barry*, 2 Curt. C. C. 259, Fed. Cas. No. 1402; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Muller v. Jewell*, 66 Cal. 216, 5 Pac. 84; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546.

Also *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75; *Phipps v. Taylor*, 15 Or. 484, 16 Pac. 171; *Yick Kee v. Dunbar*, 20 Or. 419, 26 Pac. 275; *Feller v. Feller*, 40 Or. 73, 66 Pac. 468.

dict for half the property, which was silent as to the other half, was held not responsive to the issues, a nullity, and the judgment thereon not supported.<sup>4a</sup> And a judgment in excess of the verdict is equally erroneous, and will be modified or reversed on appeal.<sup>4b</sup>

A fair expression of the rule is that the verdict must respond to each and every material issue raised by the pleadings, and must support a judgment which is determinative of such issue; and if the verdict fails to respond to any issue thus raised, it will not support a judgment which would be determinative thereof. So, the question usually is, whether an issue is raised which a responsive verdict so decides in favor of one or the other party as to support a judgment which is conclusive of that issue. If not, the verdict is fatally defective.<sup>4c</sup>

The verdict must be certain. An uncertain verdict will not support the judgment upon an appeal. In *Watson v. Damon*,<sup>5</sup> which was an action for the recovery of money on a contract, the verdict was as follows: "We, the jury, find for the plaintiff for the amount of contract two thousand two hundred and fifty dollars, with interest at ten per cent per annum, from August 1, 1876, to November 15, 1877, less the amount of notes of the value of nine hundred and fifty dollars, *with interest on said notes.*" This was held to be insufficient to support the judgment, the court saying: "It is for a certain amount less nine hundred and fifty dollars, with interest, the amount of interest being left indefinite and uncertain; nor is there anything in the pleadings from which the amount of interest can be ascertained." So in *Macoleta v. Packard*,<sup>6</sup> where the jury brought in a "verdict for the plaintiff for the full sum claimed, with interest and costs of suit," it was held that the verdict could not be supported, the court saying: "The jury should have found the interest." So where the suit was to enjoin the defendants from diverting certain water, and for damages for past diversion, the plaintiff alleging that he was entitled to five hundred inches measured with a four-inch pressure, and the verdict was,

<sup>4a</sup> *Muller v. Jewell*, 66 Cal. 217, 5 Pac. 84. But see *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546, where the principle was recognized, but the case was distinguished, and a special application was held to be necessary in this particular class of actions.

<sup>4b</sup> *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395.

<sup>4c</sup> *Orton v. Brown*, 117 Cal. 501, 49 Pac. 583.

A verdict is not defective for failure to find on issues not submitted. *Consolidated etc. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152.

<sup>5</sup> 54 Cal. 278.

<sup>6</sup> 14 Cal. 178.

"We, the jury, find that the plaintiff is entitled to forty inches, *miner's measurement*, of the waters of Clear creek, described in the complaint, and we further find that he has been damaged by the defendant in the sum of one thousand two hundred dollars," it was held that the verdict was too uncertain, the court saying: "It was admitted at the argument that these latter terms have no fixed meaning, and that an inch of water according to 'miner's measurement' in one locality is sometimes a very different quantity from an inch according to 'miner's measurement' in another locality. As already observed, the pleadings make no reference to such measurement, nor is there anything anywhere in the record to indicate what is meant by the 'forty inches, miner's measurement, of the waters' awarded by the jury and the court below to the plaintiff. For aught that the record shows, and for aught that we know, the quantity thus awarded him may exceed the five hundred inches, measured under a four-inch pressure claimed in his complaint." So where one of the issues submitted to the jury to be passed upon specially was as to whether a party had notice of the sale of certain premises, and the answer was, "If possession was notice he had," it was held that the answer was too uncertain, the court saying: "This response is too equivocal; it neither directly finds the fact of possession, nor the time of it, nor the kind of possession."<sup>7</sup> So where there were two defendants on trial, and the verdict was, "We, the jury, find the *defendant* guilty as charged in the indictment," it was held that the judgment must be reversed, the court saying: "There were two defendants on trial, and a verdict finding the defendant guilty, without specifying which of the two defendants was void for uncertainty."<sup>8</sup> So in an action for the recovery of possession of personal property, a verdict which fails to find the value of the property is insufficient.<sup>9a</sup>

But in a civil case against two defendants for the breach of a lease, where the verdict was for "the defendant," the supreme court held (reversing the order of the court below) that the verdict should stand, saying: "Undoubtedly the jury pronounced on the issues against the plaintiff. Having done so the defendants were en-

<sup>7</sup> Dougherty v. Haggin, 56 Cal. 522, 15 Morr. Min. Rep. 211.

<sup>8</sup> Woodson v. McCune, 17 Cal. 298.

<sup>9</sup> People v. Salazar, 8 Pac. C. L. J. 64.

<sup>9a</sup> Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605. Nor could it be cured

by reference to the reporter's notes. The fact that the code requires a verdict in the alternative form (sections 627 and 687, California Code of Civil Procedure) does not affect the application of the principle.

titled to costs as a matter of law. The error or defect in the verdict in using the singular instead of the plural of the word 'defendant' did not affect any substantial right of the plaintiff, and was not, therefore, any ground for disturbing the verdict. (Code Civ. Proc., sec. 475.) This case is not like *People v. Sepulveda*, [50 Cal. 342], 8 Pac. C. L. J. 64."<sup>10</sup> So where, in an action for damages, the jury found the plaintiff to be "entitled to the sum of twenty-five hundred dollars," it was held that the verdict was sufficiently certain.<sup>11</sup> An omission of the names of several parties from the title of the cause at the beginning of the verdict is not material.<sup>12</sup> Uncertainty in a verdict does not make the judgment absolutely void, but only subject to reversal on appeal.<sup>12a</sup> A verdict must not be contradictory.<sup>13</sup>

Where the verdict is wholly outside of the issues, or not in support of the judgment, or contradictory or hopelessly uncertain, reversal may be had on appeal from the judgment, and it is not necessary to show an objection made at the time of the rendition of the verdict.<sup>14</sup> But mere defects of form are waived by failing to make the necessary objection when the verdict is brought in. Upon such objection, if it be well taken, it is proper for the judge to send the jury out to correct their verdict.<sup>16</sup> If the verdict contains enough to support the judgment, but contains besides matter which is outside of the issues, such matter may be disregarded, it being mere surplusage.<sup>17</sup> In such case there is no need for sending the

<sup>10</sup> *Willard v. Archer*, 63 Cal. 33; and see *Butler v. Estrella Raisin Co.*, 124 Cal. 239, 56 Pac. 1040.

<sup>11</sup> *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657. See, also, *Truebody v. Jacobsen*, 2 Cal. 269; and look at *Proffatt on Jury Trial*, c. 10.

<sup>12</sup> *McGarritty v. Byington*, 12 Cal. 426, 2 Morr. Min. Rep. 311.

<sup>12a</sup> *Hutchinson v. Superior Court*, 9 Pac. C. L. J. 772.

<sup>13</sup> *Cottle v. Morris*, 57 Cal. 317; as to contradictory findings, see section 242, *post*.

The rule, as expressed in *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295, is that where a "special finding of fact is contradictory or inconsistent on a material issue, a judgment rendered thereon cannot be sustained."

<sup>14</sup> Look at *Campbell v. Jones*, 38 Cal. 507. It is otherwise, however, if the verdict is susceptible of being construed so that its lawful effect is relevant to the pleadings. In such

case, "if the defendant was dissatisfied with the form of the verdict, he should have asked, at the time it was announced, that it be made formal and certain." *Johnson v. Visher*, 9 Cal. 310, 31 Pac. 106.

So objection to the manner of the reception of the verdict should be made at the time it is announced. *Blum v. Pate*, 20 Cal. 69.

<sup>15</sup> *Algier v. Str. Maria*, 14 Cal. 167; *Paige v. O'Neill*, 12 Cal. 483; *Peop. v. Chu Quong*, 15 Cal. 332; *Sexey v. Adkisson*, 40 Cal. 408; *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546; *Peop. v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

<sup>16</sup> See *People v. Dick*, 34 Cal. 663; *People v. Ah Gow*, 53 Cal. 627; *Peop. v. Jenkins*, 56 Cal. 4.

<sup>17</sup> *Watson v. S. F. & H. B. R. Co.*, 50 Cal. 523; *Chamberlin v. Vance*, 51 Cal. 75; *Wilson v. Healep*, 4 Cal. 300.

jury out again; and if they are sent out and they bring in a different verdict, a new trial will be granted.<sup>18</sup> But matter which materially qualifies the rest of the verdict cannot be rejected as surplusage.<sup>19</sup> As in the case of findings, a special verdict upon various questions submitted to a jury for determination should be read together, and harmonized, if possible. If the finding upon some particular question is obscure or uncertain, reference should be had to the context for the purpose of ascertaining the true meaning; and the various findings of a special verdict should be construed so as to avoid contradiction, if possible, and it can be reasonably done.<sup>20</sup>

A verdict may be amended by the court so as to correct mere defects of form even after entry of judgment.<sup>20</sup> Defects and irregularities in the verdict may be waived by consent of counsel.<sup>21</sup>

It is no objection to the verdict of a jury that no evidence was adduced upon a material point involved in the issue. In other words, it has been held that jurors may apply their own personal knowledge of affairs to the determination of issues presented to them, where no evidence is adduced.<sup>22</sup> It is not to be doubted that this practice is more or less universal, and few verdicts are arrived at that are wholly free from the application of personal knowledge on the part of members of the jury. It would otherwise be asking too much of human nature to restrict jurors to the facts actually established in their presence. Nevertheless, it is a practice that is

<sup>18</sup> Marquard v. Wheeler, 52 Cal. 445.

<sup>19</sup> Dougherty v. Haggin, 56 Cal. 522, 15 Morr. Min. Rep. 211.

<sup>19a</sup> Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379. See, also, Hutchinson v. Superior Court, 61 Cal. 119.

<sup>20</sup> Perkins v. Wilson, 3 Cal. 137.

<sup>21</sup> Gonzales v. Leon, 31 Cal. 98; People v. Kelly, 46 Cal. 355. Compare Campbell v. Jones, 38 Cal. 507.

**NOTE.—How Issues Should be Framed for a Special Verdict.**—Where the verdict is special it is important that the questions to which the jury are to respond should be carefully framed. They should include all the material issues, and should be distinctly and separately stated. Each question should relate to one fact only. The grouping of several facts in one question is apt to produce contradic-

tions. Phoenix Water Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185. It has been said that the better practice is to frame issues before the trial, but in the case in which this was said it was held that the time of the framing is immaterial. Smith v. Rowe, 4 Cal. 6. And in practice it will be found that the issues can be framed more easily after the evidence is in. It is the province of the court to determine the particular questions which the jury are to answer, and counsel have no right to dictate the terms of such questions, and the refusal to comply with the request of counsel as to the form of a question cannot be assigned as error. American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190.

See section 233, *ante*.

<sup>22</sup> Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625.

capable of great abuse, and it is always best to present testimony where it is possible, and leave as little as possible to the personal experience of the jurors themselves.

An illustration of the practice is to be found in the case of *Cederberg v. Robinson*,<sup>22</sup> where the jury arrived at a verdict establishing the value of the personal services of the plaintiff in a certain capacity, basing their conclusion upon their own knowledge of the usual value of such services, no evidence having been adduced upon that point. In approving the practice, the supreme court said:

"It may be assumed that the jury were familiar with such work, and that from their own knowledge and experience they were capable of estimating the value of these services, and the expenses necessarily incurred; and in such a case, unless it appears that the amount allowed therefor is excessive, the verdict of the jury should not be disturbed. Juries are in many cases permitted to exercise their individual judgments as to values presumptively within their own knowledge, which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict.

As to the necessary elements of a verdict in a criminal case, see section 1150 et seq., Penal Code.<sup>24</sup>

**§ 236. Effect of Verdict.**—The effect of a verdict as an estoppel need not be considered here. So far as the cause in which it is rendered is concerned, it is conclusive of all the material issues unless attacked in the mode pointed out by the statute.<sup>1</sup> It is not conclusive, however, of every allegation in the pleading of the party in whose favor it is rendered, but only of those allegations which are material to his recovery in the action. This was laid down in *Merritt v. Wilcox*.<sup>2</sup> In that case the complaint was for a certain sum in gold coin. The verdict did not specify that the amount awarded was to be paid in gold coin. It was contended that since the complaint alleged that the money was to be paid in that kind of coin, and the verdict was in favor of the plaintiff, it operated as a finding in his favor upon all the allegations. But the court did not sustain this view and said: "In our opinion this is stating the rule too broadly. A general verdict found for the

<sup>22</sup> 100 Cal. 93, 34 Pac. 625.

<sup>24</sup> And see *People v. Cummings*, 117 Cal. 497, 49 Pac. 576.

<sup>1</sup> See section 96, *ante*; and *New-*

*berg v. Henson*, 12 Cal. 280; *Wilmington Co. v. Dominguez*, 50 Cal. 503, and look at section 244, *post*.

<sup>2</sup> 52 Cal. 238.



plaintiff in a case of this character imports a finding in his favor upon all the allegations of the complaint *material to his recovery in the action.*" The rule above laid down is similar to that acted on in *N. C. & S. C. Co. v. Kidd.*<sup>3</sup> In that case the count upon which plaintiff went to trial was in trespass for damages. The prayer was for damages only, but the averments of the complaint *were broad enough to entitle the plaintiff to a judgment for the possession of the property* and rights from which it had been dispossessed. The verdict was as follows: "We, the jurors, . . . render our verdict in favor of the plaintiff for the amount of one dollar damages." The plaintiff then moved for judgment for the restitution of the property, and that it be adjudged to be entitled to the exclusive possession thereof, and for a perpetual injunction against any further trespass. The court below denied the motion, and the supreme court affirmed the judgment and order, saying: "The verdict in this case does not necessarily find all the facts averred in the complaint. The complaint alleges a trespass on the dam site and dam in process of erection, and on the site for a canal and the canal thereon projected, surveyed, and commenced, and an interference with plaintiff's water rights, and expressly asks damages for the wrong, and the verdict finds some trespass or interference of some kind alleged, upon the whole or some part of the property, and that the plaintiff is entitled to one dollar damages. But it would be sufficient to justify this verdict to show by proofs that the trespass was committed but for a day, or an hour, at any time before the commencement of the suit, and upon any part of the property described. It might not have been continued. The possession might have ceased long before the commencement of the action, so that at the time of the commencement of the suit the defendants were not in possession, or the right of possession on the part of the plaintiff might have ceased, or been abandoned, or transferred before action brought. On many grounds there might be no right to a judgment for *possession* proved, although a right to recover *damages for the trespass* was shown. The testimony is not in the record, and we do not know what facts were proved. The verdict does not necessarily go beyond a trespass and right to damages. It does not necessarily determine all the issues."

<sup>3</sup> 37 Cal. 282. This case seems inconsistent with *McLaughlin v. Kelly*, 22 Cal. 211, 7 Morr. Min. Rep. 446. Compare, also, *Blood v. Light*, 31 Cal.

115; *Daubenspeck v. Grear*, 18 Cal. 443, 7 Morr. Min. Rep. 429; also *Johnson v. Visser*, 96 Cal. 310, 31 Pac. 106.

Where, however, a defendant in ejectment is in possession of a portion only of the tract described in the complaint, and the other defendants are in possession of the remainder, a general verdict in favor of the plaintiff may be rendered, unless a separate verdict is demanded; and if a general verdict be rendered, it will be conclusive against all the defendants.<sup>4</sup>

It is sometimes said that a verdict has the effect of "curing" defects in a complaint.<sup>5</sup> This, however, is only a way of saying that there are certain objections which, under the rules of pleading, must be taken by demurrer; or, that objections to the sufficiency of the complaint cannot be taken after verdict;<sup>6</sup> or that, after verdict, the pleadings must be deemed sufficient to support the judgment.<sup>7</sup> The doctrine, as thus expressed, has its well-defined limitations. It does not apply where there is an entire absence of material allegations.<sup>8</sup>

It is said in *Chitty on Pleading* that, ". . . The second mode by which defects in pleading may be, in some cases, aided, is by intendment after verdict. The doctrine upon this subject is founded upon the common law, and is independent of any statutory enactments. The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which

<sup>4</sup> *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597. See, also, *Anderson v. Parker*, 6 Cal. 197; *Ellis v. Jeans*, 7 Cal. 409; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

<sup>5</sup> *Happe v. Stout*, 2 Cal. 460; *Cronise v. Garghill*, 4 Cal. 120; *Garcia v. Satrustegui*, 4 Cal. 244; *Mills v. Barney*, 22 Cal. 240; *Jones v. Block*, 30 Cal. 227. Also *Nicolai v. Krimbel*, 29 Or. 76, 43 Pac. 865.

<sup>6</sup> *Horn v. Hamilton*, 89 Cal. 276, 26 Pac. 833; also, *San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Kimball v. Richardson*, 111 Cal. 386, 43 Pac. 111; *Cutting Fruit Co. v. Canty*, 141 Cal. 692, 75 Pac. 564; also, see section 115, *ante*.

<sup>7</sup> *Silveira v. Iverson*, 128 Cal. 187, 60 Pac. 687. While a general verdict will not supply the omission of a

material averment, it will establish every reasonable inference that is deducible from the pleadings. *Foste v. Insurance Co.*, 34 Or. 125, 54 Pac. 811. The verdict will aid a defective statement, but will not cure the omission of a material allegation. *Booth v. Moody*, 30 Or. 222, 46 Pac. 884; *Wyatt v. Wyatt*, 31 Or. 531, 49 Pac. 855; *Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888.

<sup>8</sup> *Richards v. Travelers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939; *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *Greiss v. State Investment Co.*, 98 Cal. 241, 33 Pac. 195; *Kimball v. Richardson*, 111 Cal. 386, 43 Pac. 1111; also, see *Barron v. Frink*, 30 Cal. 486; and *Morgan v. Menzies*, 60 Cal. 341; and see section 115, note 17, *ante*.

it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by verdict. The expression cured by verdict signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven at the trial."<sup>9</sup>

Section 434 of the Code of Civil Procedure adds two statutory limitations; or, at least, makes statutory two common-law limitations to the application of the rule as to the curing of defects by intendment after verdict. These are that the rule as to presumptive waiver shall not apply to an objection to the jurisdiction of the court or to the utter failure of the complaint to state a cause of action. The rule, therefore, seems to be, that where the parties go to trial without objection to a defect or omission which would have been fatal on demurrer, the introduction of evidence with reference to such defectively stated or omitted fact, the giving of instructions thereon, or the making of findings, or a verdict, without objection, operates as a waiver thereof; provided, such fact does not go to the jurisdiction of the court or the failure of the complaint to state a cause of action. It is said that having gone to trial, and having permitted the trial to go to findings or a verdict on the theory that the defectively stated or omitted fact was properly stated, the objection cannot be raised for the first time on appeal.<sup>10</sup>

<sup>9</sup> 1 Chitty on Pleading, p. 705.

<sup>10</sup> See Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027; Doble v. Keystone Co., 145 Cal. 490,

78 Pac. 1050; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; also Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659; and section 115, note 17, ante.

## CHAPTER XLI.

### RECORD ON APPEAL FROM THE JUDGMENT—THE FINDINGS.

- § 237. The findings constitute part of the judgment-roll.
- § 238. Systems of findings which have prevailed in California.
- § 239. Difference between systems of express and implied findings—Requirements of each system.
- § 240. Cases in which findings are, and are not, required.
- § 241. Waiver of findings.
- § 242. Requisites, sufficiency, and construction of findings.
- § 243. Conclusions of law.
- § 244. Effect of findings.
- § 245. Preparation of findings.
- § 246. Filing of findings—Time of filing.
- § 247. Amendment of findings.

**§ 237. The Findings Constitute Part of the Judgment-roll.**—Before 1862 the findings were not mentioned among the documents declared to constitute the judgment-roll. Notwithstanding this omission it was held that it was not necessary to incorporate the findings in a statement in order to present them to the appellate court,<sup>1</sup> and this was equivalent to saying that they constituted part of the roll. The omission was rectified in 1862, and ever since that time the provision of the statute has been that the findings constitute part of the judgment-roll.<sup>2</sup>

Where the question is as to whether the findings support the judgment, it is not necessary to have a bill of exceptions.<sup>3</sup> As a general rule, it may be said that no bill of exceptions or statement was necessary to bring up errors apparent upon the judgment-roll.

**§ 238. Systems of Findings Which have Prevailed in California.**—Between 1851 and 1861 the system of express findings prevailed. This system was founded upon section 180 of the Practice Act of 1851, which is as follows:<sup>1</sup>

<sup>1</sup> Reynolds v. Harris, 8 Cal. 617. As to this case, section 230, *ante*.

<sup>2</sup> See statutes quoted in section 230, *ante*.

<sup>3</sup> Thompson v. Hancock, 51 Cal. 110; and see Solomon v. Reese, 34 Cal. 28.

<sup>4</sup> Wetherbee v. Carroll, 33 Cal.

549; Solomon v. Reese, 34 Cal. 28. Putnam v. Lamphier, 36 Cal. 151. Jones v. Petaluma, 36 Cal. 230. Brewster v. Hartley, 37 Cal. 15, 9 Am. Dec. 237; Patterson v. Sharp, 41 Cal. 133; Burnett v. Pacheco, 2 Cal. 408.

<sup>1</sup> Laws of 1851, p. 78.

"Sec. 180. Upon the trial of an issue of fact by the court its decision shall be given in writing and filed with the clerk within ten days after the trial took place. In giving the decision the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."

This section was construed in *Russell v. Amador*.<sup>2</sup> In that case no findings were filed. The judgment was reversed, and Heydenfeldt, J., after quoting section 180 above given, said:

"We are of opinion that the law is not merely directory, and we have no right to destroy or impair its efficacy. It is intended by it that the decision of the court shall be the basis of the judgment in the same manner as the verdict of the jury; and it follows that without such decision the judgment cannot stand."

The rule established by this decision was adhered to in subsequent cases,<sup>3</sup> and prevailed until it was changed by statute in 1861. It required an express finding upon every material issue of fact.<sup>4</sup> It was at first held not to apply to equity cases.<sup>5</sup> This was doubted in *Duff v. Fisher*,<sup>6</sup> but was adhered to in *Lyons v. Lyons*,<sup>7</sup> in which it was said that the act of 1861 extended the rule requiring findings to equity cases. Since that statute there has been no question as to the application of the rule to equity cases.<sup>8</sup> As above

<sup>2</sup> 2 Cal. 305.

<sup>3</sup> *Semple v. Burkey*, 2 Cal. 321; *Bowers v. Johns*, 2 Cal. 419; *Hoagland v. Clary*, 2 Cal. 474; *Estell v. Chenery*, 3 Cal. 467; *Brown v. Brown*, 3 Cal. 111; *Davis v. Caldwell*, 12 Cal. 125; *McKeon v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86.

<sup>4</sup> See section 242, *post*.

<sup>5</sup> *Walker v. Sedgwick*, 5 Cal. 192; and look at *People v. Lafarge*, 3 Cal. 130.

<sup>6</sup> 15 Cal. 375.

<sup>7</sup> 18 Cal. 447.

<sup>8</sup> See *Laws of 1861*, p. 589; and look at *Gagliardo v. Hoberlin*, 18 Cal. 394; *Allen v. Fennon*, 27 Cal. 68; *Green v. Butler*, 26 Cal. 595; *Doe v. Vallejo*, 29 Cal. 385; and see section 7.

It must be conceded that the rule is not uniform. The findings of the court with the conclusions of law are said to take the place of the verdict of the jury, the findings alone being equivalent to a special verdict. See *Ferguson v. Reiger*, 43 Or. 505, 73

*Pac.* 1040; *Kyle v. Rippy*, 19 Or. 187, 25 *Pac.* 141; *Hallock v. Portland*, 8 Or. 29; *Flegel v. Koss*, 47 Or. 366, 83 *Pac.* 847; *Bruce v. Insurance Co.*, 24 Or. 486, 34 *Pac.* 16; *Williams v. Gallick*, 11 Or. 337, 3 *Pac.* 469; *Liebe v. Nicolai*, 30 Or. 364, 48 *Pac.* 172; *Bartel v. Mathias*, 19 Or. 482, 24 *Pac.* 918; *Lovejoy v. Chapman*, 23 Or. 571, 32 *Pac.* 687; *State v. Yellow Jacket Mining Co.*, 5 Nev. 415; *Bard v. Kleeb*, 1 Wash. 370, 25 *Pac.* 467, 27 *Pac.* 273. They are subject to the same rules, and verdicts in equity are merely advisory. It would thus appear that when a court makes findings in an equity case, he is merely advising himself. In *Kilroy v. Mitchell*, 2 Wash. 407, 26 *Pac.* 865, in this connection the court said: "We think, however, that such findings, though orderly and proper in cases in equity, are not essential to the validity of the judgment. Judgments at law are founded upon general or special verdicts of juries, or findings of the court which take the place thereof.

stated, the rule requiring an express finding on every issue was changed by the statute of 1861. This statute was passed not as an amendment to any section of the Practice Act but as an independent act. Section 2 is as follows:\*

"Sec. 2. In cases tried by the court without a jury no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless the exceptions be made in the court below to the finding, or to the want of a finding; and in cases of a defective finding the particular defects shall be specifically and particularly designated; and upon failure of the court below to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge, as in other cases, *provided* that such exceptions shall be filed in court within five days after the making of the finding or decision excepted to." This statute abolished the system of express findings theretofore prevailing.<sup>10</sup> In 1866 the provisions of this statute were incor-

Without such verdicts or findings there is nothing to support the judgment. Cases in equity stand upon a different basis. The decrees therein, while founded upon facts the same as in cases at law, are placed upon a broader basis than any technical determination of what has been proven by the testimony; such judgments really stand upon the entire evidence in the cause. It will thus be seen that the reasons for holding findings essential in a law case do not obtain in a cause in equity. Besides, on review in this court, a judgment at law will usually stand or fall upon the verdict or findings without any reference to the evidence as a whole; while in equity it is the duty of this court to retry the cause, not upon verdicts or findings but upon the testimony introduced in the court below."

And see, to the same effect, *Enos v. Wilcox*, 3 Wash. 44, 28 Pac. 364; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572; *White Crest etc. Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003; *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392; but see *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710, where the court said: "While the act of 1893 (page 111) did not expressly make Code Proc., section 379, which directs the procedure on trials by the court, applicable to equity

causes, the implication is very strong that it should be so applied." But it is doubtful if the court had anything else in mind than that, in equity cases where findings were actually made, exceptions might be taken as in cases at law. It is to be noted in the case above quoted (*Kilroy v. Mitchell*) it was said that findings were proper but not essential in equity cases.

See, also, *Yesler v. Hochstetler*, 4 Wash. 349, 30 Pac. 398, where it was held that the supreme court is not bound by the findings of the lower court in an equity case. Also *Stenger v. Roeder*, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211, where it was held that equity causes would not be reviewed on the findings alone; and *Blunett v. Wilce*, 43 Wash. 492, 86 Pac. 853, where it was held that the trial court did not commit error in refusing to make findings in an equity case.

See, also, the more recent decisions of *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031, and *Leitch v. Young*, 60 Wash. 446, 111 Pac. 449, where it was held that a court of equity need not make specific findings, basing its argument upon the reasons suggested above.

\* Laws of 1861, p. 589.

<sup>10</sup> *McKeon v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86; *Cook v. De la Guerra*, 24 Cal. 237; *Marshall v. Ferguson*, 23 Cal. 65.

porated into section 180 of the Practice Act, which as then amended read as follows: <sup>11</sup>

"Sec. 180. Upon a trial of issue of fact by the court, judgment shall be entered in accordance with the finding of the court, and the finding, if required by either party, shall be reduced to writing, and filed with the clerk. In the finding filed, the facts found and conclusions of law shall be separately stated. In such cases no judgment shall be reversed on appeal, for want of a finding in writing, at the instance of any party who, at the time of the submission of the cause, shall not have requested a finding in writing, and had such request entered in the minutes of the court; nor in cases tried by the court, by a commission or a referee, shall the judgment be reversed on appeal for defects in the finding, unless exceptions be made in the court below for a defect in the findings; and in cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated; and upon failure of the court to remedy, or when tried by a commissioner or referee, to cause to be remedied by such commissioner or referee, the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases, *provided* that such exceptions shall be filed in the court, and served on the attorney of the adverse party within five days after receiving from or giving to the adverse party written notice of the filing of the finding, provided that when any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case no finding of facts shall be made unless the statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement."

No further change was made until the adoption of the Code of Civil Procedure. The sections above quoted abolished the system of express findings, and substituted therefor that of implied findings. Under the latter system no judgment was reversed for

<sup>11</sup> Laws of 1865-66, p. 844.

want of findings, or for defective findings, unless proper requests and exceptions were shown.<sup>12</sup>

The Code of Civil Procedure abolished the system of implied findings, and restored the system which prevailed prior to 1861.<sup>12a</sup> It did this by re-enacting in substance the provisions of the act of 1851. The provisions as re-enacted are as follows:

"Sec. 632. Upon the trial of a question of fact by the court its decision must be given in writing, and filed with the clerk within thirty days after the cause is submitted for decision."<sup>13</sup>

<sup>12</sup> Cook v. De la Guerra, 24 Cal. 237; Warner v. Holman, 24 Cal. 228; Hurlburt v. Jones, 25 Cal. 225; Buck-out v. Swift, 27 Cal. 433, 87 Am. Dec. 90; Calderwood v. Brooks, 28 Cal. 151; Bryan v. Maume, 28 Cal. 238; Lucas v. San Francisco, 28 Cal. 591; Lyons v. Leimback, 29 Cal. 139; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124; Henry v. Everts, 30 Cal. 425; James v. Williams, 31 Cal. 211; Green v. Clark, 31 Cal. 591; Sears v. Dixon, 33 Cal. 326; Merrill v. Chapman, 34 Cal. 251; Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558, 12 Morr. Min. Rep. 473; Brooks v. Calderwood, 34 Cal. 563; Morrill v. Chapman, 35 Cal. 85; Hathaway v. Ryan, 35 Cal. 188; Emmal v. Webb, 36 Cal. 197; Steinback v. Krone, 36 Cal. 303; Cowing v. Rogers, 34 Cal. 648; Tewksbury v. Magraff, 33 Cal. 237; King v. Wellman, 38 Cal. 595; Shelby v. Houston, 38 Cal. 410; Parker v. Page, 38 Cal. 522; Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427; Cruess v. Fessler, 39 Cal. 336; Morrison v. Lods, 39 Cal. 381; City of Oakland v. Whipple, 39 Cal. 112; Carroll v. City of Benicia, 40 Cal. 386; Stokes v. Stevens, 40 Cal. 391; Reed v. Bernal, 40 Cal. 628; Troy v. Clarke, 30 Cal. 419; Smith v. Cushing, 41 Cal. 97; Mathews v. Kinsell, 41 Cal. 512; Thompson v. O'Neil, 41 Cal. 683; Hall v. Polack, 42 Cal. 218; Servanti v. Lusk, 43 Cal. 238; Smith v. Penny, 44 Cal. 161; Lovell v. Frost, 44 Cal. 471; Leroy v. Cunningham, 44 Cal. 599; Tubbs v. Ghirardelli, 45 Cal. 231; Crane v. Ghirardelli, 45 Cal. 235; Hixon v. Brodie, 45 Cal. 275; People v. Eaton, 46 Cal. 100; Kusel v.

Sharkey, 46 Cal. 3; Bernal v. Wade, 46 Cal. 663; Foscalina v. Doyle, 47 Cal. 437; Fratt v. Toomes, 48 Cal. 28; Howard v. Throckmorton, 48 Cal. 482; Mahon v. San Rafael Turnpike Co., 49 Cal. 269; Semple v. Cook, 50 Cal. 26; Sharp v. Goodwin, 51 Cal. 219.

<sup>12a</sup> And implied findings have no place under the code. Senter v. Senter, 70 Cal. 619, 11 Pac. 782.

<sup>13</sup> The above is the section as amended in 1874. As first enacted it read as follows:

"Sec. 632. Upon the trial of an issue of fact by the court its decision must be given in writing, and filed with the clerk within *twenty* days after the cause is submitted for decision, *and unless the decision is filed within that time the action must be again tried.*"

The last clause was held to be merely directory (McQuillan v. Donahue, 49 Cal. 157), and was omitted by the amendment of 1874.

Section 1406, Revised Statutes of Arizona (section 197, Civil Practice), is substantially the same as sections 632 and 633, California Code of Civil Procedure, combined, being, in that respect, a reproduction of section 180 of the California Practice Act, quoted in the text.

Sections 4406 and 4407, Revised Codes of Idaho, are, with the exception of the time within which the written decision is required to be filed with the clerk, twenty, instead of thirty, days, identical with the two California sections.

Sections 6763 and 6764, Revised Codes of Montana (sections 1111 and 1112, Code of Civil Procedure), are



"Sec. 633. In giving the decision the facts found and conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly."

identical with the Idaho sections; but see note 19, section 239, *post*.

Section 3277, Cutting's Compiled Laws (section 182, Civil Practice), is as follows:

"Upon the trial of every issue of fact by the court, when sitting without a jury, its decisions shall be rendered in writing by the court or judge who tried the cause, and filed with the clerk within ten days after the trial took place. In rendering such decision the court or judge shall briefly state, in his opinion, the facts found and the conclusions of law reached, and within one week thereafter the attorney for the prevailing party shall draw complete findings of facts and conclusions of law, and present them to the judge; provided, that such judge shall, at the time be within said county, and in the case of the absence from the county of the judge, then the complete findings shall be presented for signature within thirty days after such trial. Judgment shall be entered in accordance with said complete findings and conclusions."

Section 2685, subsection 132, Compiled Laws of New Mexico, contains the provision as to entry of judgment, but no express provision as to the findings.

Section 7039, Revised Codes of North Dakota, is in part as follows:

" . . . Upon the trial of any question or issue of fact by the court its decision thereon and conclusions of law upon such decision, and direction for entry of judgment in accordance with such conclusions must be given in writing and filed with the clerk within sixty days after the cause has been submitted for decision, unless such decision is prevented for the reason hereinbefore stated, and judgment shall be entered by the clerk in accordance with such direction upon the application of the party entitled thereto and the filing of such decision and conclusions of law. . . . " The "reason" referred to is "sickness of the judge." Section 7040 is identical with

section 633 of the California code, quoted in the text.

Section 158, Lord's Oregon Laws, is in part as follows:

"Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk during the term or within twenty days thereafter. The decision shall state the facts found, and the conclusions of law separately, without argument or reason therefor. . . . " And thereafter provision is made for entry in the journal, and subsequent entry of judgment. Also, provision is made for an "opinion" of the court in writing.

Section 276, Code of Civil Procedure of South Dakota, and section 3168, Compiled Laws of Utah, contain provisions practically identical with those of California and other states, above quoted.

Section 367, Rem. & Bal. Code of Washington (section 5029, Bal. Code), is as follows:

"Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."

Section 4515, Compiled Statutes of Wyoming, is as follows:

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

The requirement that the decision should be rendered within any specific time has been repeatedly held to be directory only. *McLennan v. Bank*, 87 Cal. 569, 25 Pac. 760; *Toole v. Weirick*, 39 Mont. 359, 133 Am.

The re-enactment of these provisions restored the system of express findings, the construction given by the early decisions being adopted.<sup>14</sup> No change has since been made.

St. Rep. 576, 102 Pac. 590; *Lynch v. Coviglio*, 17 Utah, 106, 53 Pac. 983. Also, *Victor etc. Co. v. Bank*, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72. And see *Roblin v. Palmer*, 9 S. D. 36, 67 N. W. 949; *Edmonds v. Riley*, 15 S. D. 470, 90 N. W. 139.

The Colorado code contains no provision which imposes upon the trial court the necessity of making written findings and conclusions of law. *Jakway v. Rivers*, 48 Colo. 49, 108 Pac. 999.

<sup>14</sup> *Campbell v. Buckman*, 49 Cal. 362; *N. P. R. R. Co. v. Reynolds*, 50 Cal. 90; *Dowd v. Clark*, 51 Cal. 262; *Ladd v. Tully*, 51 Cal. 277; *People v. Forbes*, 51 Cal. 628; *Kinsey v. Green*, 51 Cal. 379; *Bosquet v. Crane*, 51 Cal. 505; *Speegle v. Leese*, 51 Cal. 415; *Harris v. Burns*, 51 Cal. 528; *Kennedy v. Berry*, 52 Cal. 87; *Watson v. Cornell*, 52 Cal. 91; *Le Clert v. Oullahan*, 52 Cal. 252; *Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661; *Johnson v. Squires*, 53 Cal. 37; *Elliott v. Peck*, 53 Cal. 84; *O'Connor v. Frasher*, 53 Cal. 435; *Dilla v. Bohall*, 53 Cal. 709; *Baggs v. Smith*, 53 Cal. 88; *Phipps v. Harlan*, 53 Cal. 87; *Shaw v. Wandesforde*, 53 Cal. 300; *Taylor v. Reynolds*, 53 Cal. 686; *Paulson v. Nunan*, 54 Cal. 123; *Byrnes v. Claffey*, 54 Cal. 155; *Hardenberg v. Hardenberg*, 54 Cal. 591; *Green v. Chandler*, 54 Cal. 626; *Downing v. Graves*, 55 Cal. 544; *Harlan v. Ely*, 55 Cal. 340; *Ernst v. Cummings*, 55 Cal. 179; *Freeman v. Campbell*, 55 Cal. 197; *Knight v. Roche*, 56 Cal. 15; *Everson v. Mahew*, 57 Cal. 144; *Robinson v. Pittsburgh R. R. Co.*, 57 Cal. 417; *Estate of Burton*, 63 Cal. 36; *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115; *Savings & Loan Soc. v. Thorne*, 67 Cal. 53, 7 Pac. 36; *Goodnow v. Griswold*, 68 Cal. 599, 9 Pac. 837; *Millard v. Legion of Honor*, 81 Cal. 340, 22 Pac. 864; *Marsters v. Lash*, 61 Cal. 622; *S. P. R. R. Co. v. Crampton*, 63 Cal. 537; *Sanders v. Simeich*, 65 Cal. 50, 2 Pac. 741; *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704; and see *Van Court v. Winterson*, 61

Cal. 615; *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721; *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60; *Christy v. Spring Valley Waterworks*, 84 Cal. 541, 24 Pac. 307; *Powell v. Patison*, 100 Cal. 234, 34 Pac. 676.

The rule which requires findings upon every material issue unless findings are waived has been uniformly followed in all jurisdictions where the system of express findings prevails. The following decisions may be cited in support of that rule:

*Idaho*: *Lewiston v. Williams*, 2 Idaho, 618 (670), 23 Pac. 552; *Carson v. Thews*, 2 Idaho, 162 (176), 9 Pac. 605; *Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815; *Wood v. Brodereson*, 12 Idaho, 190, 85 Pac. 490; *State v. Baird*, 13 Idaho, 126, 89 Pac. 298; *Later v. Haywood*, 14 Idaho, 145, 93 Pac. 174.

*North Dakota*: *Gull River Lumber Co. v. School District*, 1 N. D. 500, 48 N. W. 427; *Barr-Scott Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867.

*Oregon*: *Fink v. Canyon etc. Co.*, 5 Or. 301; *McFadden v. Friendly*, 9 Or. 222; *Hicklin v. McClear*, 18 Or. 126, 22 Pac. 1057; *Merchants' National Bank v. Pope*, 19 Or. 35, 26 Pac. 622; *Drainage District v. Crow*, 20 Or. 535, 26 Pac. 845; *Pengra v. Wheeler*, 24 Or. 532, 34 Pac. 354, 21 L. R. A. 726; *Jameson v. Coldwell*, 25 Or. 199, 35 Pac. 245; *Clark v. Bundy*, 29 Or. 190, 44 Pac. 282; *Moody v. Richards*, 29 Or. 282, 45 Pac. 777; *Daly v. Larsen*, 29 Or. 535, 46 Pac. 143; *Breeding v. Williams*, 33 Or. 391, 54 Pac. 206; *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011; *Chung v. Stephenson*, 50 Or. 244, 89 Pac. 386, 89 Pac. 805; *Freeman v. Trummer*, 50 Or. 287, 91 Pac. 1077; *Vuilleumier v. Oregon etc. Co.*, 55 Or. 129, 105 Pac. 706; *Darling v. Miles (Or.)*, 111 Pac. 702.

*South Dakota*: *McKenna v. Whitaker*, 9 S. D. 442, 69 N. W. 587.

*Utah*: *Blumenthal v. Assay*, 3 Utah, 507, 24 Pac. 1056; *Mitchell v. Jensen*, 29 Utah, 346, 81 Pac. 165; *Dillon*

**§ 239. Difference Between the Systems of Express and Implied Findings—Requirements of Each System.**—The difference between the two systems of findings will be best shown by stating the requirements of each.

1. *The System of Implied Findings.*—Under the system of implied findings the court could file findings if it saw fit to do so, without any request from the party.<sup>1</sup> The losing party had no right to findings unless he made a request therefor at the time of the submission of the cause, and had such request entered in the minutes of the court. If no such request was made, a subsequent one was of no avail.<sup>2</sup> If the findings filed in response to such request, or filed in the first instance without it, were defective in not covering all the issues, it was incumbent upon the losing party to except to the defects, pointing out the particular omissions of which he complained.<sup>3</sup> The defects to be excepted to were defects in the findings of fact, and not in the conclusions of law;<sup>4</sup> nor was it intended that the party should take such exceptions where the issues were all covered by the findings but the findings were not sustained by the evidence, the remedy in such case being a motion for new trial;<sup>5</sup> nor was it proper for the losing party to specify how he wished the issues found; he was simply to point out the omissions,

etc. *Co. v. Cleveland*, 32 Utah, 1, 88 Pac. 670.

*Washington*: *Bard v. Kleebe*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *Enos v. Wilcox*, 3 Wash. 44, 28 Pac. 364; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 31 Pac. 1030; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *Murphy v. Shoudy*, 13 Wash. 33, 42 Pac. 631; *Noyes v. King Co.*, 18 Wash. 417, 51 Pac. 1052; *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572; *White Crest etc. Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003; *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392.

The refusal of the court to state findings of fact in writing, and conclusions of law upon the same, when requested so to do by either party to a cause, before judgment, is reversible error. *Rogers v. Bonnett*, 2 Okl. 553, 37 Pac. 1078.

In an action by a real estate broker for commissions, where he alleged commission at the rate of five per cent, and the answer alleged commissions at two and one-half per cent, it was the duty of the court to find as to the rate of commissions to be paid. *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490.

<sup>1</sup> *Gay v. Moss*, 34 Cal. 125; *Polhemus v. Carpenter*, 42 Cal. 375.

<sup>2</sup> *City of San Jose v. Shaw*, 45 Cal. 178.

<sup>3</sup> See section 180, as amended in 1866, quoted in preceding section, and *Lucas v. San Francisco*, 28 Cal. 591.

<sup>4</sup> *Solomon v. Reese*, 34 Cal. 28; *Lyons v. Leimback*, 29 Cal. 139; *Carroll v. Benicia*, 40 Cal. 386.

<sup>5</sup> *Hidden v. Jordan*, 28 Cal. 301; *Rice v. Inskeep*, 34 Cal. 224; *Cowing v. Rogers*, 34 Cal. 648; *Hathaway v. Ryan*, 35 Cal. 188; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427; *Gates v. Salmon*, 46 Cal. 361; *Carroll v. Benicia*, 40 Cal. 386.

leaving it to the judge to make the finding thereon in accordance with the evidence.<sup>6</sup> Exceptions, when taken, had to be incorporated in a proper record on appeal.<sup>7</sup> The party taking the above steps was entitled to have full findings upon all the material issues of fact. If no findings were filed after a proper request therefor,<sup>8</sup> or if defects in those filed were not cured after being pointed out in the manner mentioned above,<sup>9</sup> it was ground for reversal. But if the steps were not taken the party could not have a reversal for want of findings,<sup>10</sup> or for defects in the ones filed<sup>11</sup>—all omitted issues being presumed to have been found in favor of the party for whom judgment was rendered.<sup>12</sup> In consequence of this presumption the losing party could never have a reversal upon the findings unless they were entirely inconsistent with the judgment and could not be reconciled with any state of facts which might have been proved, and upon which the judgment might be supported.<sup>13</sup> No presumption could be made, however, as to facts outside the issues.<sup>14</sup> And where the written findings

<sup>6</sup> *Hidden v. Jordan*, 28 Cal. 301; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124. See, also, *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704. Section 3277, Cutting's Compiled Laws of Nevada (see note 13, section 238, ante), provides for the preparation of findings and conclusions by the prevailing party.

<sup>7</sup> *Brooks v. Calderwood*, 34 Cal. 563.

<sup>8</sup> *Cruess v. Fessler*, 39 Cal. 336; *Polhemus v. Carpenter*, 42 Cal. 375; *Logan v. Hale*, 42 Cal. 645.

<sup>9</sup> *Hathaway v. Ryan*, 35 Cal. 188.

<sup>10</sup> *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Hurlburt v. Jones*, 25 Cal. 225; *King v. Wellman*, 38 Cal. 595; *Reed v. Bernal*, 40 Cal. 628; *Leroy v. Cunningham*, 44 Cal. 599; *Hixon v. Brodie*, 45 Cal. 275; *Howard v. Throckmorton*, 48 Cal. 482; *Sharp v. Goodwin*, 51 Cal. 219.

<sup>11</sup> *Hurlburt v. Jones*, 25 Cal. 225; *Lucas v. San Francisco*, 28 Cal. 591; *Lyons v. Leimback*, 29 Cal. 139; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Troy v. Clark*, 30 Cal. 419; *James v. Williams*, 31 Cal. 211; *Green v. Clark*, 31 Cal. 591.

<sup>12</sup> *Bryan v. Maume*, 28 Cal. 238; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Henry v. Everts*, 30 Cal.

425; *James v. Williams*, 31 Cal. 211; *Sears v. Dixon*, 33 Cal. 326; *Merrill v. Chapman*, 34 Cal. 251; *Pralus v. Jefferson Mg. Co.*, 34 Cal. 558, 11 Pac. 100; *Morr. Min. Rep.* 473; *Emmal v. Webb*, 36 Cal. 197; *Steinback v. Krone*, 36 Cal. 303; *Tewksbury v. Magraff*, 33 Cal. 237; *Shelby v. Houston*, 38 Cal. 410; *Parker v. Page*, 38 Cal. 522; *City of Oakland v. Whipple*, 39 Cal. 112; *Stokes v. Stevens*, 40 Cal. 391; *Smith v. Cushing*, 41 Cal. 97; *Matthews v. Kinsel*, 41 Cal. 512; *Thompson v. O'Neil*, 41 Cal. 683; *Hall v. Polack*, 42 Cal. 218; *Servanti v. Lusk*, 43 Cal. 238; *Smith v. Penny*, 44 Cal. 161; *Lovell v. Frost*, 44 Cal. 471; *Tubbs v. Ghirardelli*, 45 Cal. 231; *Crane v. Ghirardelli*, 45 Cal. 235; *People v. Eaton*, 46 Cal. 100; *Bernal v. Wade*, 46 Cal. 663; *Fosealina v. Doyle*, 47 Cal. 437; *Fratt v. Toomes*, 48 Cal. 28; *Mahon v. San Rafael T. P. Co.*, 49 Cal. 269; *Semple v. Cook*, 50 Cal. 26.

<sup>13</sup> *Lyons v. Leimback*, 29 Cal. 139; *Mathews v. Kinsel*, 41 Cal. 512; *Thompson v. O'Neil*, 41 Cal. 683; *Smith v. Cushing*, 41 Cal. 97.

<sup>14</sup> *Bernal v. Gleim*, 33 Cal. 668; and see *Gregory v. Nelson*, 41 Cal. 278, 12 *Morr. Min. Rep.* 124. Also *Ortega v. Cordero*, 88 Cal. 225, 20 Pac. 80.

ended with a statement that "the foregoing are all the facts of the case," it was held that no findings could be implied.<sup>15</sup>

2. *The System of Express Findings.*—Under the system of express findings, on the other hand, nothing is implied, but full findings are required upon every material issue, without any request therefor,<sup>15a</sup> and without any exceptions on account of defects; and if any material issue is left unfound it is ground for reversal of the judgment.<sup>15b</sup> But although under this system the losing party is not required to take any steps to become entitled to findings, he is required to show affirmatively that he did not waive them.<sup>15</sup> The code has provided that findings may be waived, and the rule established by the decisions is that where no findings appear in the judgment-roll, it will be presumed in support of the judgment that they were waived in the court below unless the contrary is shown by the record.<sup>17</sup> Moreover, a judgment will not be reversed for want of a finding on an issue with respect to which no evidence was introduced.<sup>17a</sup> Consequently, it is necessary for the appellant to have a bill of exceptions to show that he made no waiver,<sup>17b</sup> and that there was evidence upon the issue as to which no finding was made sufficient to justify a finding thereon,<sup>17c</sup> unless these facts can

<sup>15</sup> *Schwartz v. Skinner*, 47 Cal. 3.

<sup>15a</sup> In *Porter v. Woodward*, 57 Cal. 535, language was used which seems to imply that a request for findings may be necessary under the system of express findings; but this was in no way involved in the decision, and is at variance with the whole course of the decisions.

<sup>15b</sup> See cases cited in note 14, section 238, *ante*, upon practically the same point; and cases cited in notes 2 and 3 in same section, as to rule as it stood before 1861; and see sections 240 and 242, *post*, where the point is more fully discussed.

<sup>15</sup> As to waiver of findings, see section 241, *post*.

<sup>17</sup> *Mulcahy v. Glazier*, 51 Cal. 626; *Smith v. Lawrence*, 53 Cal. 34; *Reynolds v. Brummagin*, 54 Cal. 254; *Weeks v. G. M. Co.*, 73 Cal. 599, 15 Pac. 302; *In re Sanderson*, 74 Cal. 199, 15 Pac. 753; *Campbell v. Coburn*, 77 Cal. 36, 18 Pac. 860; *Gordon v. Donahue*, 79 Cal. 501, 21 Pac. 970; *Goyhinech v. Goyhinech*, 80 Cal. 409, 410, 22 Pac. 175; *In re Arguello*, 85 Cal. 151, 24 Pac. 641; *Richardson v.*

*Eureka*, 110 Cal. 441, 42 Pac. 965; *Tomlinson v. Ayres*, 117 Cal. 568, 49 Pac. 717; *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686; *Horwege v. Sage*, 137 Cal. 539, 70 Pac. 621; *Baker v. Baker*, 139 Cal. 626, 73 Pac. 469; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70.

<sup>17a</sup> See *Wise v. Burton*, 73 Cal. 174, 14 Pac. 683; and section 240, note 5, *post*.

<sup>17b</sup> See cases cited in note 17, *supra*.

<sup>17c</sup> See *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116; *Dedmon v. Moffitt*, 89 Cal. 211, 26 Pac. 800; *Winslow v. Gohranson*, 88 Cal. 450, 26 Pac. 504; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Rogers v. Duff*, 97 Cal. 66, 31 Pac. 836; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Giletti v. Saracco*, 110 Cal. 428, 42 Pac. 918; *Klokke v. Escailler*, 124 Cal. 297, 56 Pac. 1113; *Greer v. Greer*, 135 Cal. 121, 67 Pac. 20; *De Tolna v. De Tolna*, 135 Cal. 575, 67 Pac. 1045; *Cutting Fruit Co. v.*

be gathered from other portions of the record. Where findings are waived, the same presumptions will be made as under the system of implied findings; that is to say, it will be presumed that all the material issues were found in favor of the successful party.<sup>18</sup>

3. *Difference Between the Two Systems.*—The foregoing is an outline of the requirements of the two systems of findings. The difference between them consists mainly in the fact that in the one the party had to take certain steps to become entitled to findings, while in the other he is entitled to findings on all the issues without taking any steps whatever.<sup>19</sup> Aside from the foregoing, the sufficiency of the findings is to be tested by the same rules, as to which see section 242.

Canty, 141 Cal. 692, 75 Pac. 564; Damon v. Quinn, 143 Cal. 75, 76 Pac. 818; and see section 240, *post*.

<sup>18</sup> Look at Sharp v. Goodwin, 51 Cal. 219; Glenn v. Arnold, 56 Cal. 631; Utter v. Eames, 59 Cal. 5.

<sup>19</sup> *Relative Merits of the Two Systems.*—With reference to the relative merits of the two systems, Sanderson, J., delivering the opinion in Tewksbury v. Magraff, 33 Cal. 237, said:

"It may well be doubted whether the act of the 20th of May, 1861 (so far as it relates to findings and reproduced in the amendments of 1866 to section 180 of the Practice Act), is not productive of more mischief than good. It certainly proceeds upon an illogical theory, for it inverts the natural and logical order of the proceedings. Instead of making it the duty of the successful party to see that the findings contain facts sufficient to sustain the judgment, it makes it the duty of the unsuccessful party to see that it contains facts sufficient to reverse it. Instead of making the finding a consistent and visible foundation for the judgment to stand upon, the statute converts it into air, or a mine for its explosion. This change certainly detracts from the logic of the judgment-roll, the various parts of which, like the members of a Macedonian Phalanx, should rest upon and support each other, and entails a practice which in a majority of cases defeats the end which

findings were intended to subserve." See, also, Sears v. Dixon, 33 Cal. 326.

It is to be noted (see note 14, section 238, *ante*) that the provisions of the California code, which provide a system of express findings, is reproduced in the codes of practically all the so-called Pacific coast states, with one or two exceptions. This is the case with the Montana code; but by the addition of section 6766, Revised Codes (section 1114, Code of Civil Procedure), the result, under the Montana decisions, is to return to the system of implied findings described in the text. The section reads as follows: "No judgment shall be reversed on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the case, shall not have requested findings in writing and had such request entered in the minutes of the court; nor in cases tried by the court shall the judgment be reversed on appeal for defects in the findings unless exceptions be made in the court below for a defect in the findings or in a finding."

This section has been held to produce in Montana a system of implied findings. Gallagher v. Cornelius, 23 Mont. 27, 57 Pac. 447; Haggin v. Saile, 23 Mont. 375, 59 Pac. 154; Carrie v. Railroad Co., 24 Mont. 123, 60 Pac. 989; Yellowstone Bank v. Gagnon, 25 Mont. 268, 64 Pac. 664; Quinlan v. Calvert, 31 Mont. 115, 77 Pac. 428; and see Cobban v. Hecklen, 27 Mont. 245, 70

### § 240. Cases in Which Findings are and are not Required.—

As has been stated, the system of express findings requires a finding upon every material issue.<sup>1</sup> This applies not only to issues raised upon allegations of the complaint, but also to issues raised upon affirmative defenses in the answer,<sup>2</sup> or upon a counterclaim,<sup>3</sup> or cross-complaint.<sup>2a</sup> And a finding upon every material issue is necessary, although no evidence was introduced upon such issue.<sup>4</sup> But if no evidence be introduced upon an issue, a failure to find thereon will be regarded as an immaterial error, and not ground for reversal,<sup>4a</sup> for the reason, as will appear, that the finding, had one been made, must have been adverse to the appellant.<sup>5</sup>

Pac. 805; *Grogan v. Valley Co.*, 30 Mont. 229, 76 Pac. 211; *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Gans v. Sanford*, 35 Mont. 295, 88 Pac. 955.

<sup>1</sup> See section 239, *ante*, note 15b, and section 238, *ante*, notes 12 and 14.

Findings of fact must include all the material issues. *Henderson v. Reynolds (Or.)*, 110 Pac. 979.

<sup>2</sup> *People v. Forbes*, 51 Cal. 628; *Billings v. Everett*, 52 Cal. 661; *Phipps v. Harlan*, 53 Cal. 87; *Shaw v. Wandesforde*, 53 Cal. 300; *Taylor v. Reynolds*, 53 Cal. 686; *Harlan v. Ely*, 55 Cal. 340; *Cassidy v. Cassidy*, 63 Cal. 352; *Gladding v. California etc. Assn.*, 66 Cal. 6, 4 Pac. 764; *Heinlen v. Fresno etc. Co.*, 68 Cal. 35, 8 Pac. 513.

<sup>3</sup> *Baggs v. Smith*, 53 Cal. 88.

<sup>2a</sup> Findings must be within the issues when compared with the pleadings, and must cover all the material issues raised whether upon allegations in the complaint and denied in the answer, on an affirmative defense pleaded in the answer, or on a counterclaim denied and treated as denied by the plaintiff. *Dillon etc. Co. v. Cleaveland*, 32 Utah, 1, 88 Pac. 670.

<sup>4</sup> *Speegle v. Leese*, 51 Cal. 415.

Also, *Mitchell v. Jensen*, 29 Utah, 346, 81 Pac. 165; *Everett v. Jones*, 32 Utah, 489, 91 Pac. 360.

<sup>4a</sup> See notes 17c, section 239, *ante*, and 7 and 7a, section 286, *post*. Parties cannot insist upon findings where no evidence was introduced thereon. *Bucker's etc. Co. v. Farmers' etc. Co.*, 81 Colo. 62, 72 Pac. 49.

<sup>5</sup> In the absence of an affirmative showing, it must be presumed, either that no evidence whatever was introduced upon a particular issue, or that it was in support of the judgment, consistent with the findings which do support the judgment, and adverse to the appellant's contention. By evidence is therefore to be understood such evidence as will justify a finding which would, in turn, invalidate the judgment which is fully supported by the findings actually made. In the absence of such evidence, failure to find upon the issue is an immaterial error, not ground for reversal, since the finding, had one been made, must have been one consistent with the findings actually made, and therefore a finding against the appellant.

See particularly, *Wise v. Burton*, 73 Cal. 174, 14 Pac. 683; *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Winslow v. Gohrensen*, 88 Cal. 450, 26 Pac. 504; *Klokke v. Escallier*, 124 Cal. 297, 56 Pac. 1113; and also *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116; *Demdon v. Moffitt*, 89 Cal. 211, 26 Pac. 800; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Rogers v. Duff*, 97 Cal. 66, 31 Pac. 836; *Hihn v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Giletti v. Saracco*, 110 Cal. 428, 42 Pac. 918; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848; *Reed v. Johnson*, 127 Cal. 538, 59 Pac. 986; *Stewart v. Hollingsworth*, 129 Cal. 177, 61 Pac. 936; *Roebbling's Sons v. Gray*, 139 Cal.

Immaterial issues need not be determined;<sup>6</sup> but if findings are made upon immaterial issues, they will be disregarded,<sup>7</sup> and

607, 73 Pac. 422; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Cutting Fruit Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; People v. McCue, 150 Cal. 195, 88 Pac. 899; Estate of Barclay, 152 Cal. 753, 93 Pac. 1012.

Again, an issue upon which there is no evidence must be resolved against the party upon whom rests the burden of proof, in accordance with the rule of presumption which sustains the judgment; in other words, against the appellant. *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. 239; *Vanderslice v. Matthews*, 79 Cal. 273, 21 Pac. 748; *Connolly v. Hingley*, 82 Cal. 642, 23 Pac. 273; *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700; *Demartin v. Demartin*, 85 Cal. 71, 24 Pac. 594; *Woodham v. Cline*, 130 Cal. 497, 62 Pac. 822; *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664; and see, also, *Frantz v. Harper (Cal.)*, 62 Pac. 603; *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. 576.

A statement that no evidence was introduced on a particular issue is not a finding thereon. *Speegle v. Leese*, 51 Cal. 415; *Campbell v. Buckman*, 49 Cal. 362. But see *Kiesel v. Bybee*, 14 Idaho, 670, 95 Pac. 20, where it was held that a finding that defendant, upon whom rested the burden of proof, introduced no evidence upon the omitted issue is equivalent to a finding against him on that issue, and sufficient to support a judgment. But see *Beaverhead etc. Co. v. Dillon etc. Co.*, 34 Mont. 135, 85 Pac. 880, where it seems to have been held that a finding would be implied in accordance with an affirmative defense in the answer, if not inconsistent with findings actually made, and nothing was said as to whether it was supported by evidence or not. The burden of proof was clearly upon defendant.

Though findings must be made, upon every material issue, and must be responsive to and cover such issues, the court's conclusion upon a part of the issues of an action may be such as to render the others un-

important and findings thereon superfluous. In such cases it is not error to omit findings on issues that have thus become immaterial. *Lewis v. Bank*, 46 Or. 182, 78 Pac. 990.

<sup>6</sup> *Fontaine v. S. P. R. Co.*, 54 Cal. 645; *McCourtney v. Fortune*, 57 Cal. 617; *Belcher Con. G. M. Co. v. Deferrari*, 62 Cal. 160; *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159; *People v. Center*, 66 Cal. 551, 5 Pac. 263; 6 Pac. 481; *Roberts v. Haley*, 65 Cal. 397, 4 Pac. 385; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Quinn v. Anderson*, 70 Cal. 454, 11 Pac. 746; *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777; *Malone v. Del Norte*, 77 Cal. 217, 19 Pac. 422; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Daly v. Sorocco*, 80 Cal. 367, 22 Pac. 211; *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302; *Gillespie v. Lake*, 85 Cal. 402, 24 Pac. 891; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *Hooker v. Thomas*, 86 Cal. 176, 24 Pac. 941; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186; *Windhausen v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Diefendorff v. Hopkins*, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; *Southern Pacific Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Hulsmann v. Todd*, 96 Cal. 228, 31 Pac. 39; *Merrill v. Merrill*, 102 Cal. 317, 36 Pac. 675; *Bancroft v. Haslett*, 106 Cal. 151, 30 Pac. 602; *Sherman v. Sandell*, 106 Cal. 373, 39 Pac. 797; *In re Connors*, 110 Cal. 408, 42 Pac. 906; *Auburn etc. Assn. v. Hill*, 113 Cal. 383, 45 Pac. 696; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Collins v. Maude*, 144 Cal. 289, 77 Pac. 945; *Boyd v. Liefer*, 144 Cal. 336, 77 Pac. 953; *Smith v. DuBois*, 148 Cal. 622, 84 Pac. 38; *Collins v. Gray*, 154 Cal. 131, 97 Pac. 142.

Also, *Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

<sup>7</sup> *Lovell v. Frost*, 44 Cal. 471; *Estate of Learned*, 70 Cal. 140, 11 Pac. 587. If immaterial, it matters not



judgments based thereon will be reversed as erroneous.<sup>7a</sup> And it has been held that where the evidence upon a point is all one way, and against the appellant, the failure to find upon it is an immaterial error;<sup>8</sup> but this is not consistent with some of the other cases.<sup>8a</sup>

Where there is no issue no finding is necessary.<sup>8b</sup> Thus, findings are not necessary upon immaterial averments;<sup>8c</sup> nor upon a default;<sup>9</sup> nor where judgment is rendered on the pleadings.<sup>10</sup> Where a fact is admitted by the pleadings,<sup>11</sup> or the averments of the complaint not denied,<sup>11a</sup> findings are unnecessary, and con-

that the finding is erroneous. Such finding is never ground for reversal. *White v. Douglass*, 71 Cal. 115, 11 Pac. 860; *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883; *De Gottardi v. Donati*, 155 Cal. 109, 99 Pac. 492.

<sup>7a</sup> *In re Lukes*, 71 Cal. 113, 12 Pac. 390.

<sup>8</sup> *Hutchings v. Castle*, 48 Cal. 152; *Schroeder v. Jahns*, 27 Cal. 274.

<sup>8a</sup> See *Campbell v. Buckman*, 49 Cal. 362; *Speegle v. Leese*, 51 Cal. 415.

<sup>8b</sup> Findings upon facts not in issue may be treated as mere surplusage, where all material facts are fully found. *W. C. Lumber Co. v. Apfeld*, 86 Cal. 335, 24 Pac. 993. Findings outside the issues do not constitute ground for a new trial; but if issues are erroneously joined, and trial is had as though properly joined, errors in findings thereon, and failure to find thereon, constitute ground for new trial. *Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075.

<sup>8c</sup> *Snyder v. Tunitas Co.*, 72 Cal. 194, 13 Pac. 479.

<sup>9</sup> *Brown v. Brown*, 3 Cal. 111; *Himmelman v. Spanagel*, 39 Cal. 401; *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567; *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892.

<sup>10</sup> *Taylor v. Palmer*, 31 Cal. 240. Also, *Sutherland v. Bloomer*, 50 Or. 398, 93 Pac. 135.

<sup>11</sup> *Swift v. Muygridge*, 8 Cal. 445; *Fox v. Fox*, 25 Cal. 587; *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594, 15 Morr. Min. Rep. 284; *Taylor v. C. P. R. R. Co.*, 67 Cal. 615, 8 Pac. 436; *In re Doyle*, 73 Cal. 564, 15 Pac. 125; *Hanson v. Fricker*, 79 Cal. 283,

21 Pac. 751; *Gruhn v. Stanley*, 92 Cal. 86, 28 Pac. 56; *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80; *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 62 Pac. 974, 66 Pac. 982; *Machado v. Kinney*, 135 Cal. 354, 67 Pac. 331. Also, *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011; *Luse v. Isthmus Transit Co.*, 6 Or. 125, 25 Am. Rep. 506; *Moody v. Richards*, 29 Or. 282, 45 Pac. 777; *State v. Rocky Mountain etc. Co.*, 27 Mont. 394, 71 Pac. 311; *Fink v. Canyon Road Co.*, 5 Or. 301.

<sup>11a</sup> *Grossini v. Perazzo*, 66 Cal. 545, 6 Pac. 450; *Pomeroy v. Gregory*, 66 Cal. 572, 574, 6 Pac. 492, 493; *Anderson v. Black*, 70 Cal. 226, 11 Pac. 700; *Drinkhouse v. Spring Valley Water Co.*, 87 Cal. 253, 25 Pac. 420; *National Bank (1st of L. A.) v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980. Also, *Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991.

There is no real difference between the phrases, "fact admitted by the pleadings," and "averments of the complaint not denied." For if an averment of the complaint is not denied, it is, in effect, admitted. *Campe v. Lassen*, 67 Cal. 139, 7 Pac. 430.

Averments not controverted need not be found. *Peterson v. Johnson*, 20 Wash. 497, 55 Pac. 932. Nor is it necessary to find upon facts not in issue. *Kent v. Richardson*, 8 Idaho, 750, 71 Pac. 117. Where the facts are uncontroverted and justify but one inference, formal findings are unnecessary. *State v. Edwards*, 40 Mont. 287, 106 Pac. 695.

trary findings are nugatory.<sup>12</sup> So, findings upon issues not properly raised by the pleadings are unnecessary.<sup>12a</sup> Nor are findings necessary upon issues raised by allegations to which a demurrer has been sustained and no amendment made.<sup>12b</sup> Nor are findings necessary or proper upon a nonsuit,<sup>13</sup> a ruling upon a nonsuit being upon a matter of law, and requiring to be reviewed as an error of law.<sup>14</sup> Nor are findings proper where the facts are stipulated, or the trial is had upon an agreed statement.<sup>14a</sup> But findings are necessary in cases tried before referees.<sup>15</sup> And in an early case it was held that findings were necessary upon a motion involving a question of fact.<sup>16</sup> But findings are neither necessary nor proper where the issues of fact are tried by a jury, and a verdict is rendered thereupon, except in cases where such ver-

<sup>12</sup> *Burnett v. Stearns*, 33 Cal. 468; *Bradbury v. Cronise*, 46 Cal. 287, 9 *Morr. Min. Rep.* 366; *McDonald v. M. V. H. Assn.*, 51 Cal. 210; *Tracy v. Craig*, 55 Cal. 91; *Walker v. Brem*, 67 Cal. 599, 8 *Pac.* 320; *White v. Douglass*, 71 Cal. 115, 11 *Pac.* 860; *In re Lukes*, 71 Cal. 113, 12 *Pac.* 390; *Gould v. Stafford*, 77 Cal. 66, 18 *Pac.* 879; *Jackson v. Torrence*, 83 Cal. 521, 23 *Pac.* 695.

Findings upon facts averred in the complaint and not denied in the answer, or facts admitted, need not be found, for admitted facts are treated by the court as already found in accordance with the admissions. *State v. Telephone Co.*, 27 *Mont.* 394, 71 *Pac.* 311.

<sup>12a</sup> *Hall v. Arnott*, 80 Cal. 348, 22 *Pac.* 200; *Rudel v. Los Angeles Co.*, 118 Cal. 281, 50 *Pac.* 400; *Machado v. Kinney*, 135 Cal. 354, 67 *Pac.* 331.

A finding at variance with and outside the issues, and unsupported by the proof, is unwarranted, and will be treated as a nullity. *Deaner v. O'Hara*, 36 *Colo.* 476, 85 *Pac.* 1123. Findings outside the issues are mere nullities. *Booth v. Bank*, 47 *Or.* 299, 83 *Pac.* 785. The court cannot go outside the issues and make findings on questions not in dispute, and a finding not within the issues will be disregarded. *O'Brien v. Drinkenberg*, 41 *Mont.* 538, 111 *Pac.* 137. Findings outside the issues and contrary to the theory of the action are improper. *Kimball v. Success etc. Co. (Utah)*, 110 *Cal.* 872. A finding

entirely outside the issues is erroneous. *Neuberger v. Robbins (Utah)*, 106 *Pac.* 933.

<sup>12b</sup> *Kendall v. Waters*, 68 Cal. 26, 8 *Pac.* 510.

<sup>13</sup> *Gilson Q. M. Co. v. Gilson*, 47 Cal. 597; *Reynolds v. Brumagim*, 54 Cal. 254; *Harney v. McLeran*, 66 Cal. 34, 4 *Pac.* 884; *Snell v. Payne*, 115 Cal. 218, 46 *Pac.* 1069; *Kennedy etc. Co. v. Dusenbury*, 116 Cal. 124, 47 *Pac.* 1008. Also, *Broderius v. Anderson*, 54 *Wash.* 591, 103 *Pac.* 837; *Thorne v. Joy*, 15 *Wash.* 83, 45 *Pac.* 642; *Barkley v. Barton*, 15 *Wash.* 33, 45 *Pac.* 654.

<sup>14</sup> See section 112, *ante*.

<sup>14a</sup> *Frush v. Portland*, 6 *Or.* 281. A stipulation of facts takes the place of findings. *Brown v. Brown*, 12 *S. D.* 506, 81 *N. W.* 883.

A conclusion of law contradictory of an agreed statement will vitiate the judgment. *Birney v. Warren*, 28 *Mont.* 64, 72 *Pac.* 293.

<sup>15</sup> *Lambert v. Smith*, 3 Cal. 408; *Thompson v. Patterson*, 54 Cal. 542; *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 *Pac.* 85; and compare *Connor v. Morris*, 23 Cal. 447.

<sup>16</sup> *Semple v. Burkey*, 2 Cal. 321. This case has never been specifically overruled, but it does not seem to have had much effect upon the practice, for it is not customary to have written findings upon motions, and the case was seriously questioned in the later one of *Waller v. Weston*, 125 Cal. 201, 57 *Pac.* 892, as seeming to authorize findings in default cases.

dict is to be regarded as advisory merely, as in the case of a special verdict in equity.<sup>16a</sup>

Whenever issues of fact in probate proceedings are tried as provided in section 1716 of the Code of Civil Procedure, findings are proper.<sup>17</sup> But findings in probate proceedings in general, though sometimes allowed, are always regarded as being of doubtful propriety. In *Estate of Arguello*<sup>18</sup> this doubt was expressed. In *Re Levinson*<sup>19</sup> it was held that findings were not required in contests over the partial settlement of accounts. In *Miller v. Lux*<sup>20</sup> it was said: "While in such a proceeding it is not incumbent upon the court to make and file express findings, still, when the account is assailed in any particular for matters not appearing on its face, the court may properly make express findings." Other cases might be cited having similar effect.<sup>21</sup> The reason of the rule as expressed in all these cases is that issues of fact are not raised in proceedings which result in mere orders. And this position receives support in other lines of decisions. Thus in *Lyons v. Marcher*,<sup>22</sup> which had reference to a proceeding supplementary to execution, the court said:

"On appeal from an order except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of papers used on the hearing in the court below. (Code Civ. Proc., sec. 951.) There is here no mention of findings, nor of a judgment-roll, which includes the findings. Where the matter is heard on oral evidence exceptions to decisions after judgment may be preserved by a bill thereof."

In the recent case of *In re Danford*,<sup>23</sup> which was a disbarment proceeding, with reference to the alleged error of the court in refusing a request for findings, the court said:

<sup>16a</sup> *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70.

<sup>17</sup> *Estate of Crosby*, 55 Cal. 574; *Estate of Burton*, 63 Cal. 36.

<sup>18</sup> 85 Cal. 151, 24 Pac. 641.

<sup>19</sup> 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

<sup>20</sup> 100 Cal. 609, 35 Pac. 345, 639.

<sup>21</sup> *Estate of Adams*, 131 Cal. 415, 63 Pac. 838; *Estate of Schandoney*, 133 Cal. 387, 65 Pac. 877.

<sup>22</sup> 119 Cal. 382, 51 Pac. 559.

<sup>23</sup> 157 Cal. 425, 108 Pac. 322.

Decisions of other states, involving the principles outlined in the text, are as follows:

Findings need not be made upon immaterial issues. See *St. Vrain etc. v. Denver etc. Co.*, 18 Colo. 211, 32 Pac. 827. And if the findings made are sufficient to sustain the judgment, the fact that the court failed to find upon certain allegations in the complaint which, if true or not true, would not affect the result, is no cause for a new trial. *Tage v. Alberts*, 2 Idaho, 249 (271), 13 Pac.

" . . . . Written findings are not required under the common law practice, and are necessary only when a statute so provides. Sections 632 and 633 of the Code of Civil Procedure, which declares that the decision must be in writing, and that the facts found and the conclusions of law must be separately stated, are included in Title VIII of Part II of said code. . . . The requirement of findings, with some other details found in Part II, applies only to civil actions, and to those special proceedings (for example, matters of probate, Code Civ. Proc., sec. 1713) to which such provisions are specially made applicable. . . . The procedure is in almost all respects dissimilar to that provided for civil actions, and as it makes no mention of findings, there is no reason for holding that the legislature import the need of findings into it."

§ 241. **Waiver of Findings.**—The act of 1851 contained no provision as to the waiver of findings. The Code of Civil Procedure contains the following:<sup>1</sup>

19. Where the defense in an action for damages is contributory negligence, it is not error for the court to omit a special finding on the issue thus raised, where the evidence fails to show that injury resulted from such contributory negligence. *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124. It is not error to make express findings upon issues that became immaterial during the trial. *Chambers v. Emery*, 13 Utah, 374, 45 Pac. 192. Where no issue was raised as to the making of a test of apparatus, the subject of a suit to foreclose a lien, the defense being that plaintiffs failed to supply the apparatus they agreed to furnish, a finding upon such issue was error. *Goldsmith v. Elwert*, 31 Or. 539, 50 Pac. 867. A finding as to the existence of a by-law is a finding outside the issues, and improper, where no reference was made to such by-law in the pleadings. *Maynard v. Life Ins. Co.*, 14 Utah, 458, 47 Pac. 1030.

Findings need not be made upon immaterial issues, nor is it reversible error to omit findings upon material issues, which would necessarily be prejudicial to the appellant, and when

those found sustain the judgment. *Maynard v. Insurance Assn.*, 16 Utah, 145, 67 Am. St. Rep. 602, 51 Pac. 259.

<sup>1</sup> No change has been made in this section since the adoption of the code. Also, section 4408, Revised Code of Idaho; section 6765, Revised Code of Montana (section 1113, Code of Civil Procedure); and see section 7041, Revised Codes of North Dakota, which is the same as the Code of California and other provisions, except as to the third subdivision, which is omitted. Section 278, Code of Civil Procedure of South Dakota, is identical with the North Dakota section cited. Section 3170, Compiled Laws of Utah, is identical with the California section quoted in the text.

The following cases are cited construing the effect of these sections: *Cole v. Association*, 3 S. D. 272, N. W. 1086; *N. W. Elevator Co. v. Lee*, 15 S. D. 114, 87 N. W. 56; *Chandler v. Kennedy*, 8 S. D. 56, N. W. 439; *Nichols-Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. 108; *Garr-Scott & Co. v. Spaulding*, 2 D. 414, 51 N. W. 867.

"Sec. 634. Findings of fact may be waived by the several parties to an issue of fact:—

"1. By failing to appear at the trial;

"2. By consent in writing filed with the clerk;

"3. By oral consent in open court, entered in the minutes."

Under this statute it was held in *Mulcahy v. Glazier*<sup>2</sup> that where no findings appeared in the judgment-roll, it will be presumed that findings were waived, unless the contrary appear. The court said:

"It is a well-settled rule that upon appeal taken error is not to be presumed, but must be affirmatively shown. Where, therefore, as here, a cause is tried by the court without a jury, and the appeal is taken upon the judgment-roll, the mere nonappearance of findings of fact in the roll does not necessarily establish that error was committed. The statute, when its several provisions are considered together, does not absolutely or unconditionally require that findings of fact shall be filed; but only that they must be filed unless waived in some one or more of the three methods therein mentioned. Under the rule of presumption referred to we cannot presume that no such waiver occurred; the necessary intendment in support of the judgment is the other way. A party, therefore, who comes here to say that the court below committed an error in failing to find the facts must, by bill of exceptions or some other appropriate method, make it affirmatively appear by the record that no waiver of findings had in fact occurred in the court below, otherwise the intendment here must go to support, and not to overthrow, the judgment rendered there."

This decision was adhered to on petition for rehearing, and has been followed in several subsequent cases.<sup>3</sup> It is necessary, therefore, that the appellant have a bill of exceptions to show affirmatively that findings were not waived,<sup>4</sup> unless that fact appears from some other part of the record.<sup>5</sup>

<sup>2</sup> 51 Cal. 626. The record must show affirmatively that findings were not waived, otherwise it will be presumed that they were waived. *Squier v. Lowenberg*, 1 Idaho, 785; *Parker v. Beagle*, 4 Idaho, 453, 40 Pac. 61; *McCornick v. Friedman*, 7 Idaho, 686, 65 Pac. 440.

<sup>3</sup> *Smith v. Lawrence*, 53 Cal. 34; *Carr v. Cronan*, 54 Cal. 600; *Reynolds v. Brumagim*, 54 Cal. 354; and see

cases cited in note 17, section 239, *ante*.

<sup>4</sup> In other words, the bill is not to exhibit any action of the court, but is to show mere nonaction, a somewhat singular office for a bill of exceptions. See *People v. Torres*, 38 Cal. 141. See cases cited in note 17, section 239, *ante*.

<sup>5</sup> But if it be shown by the bill of exceptions that there was no waiver,

Where findings appear in the record, but are defective in not covering all the issues, it will not be presumed that findings on the omitted issues were waived.<sup>6</sup> It is probable, however, that

the judgment will be reversed. *Haf-fenegger v. Bruce*, 54 Cal. 416.

The presumption of waiver can have no force in a case where the court has filed a paper which is designated the "decision," and which is clearly intended as the finding upon a material issue, that judgment is ordered in favor of the defendant *because* the evidence proved that one of the pleas of the defendant was true. *Kimball v. Stormer*, 65 Cal. 116, 3 Pac. 408. Nor can there be any presumption of waiver, even if such presumption is necessary to sustain the judgment, where there were written findings and conclusions of law in the record. *Ball v. Kehl*, 95 Cal. 606.

The principle followed in these decisions seems to have been uniformly accepted elsewhere. See *Bunnell etc. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767; *Whitmore v. Shiverick*, 3 Nev. 288; *Luse v. Isthmus etc. Co.*, 6 Or. 125, 125 Am. Rep. 506; *Umatilla Irr. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Noland v. Bull*, 24 Or. 479, 33 Pac. 983; *Harris v. Harsch*, 29 Or. 562, 46 Pac. 141; *Reade v. Pacific Supply Co.*, 40 Or. 60, 66 Pac. 443; *Allen v. Leavens*, 26 Or. 164, 46 Am. St. Rep. 613, 37 Pac. 488, 26 L. R. A. 620; *Richardson v. Dunlap*, 26 Or. 270, 38 Pac. 1; *Hicklin v. McClellan*, 18 Or. 126, 22 Pac. 1057; *Miller v. Head Camp*, 45 Or. 192, 77 Pac. 83; *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011; *Greer v. Squire*, 9 Wash. 359, 37 Pac. 545; *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440.

One who does not avail himself of the statutory method of securing findings can successfully complain that they were not more specific. *Larimer etc. Co. v. Wyatt*, 23 Colo. 480, 48 Pac. 528.

A failure to make a proper finding is not available on appeal unless there was a timely request, and objection to such omission in the trial court. *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534.

It is proper to note here that in sections 6766, 6767 and 6768, Revised Codes of Montana (sections

1114, 1115 and 1116, Code of Civil Procedure), the principles here involved appear to be crystallized into statutory form; and that the supreme court of that state has held the effect to be to introduce the system of implied findings which obtained in California from 1861 to 1874. See note 19, section 239, *ante*, and cases there cited; particularly *Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447, and *Haggin v. Saile*, 23 Mont. 375, 59 Pac. 154.

<sup>6</sup> *People v. Forbes*, 51 Cal. 628; and in *People v. Fuqua*, 61 Cal. 377, a criminal case, when the defendant, in addition to his plea of not guilty, pleaded a former acquittal, which latter plea the jury failed to pass upon, the judgment was reversed, the court saying:

"The attorney general contends that in the absence of anything appearing to the contrary the appellate court must presume in support of the correctness of the judgment of the court below that that defense was withdrawn or waived. But we are not aware that the doctrine of presumption has ever been carried to that length. To presume that a party had withdrawn or waived a defense, which he had pleaded, simply because a jury had failed to find upon it might lead to very serious consequences. The evidence in the case is not before us, and we cannot know whether any attempt was made to establish that defense. But as we view the matter it is immaterial whether there was or not. If the jury had found in favor of the people upon the plea of a former acquittal, and had failed to find upon the plea of not guilty, it does not seem probable that we would have been asked to presume in support of a judgment of conviction that the defendant had waived or withdrawn his plea of not guilty. It has been repeatedly held by this court that the failure of a trial court to find upon all the issues raised by the pleadings was a sufficient ground for the reversal of a judgment. It has never been suggested in such cases that the

this distinction does not serve to exclude from the operation of the rule heretofore noted <sup>6a</sup> cases where there are findings upon the issues raised by the complaint, but none upon affirmative defenses raised by the answer or averments in the cross-complaint. <sup>6b</sup>

The rule as to presumption of waiver applies only in the appellate court, and not in the trial court; and may be overcome by a statement in the record that they were not waived.<sup>7</sup>

The fact of waiver, although permitted by the statute and well established, cannot dispense with actual findings, although it may dispense with their reduction to writing, or their incorporation in the record, or even their formal statement by word of mouth. There must be a decision of the court upon the facts involved, if facts are involved, either formally expressed or implied. Such findings are said to be logically necessary to support the judgment.<sup>8</sup> Without them it might well be, as contended by the respondent in *Blanc v. Paymaster etc. Co.*,<sup>9</sup> that there would be nothing to which specifications of the insufficiency of the evidence could relate; and it might so happen that the successful party who entertains any doubt as to the sufficiency of his evidence would waive findings, and so preclude the review of that question altogether. The court said in response to this contention in the case cited:

" . . . . We do not think this is the correct view of the law upon this point. There are no express findings in the record, but it is the presumption of the law that the court found all the matters of fact in favor of the successful party. Such findings are implied, and if the evidence is insufficient to justify the court in finding any material and necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding. . . . "

Wherefore, whether findings be waived or not, if there are no written findings in the record, the appellate court will pre-

failure to find upon all the issues would raise a presumption that those not found upon had been abandoned on the trial.<sup>6a</sup>

<sup>6a</sup> That waiver will be presumed in the absence of a showing by bill of exceptions or otherwise that there was no waiver.

<sup>6b</sup> See cases cited in note 17, section 239, *ante*; and see *Roberts v. Hall*, 147 Cal. 431, 82 Pac. 66, and

*People v. McCue*, 150 Cal. 195, 88 Pac. 899, and cases cited; also cases cited in note 5 of section 240.

<sup>7</sup> Look at *Van Court v. Winterson*, 61 Cal. 615.

<sup>8</sup> *Utter v. Eames*, 59 Cal. 5; *Wixson v. Devine*, 80 Cal. 385, 22 Pac. 224; *Rankin v. Newman*, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304.

<sup>9</sup> 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

sume that all the facts necessary to sustain the judgment have been found by the trial court;<sup>10</sup> subject, however, to the rule that if the record contains a showing that findings were not made or not waived, the judgment must be reversed; for if findings are not waived, it is error to enter judgment without them.<sup>10a</sup>

Inasmuch as the findings of a referee are required to be in writing by the code, there can be no presumptive waiver thereof, and an absence of findings in the report of a referee is taken to be a failure to find, and is fatally defective.<sup>11</sup>

**§ 242. Requisites, Sufficiency and Construction of Findings.**—Although these subjects are more or less connected, they will, for sake of clearness, be to some extent treated separately.

*1. The Findings must Respond to the Issues—Facts may be Stated in the Findings in the Same Way They are Stated in the Pleadings—Findings by Reference to Pleadings.*

(a) The findings must respond to the issues. They must support the judgment, and contain nothing inconsistent with it.<sup>1</sup> The only purpose of the findings is to dispose of the issues of the pleadings.<sup>1a</sup> Stating it differently, the only purpose of the findings is to answer the questions put by the pleadings.<sup>1b</sup> Every material issue must be disposed of,<sup>1c</sup> every necessary question must be answered, and the judgment cannot be sustained if the court fails to find upon any material issue,<sup>2</sup> or answer any necessary

<sup>10</sup> See *Cummings v. Howard*, 63 Cal. 503.

<sup>10a</sup> See *Bennett v. Pardini*, 63 Cal. 154; and see notes 12 and 14, in section 238, *ante*.

<sup>11</sup> *Lee Sack Sam v. Gray*, 104 Cal. 243, 38 Pac. 85.

<sup>1</sup> *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; and see *Last Chance Co. v. Heilbron*, 86 Cal. 1. 26 Pac. 523; *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490; and *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696, where it was held that the findings must respond to and cover all material issues raised by the pleadings.

The findings must respond to the issues. *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708. And must cover so much of the issues raised by the pleadings as will sustain the judgment. *Cochise Co. v. Copper Queen Co.*, 8 Ariz. 221, 71 Pac. 946. Find-

ings must be made upon all material issues necessary to support the judgment. *Darling v. Miles (Or.)*, 111 Pac. 702.

<sup>1a</sup> Since this is so, it has been held that if the findings substantially cover the issues, the fact that they are clumsily drawn, and, because of erroneous capitalization and punctuation, disclose more or less ambiguity, will not affect the validity of the judgment. *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783.

<sup>1b</sup> See *Dam v. Zink*, 112 Cal. 91, 44 Pac. 331.

<sup>1c</sup> See sections 239 and 240, *ante*. But immaterial issues need not be found. See section 240, *ante*, note 6.

<sup>2</sup> *Traverso v. Tate*, 82 Cal. 170, 22 Pac. 1082.

Where the court fails to find on some of the issues made by the pleadings, the judgment will be re-



question. But facts not in issue need not be found,<sup>2a</sup> and if they

versed unless a finding upon such issues would not affect the judgment entered. *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490. Where the court fails to find on all the material issues made by the pleadings, the judgment must be reversed, unless a finding on such issues would not affect the judgment. *State v. Baird*, 13 Idaho, 126, 89 Pac. 298; *Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374.

<sup>2a</sup> *Estate of Cartery*, 56 Cal. 470; and see cases cited in note 3, below.

It has, however, been frequently held that if evidence is introduced and findings outside the issues raised by the pleadings, without objection at the time, and exceptions saved, the order denying the motion for a new trial will not be reversed on the ground that the findings were outside the issues. In *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186, the court said:

"It is objected that the finding is not within the issues. As the record shows nothing to the contrary, we must presume that the testimony was introduced to establish the fact found by this finding. It does not appear that any objection was made by the plaintiff to the evidence that it was inadmissible under the pleadings, as not being within the issues joined. As the record stands, it appears that the cause was tried as if the agreement found was put in issue. Under such circumstances, we cannot permit the objection to be now made that this finding is of matters outside of the issues joined in the cause. It should not be permitted that the plaintiff should allow the cause to be tried as if issues are regularly joined, and when the result is a judgment adverse to his claims, urge in this court that no such issue was made in the court below."

In *Moore v. Campbell*, 72 Cal. 251, 13 Pac. 689, the court said:

"It is further objected that the finding that plaintiff's claim was fully paid and satisfied was not

within the issues tendered by the defendant's answer. The point does not appear to have been made in the court below, and we think it should not be sustained here. The answer might have been, and perhaps should have been, amended at the trial, but as the case was tried upon it without objection as to its sufficiency, and the findings and decision were justified by the evidence, the order refusing a new trial should not, we think, be affirmed."

In *Illinois T. & S. Co. v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60, the court said:

"It is well settled that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact, and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issue."

See *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278, *Carroll v. Briggs*, 138 Cal. 452, 71 Pac. 501, *Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419, as to the rule where, as in *Illinois T. & S. Co. v. Pacific Ry. Co.*, the question arose primarily from defective pleadings.

In *Ortega v. Cordera*, 88 Cal. 221, 26 Pac. 80, *arguendo*, the court said with reference to this point:

"The principle upon which these decisions rest is that of equitable estoppel; it being held that a party who acquiesces and participates in the trial of an issue without objection, as if it arose from the pleadings, when he might have objected on the ground that the issue was not made by the pleadings in the trial court, where the objection might have been met by amendment of the pleadings or otherwise, so that it would have operated less injuriously upon the other party than if first made on appeal, has thereby waived the objection and misled the other party to understand that the issue was properly made, and there-

fore should not be heard to make it on appeal."

The opinion in this case clearly distinguishes that class of cases where issues not raised were actually and purposely tried, pertinent evidence introduced, and where the party against whom the estoppel is invoked consciously participated or acquiesced in such trial, in such a manner as may have induced the other party to believe that the issue had been properly made, or diverted his attention from the fact that it was not in fact made; and that other class of cases where no such intent was manifest, no trial consciously acquiesced in, and no pertinent evidence introduced, but where the court itself, in disregard of the issues actually raised or "found" by the admissions of the pleadings, makes findings upon issues not so raised, or findings adverse to the same. In the former class this doctrine of equitable estoppel has been applied. *White v. S. R. & S. Q. R. R. Co.*, 50 Cal. 417; *Tevis v. Hicks*, 41 Cal. 123; *Smith v. Penny*, 44 Cal. 161; *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186. The court has said that a party will not be permitted to raise an objection to a finding outside the issues for the first time on appeal after having allowed the trial to proceed as if the issues were regularly joined by the admission of pertinent evidence in the court below.

Where, however, on the other hand, the finding is not the result of intentional or conscious participation of the party who objects, either by the introduction of pertinent evidence or a failure to object to such evidence, when introduced by his adversary, as being pointed outside the issues actually raised, but of the disregard by the court of those issues, the rule is that such finding will be disregarded on appeal. In the case of *In re Doyle*, 73 Cal. 564, 15 Pac. 125, *McKinstry, J.*, for the court, said:

"... When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found.' ... If the court does not find adversely to the admission, such finding should be

disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. ... In such case the facts alleged must be assumed to exist. Any findings adverse to the admitted facts drops from the record and any legal conclusion which is not upheld by the admitted facts is erroneous."

But it is said that it will be presumed that the court found the facts in question from competent evidence. The answer is that it will not be presumed that evidence was introduced to contradict the admissions of the record. *Burnett Stearns*, 33 Cal. 468. "This court cannot presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint denied by the answer." *Gregory Nelson*, 41 Cal. 278, 12 Morr. M. Rep. 124.

With respect to the first class of cases above referred to, some of the decisions are thought to have gone quite to the verge of the doctrine of equitable estoppel or waiver, as to encroach upon the domain of pleadings and evidence, particularly as to sections 462, 588, 589 and 590 of the California Code of Civil Procedure. In *Ortega v. Cordero*, above cited, the court said on this point:

"It is not within the discretion of any court to dispense with these provisions, yet they are violated by a decision of the appellate court that a party, by his conduct at the trial, is estopped from asserting on appeal, for the first time, that a fact found by the trial court was not within the issues made by the pleadings, since such a decision assumes that the fact found was within the issues, and its propriety can be questioned only on the ground that the facts of record are insufficient to create the alleged estoppel."

If material allegations in a complaint controverted by the answer raise issues of fact under the code, and under the code material allegations, uncontroverted, are to be taken as true, and a trial court

are found, the finding is nugatory.<sup>3</sup> It has been said of such a finding that it can form no element in determining the appropriate judgment to be rendered.<sup>3a</sup> So findings against admissions in the pleadings are of no effect,<sup>4</sup> and such findings will not support a judgment; and, to the extent that such findings are against the admissions of the pleadings, to that extent the judgment will

makes a finding against such material allegations, after a trial in the course of which evidence pertinent to such issue was introduced, consciously and with purpose, and with intent to mislead the other party into the belief that the issue was properly joined, the party is said to be estopped from raising the objection on appeal, that such finding was outside the issues, and contrary to the issues presumed under the code, but how is the objection to be raised? Or, can it be raised at all? The appellate court, as is above suggested, assumes that the fact thus found was within the issues, and consistent with the admissions of the pleadings. If it be true, as also suggested, that the propriety of the finding can be questioned only on the ground that the record is insufficient to create the alleged estoppel, what becomes of the latter, when the facts of the record are insufficient to establish the impropriety of the finding? If the record shows ground for this estoppel, is it not apparent that the record also shows a disregard of the code provisions above referred to? And if the estoppel is conceded, is it not true that the appellate court must also disregard the same code provisions in overruling the objection as the trial court did in making the finding? The opinion of the court in *Ortega v. Cordero*, above cited, is not very clear upon this point, but it does not clearly show that the facts of the estoppel must appear in the record, and that they cannot be presumed. There must be a bill of exceptions. It will not be presumed in the absence of such bill of exceptions that evidence was introduced for the purpose either of establishing or rebutting allegations of the complaint not denied by the answer. In the absence of such a

record showing of actual intent and conscious participation there will be no presumption to sustain an estoppel of this kind, and the finding will be disregarded.

Other branches of this discussion may be found in sections 115, *ante*, and 280, *post*.

<sup>3</sup> *Gregory v. Nelson*, 41 Cal. 278, 12 Morr. Min. Rep. 124; *Morenhout v. Barron*, 42 Cal. 591; *Phelan v. Gardiner*, 43 Cal. 306; *Marks v. Sayward*, 50 Cal. 57; *Devoe v. Devoe*, 51 Cal. 543; *Green v. Chandler*, 54 Cal. 626; *Robinson v. Pittsburg R. R. Co.*, 57 Cal. 417; *Lothian v. Wood*, 55 Cal. 159; *Rosencranz v. Wagner*, 62 Cal. 151; *Hall v. Arnot*, 80 Cal. 348, 22 Pac. 200; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299; *Rudel v. Los Angeles Co.*, 118 Cal. 281, 50 Pac. 400; *Machado v. Kinney*, 135 Cal. 354, 67 Pac. 331; *Howe v. Schmidt*, 151 Cal. 436, 90 Pac. 1056; and see *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122; and as to instructions, see *Lee v. Market St. Ry. Co.*, 135 Cal. 293, 67 Pac. 765; and see cases in notes 2a, *supra*, and 3a and 4, below. Also, see note 12a, section 240, *ante*.

<sup>3a</sup> *Commissioners v. Barnard*, 98 Cal. 199, 32 Pac. 982, and see *McCreery v. Marston*, 56 Cal. 403.

<sup>4</sup> *Burnett v. Stearns*, 33 Cal. 468; *Hill v. Den*, 54 Cal. 6; *Tracy v. Craig*, 55 Cal. 91; *Silvey v. Neary*, 59 Cal. 97; *Taylor v. C. P. R. Co.*, 67 Cal. 656, 8 Pac. 594, 15 Morr. Min. Rep. 284; *Walker v. Brem*, 67 Cal. 599, 8 Pac. 320; *Reinhart v. Lugo*, 75 Cal. 639, 18 Pac. 112; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Bulwer Con. Mining Co. v. Standard Con. Min. Co.*, 83 Cal. 589, 23 Pac. 1102; *Last Chance Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523; *Gregory v. Gregory*, 102 Cal. 50, 36

be against law.<sup>4a</sup> So the cause of action established by the findings must be the same as the cause set forth in the complaint.<sup>5</sup> If the findings and the cause of action thus set forth in the complaint do not correspond, such findings will be held not to support the judgment.<sup>5a</sup> If no material allegation of the complaint be controverted in the answer, no issue of fact is raised, and findings are not required.<sup>5b</sup> But if findings are made, they are to be disregarded as immaterial.<sup>5c</sup>

(b) Facts may be stated in the findings in the same way they are stated in the pleadings. It is not necessary that the findings should follow the precise language of the pleadings; \* but, as stated

Pac. 364; *Faulkner v. Bondoni*, 104 Cal. 140, 37 Pac. 883; *Lambert v. Lambert*, 1 Cal. App. 114, 81 Pac. 715.

<sup>4a</sup> *Traverso v. Tate*, 82 Cal. 170, 22 Pac. 1082; and such findings, if material, are ground for reversal. *Faulkner v. Bondoni*, 104 Cal. 140, 37 Pac. 883.

<sup>5</sup> *Mondran v. Goux*, 51 Cal. 151; *Last Chance Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523.

The rule applies to affirmative matter of the answer, which, under the statutes of most states, is deemed denied. See *Snyder v. Emerson*, 19 Utah, 319, 57 Pac. 300. See, also, *Beaverhead etc. Co. v. Dillon etc. Co.*, 34 Mont. 135, 85 Pac. 880.

<sup>5a</sup> *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; even though the proof discloses another cause of action.

<sup>5b</sup> *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 589, 23 Pac. 1102.

<sup>5c</sup> *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 589, 23 Pac. 1102.

<sup>6</sup> In this regard *Rhodes, J.*, delivering the opinion in *Schroeder v. Jahns*, 27 Cal. 274, said: "While agreeing with counsel for the defendant that the court must find as to the truth of every issue of fact found in the case, we think the finding need not be directly and pointedly made that each of the several allegations of the complaint or the answer is or is not true, but if the court finds such facts as will be sufficient, with the facts admitted by the parties to be true, to necessarily determine every material issue in the cause, the re-

quirement of the law in that respect will be satisfied."

In *Clary v. Hazlitt*, 67 Cal. 289, 7 Pac. 701, the court said:

"It is not necessary that the facts as found should follow the language of the pleadings which they support. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the code are met."

In *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194, the opinion is an approval of the language of *Clary v. Hazlitt*. In *Ready v. McDonald*, 128 Cal. 663, 79 Am. St. Rep. 76, 61 Pac. 272, the court said:

"If the truth or falsity of each material allegation can be demonstrated from the findings, the law is complied with." In *Hart v. Finigan*, 71 Cal. 578, 12 Pac. 682, *Commissioner Foote*, for the court, said:

"Under the facts as found upon the testimony admissible under the issues as made up, it appears that the conclusions of law of the court are correct. When such is the case, it would seem to subserve no useful purpose to reverse a judgment, because the court below upon the evidence, conflicting as it was, has not found as a matter of fact that the contention of plaintiffs, or its denial by the defendant, are either absolutely true in all respects in the language of the pleading. That tribunal has certainly passed upon and considered the material issues as presented by the pleadings, and its action cannot be called in question if, upon the evidence as adduced, it has not fully agreed with the language of the plain-

above, the only purpose of findings is to answer the questions put by the pleadings, and it seems to be the received idea that it is sufficient if the answers are given in the same language as the questions, and that the two modes of statement are governed by the same general rules. In this regard, Shafter, J., delivering the opinion in *Hihn v. Peck*,<sup>7</sup> said:

" . . . . It has been uniformly held that it is not necessary for the court in its findings to present the results of last analysis; but, on the contrary, that it would be sufficient if the court found the facts entering as terms into the legal proposition upon which the prevailing party based his right of recovery. The 'facts' which the court is to find, and the 'facts' which a pleader is to state, lie, according to the decisions in this state, in the same plane; that is, in both connections 'facts' are to be stated according to their legal effect." Upon this principle, that is, that it is sufficient to state facts in the findings in the same way they are stated in the pleadings, it has been said that where specific facts are put in issue, it is the duty of the court to find the facts specifically; but that where only general facts are alleged the finding may be general.<sup>8</sup>

(c) Upon the principle just stated, viz., that it is sufficient if the language of the findings follow the language of the pleading, it has been held that the findings may consist of a simple reference to the pleadings. Thus, in *McEwen v. Johnson*,<sup>9</sup> it was held that a finding in the following language, viz., "that the facts stated in the plaintiff's complaint are true," and "the facts stated

tiffs' forcible allegations, or that of the defendant's emphatic denials. . . . Parties bringing suits state the facts constituting their cause of action; defendants deny such facts, which is entirely proper. But a court, in passing upon the issues as made, must find the facts ultimately, or such probative facts as that ultimate facts may be inferred. Where, as in this case, such action is had by the court, and the facts as found show beyond doubt that the conclusions of law arrived at are correct, the judgment should not be reversed, because the findings do not positively negative either the plaintiffs' nor the defendant's allegations in their pleadings, in all respects as they are worded, but do so substantially." See, also,

*Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Millard v. Legion of Honor*, 81 Cal. 340, 22 Pac. 864; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14.

7 30 Cal. 280. See, also, *Millard v. Hathaway*, 27 Cal. 119, in which the court said: "We further consider that the findings follow the issues raised by the complaint, and as a demurrer would not lie to the one, so judgment could not be arrested upon the other."

And see, also, *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890.

<sup>8</sup> *Protalongo v. Larco*, 47 Cal. 378.

<sup>9</sup> 7 Cal. 258; and see *Parke v. Hinds*, 14 Cal. 415.

in the defendant's answer are not true," was sufficient, and the court said: "We think that the finding may well refer to the pleadings for a specification of the facts found and not found, provided such reference is sufficiently distinct to make it intelligible, and the facts are sufficiently stated in the pleadings." So in *Pralus v. Pacific G. & S. M. Co.*<sup>10</sup> a finding in the following language, viz., "all the allegations and averments in plaintiff's complaint are true, and that all in the answer are untrue," was held to be sufficient. So in *Williams v. Hill*<sup>11</sup> it was held that a finding that "all the facts set forth in the complaint are true," was sufficient. So in *Davis v. Drew*,<sup>12</sup> where the finding was by reference to certain subdivisions of the answer, the court said: "The mode of finding by reference to the answer, or portions of it, is not to be commended. It imposes greater labor in this court both on counsel and on court. But our predecessors have accepted such findings as proper and sufficient, and therefore we do not feel disposed to adopt a different course." So in *Carey v. Brown* the court said:

"It is urged that the finding 'that all the allegations of the complaint are true, and that all the allegations of the answer are untrue' is too general. On the authority of *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30, 12 Morr. Min. Rep. 478, this objection must be overruled."

Later decisions have gone even further. In *Kennedy etc. Co. v. S. S. Const. Co.*,<sup>13a</sup> a finding "that all the allegations contained in subdivisions I, III, IV, and VI are true" was held to be sufficient, although the finding did not state whether the allegations were to be found in the complaint or the answer. The court was of the opinion that inasmuch as the answer contained no numbered allegations, the finding could by no possibility refer to the pleading, and must, of necessity, refer to the complaint. The court said:

"It is true the finding should be specific, but as the record itself removes any uncertainty, we do not feel justified in reversing the judgment upon this ground."

In *Alameda Co. v. Crocker*,<sup>13b</sup> the finding "that all the facts alleged in the complaint are true, except as to those hereinafter spe-

<sup>10</sup> 35 Cal. 30, 12 Morr. Min. Rep. 478.

<sup>11</sup> 54 Cal. 390.

<sup>12</sup> 58 Cal. 152.

<sup>13</sup> 58 Cal. 180.

<sup>13a</sup> 123 Cal. 584, 56 Pac. 457.

<sup>13b</sup> 125 Cal. 101, 57 Pac. 766.

ified, and as to those allegations the court finds as follows," was regarded as sufficient, the court saying:

"We think the natural reading of the finding is, in effect, that all the facts alleged in the complaint are true, except as to those facts therein alleged and in the findings otherwise specified as to which the facts are not necessarily untrue, but are found specifically by the court."

Continuing, and differentiating a finding of this description from one held in *Bank of Woodland v. Treadwell*, *Harlan v. Ely*, and *Johnson v. Squires*, cited below, the court said:

"Here the finding is that the facts set forth in the complaint are true as to certain particulars, and as to these the facts are as specifically found. In the cases cited the finding left something undetermined, so that the court could not ascertain precisely what facts had been found."

So in numerous other decisions similar rulings have been made.<sup>130</sup>

<sup>130</sup> In *Moore v. Clear Lake Waterworks*, 8 Cal. 146, 8 Pac. 816, it was held that a finding that all the allegations of the complaint with a certain exception are true, and that all the allegations of the answer are untrue, was sufficient; in *Johnson v. Klein*, 70 Cal. 186, 11 Pac. 606, it was held that a finding that all the averments of the complaint are true is sufficient, if the answer contain nothing but denials and admissions of matters alleged in the complaint; in *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 404, 11 Pac. 833, that a finding that all the allegations of the complaint are true is a sufficient finding on a plea of the statute of limitations, if the complaint contained averments that the statute had not run; in *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. 212, that a finding by reference to a complaint was sufficient if the complaint itself was sufficient; in *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965, that a finding that all the allegations of the complaint are true, and all the averments of the answer untrue, is sufficient, if the pleadings are sufficient; and similar findings were sustained in *San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644; *Gale v. Bradbury*, 116 Cal. 39, 47 Pac. 778; *Shafer v. Willis*, 124 Cal. 36, 56 Pac. 635; *McLennan v. Wilcox*,

126 Cal. 51, 58 Pac. 305; *County of Sutter v. McGriff*, 130 Cal. 124, 62 Pac. 412; *Homeseekers' etc. Co. v. Gleeson*, 133 Cal. 312, 65 Pac. 617; *Brovelli v. Bianchi*, 136 Cal. 612, 69 Pac. 416; *Continental etc. Co. v. Wilson*, 144 Cal. 776, 78 Pac. 254.

And see *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273, where the question of findings by reference to the pleadings was fully discussed in view of the early California decisions. Also *King Co. v. Hill*, 1 Wash. 404, 25 Pac. 451.

In *Daggs v. Hoskins*, 5 Ariz. 300, 52 Pac. 357, *McGowan v. Sullivan*, 5 Ariz. 334, 52 Pac. 986, and *Newhall v. Porter*, 7 Ariz. 160, 62 Pac. 689, it was held that a general finding upon the issues in favor of defendant was sufficient. So in *Bitter v. Mouat etc. Co.*, 10 Colo. App. 307, 51 Pac. 519, it was held that a finding "that the facts set forth in the complaint are true," is sufficient, if the complaint is sufficient. So, a general finding that plaintiffs have failed to make out a case is sufficient as a finding upon which to base a decree of dismissal. *Noyes v. King Co.*, 18 Wash. 417, 51 Pac. 1052.

A finding that the allegations of plaintiff's complaint are not supported by the evidence and the allegations of defendant's affirmative de-



The foregoing decisions seem to establish the proposition that findings may consist of a simple reference to the pleadings. It must be admitted, however, that there are cases which cannot be reconciled with the ones above cited without the exercise of much ingenuity. Thus in *Johnson v. Squires*,<sup>14</sup> it was held that a finding that "all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the plaintiffs and against the said defendants" was not sufficient, the court saying: "We do not think this finding sufficient. To say that all the issues of fact raised by the pleadings are found and decided in favor of either party suggests an inquiry as to what issues are raised by the pleadings—a question often found to be of no little difficulty to determine, and concerning which in this case the views of the court below may be widely different from our own." So a finding that "all the allegations of the complaint are true and all the allegations and denials of the answer *contradicting the complaint in any respect* are untrue" was held to be insufficient.<sup>15</sup> So a finding that "all the *material* facts set forth in the complaint are true" was held to be insufficient, on the ground that the supreme court cannot know what facts were considered to be material by the court below.<sup>16</sup> So the general *omnibus* finding "that all the *material* denials and averments of the answer to the complaint herein are true, and all the *material* averments of the amended complaint

are proven and true is sufficient to support a judgment or dismissal. *Wilkinson v. Bethel*, 13 Idaho, 746, 93 Pac. 27.

On the other hand, in an action to quiet title to a mining claim, in which defendant alleges a conflicting location, and asks that it be quieted, a finding that the court finds in defendant's favor on all the issues of fact, and that all the allegations of his cross-complaint are true, is not sufficient as a finding upon which to base a judgment quieting defendant's title, but full findings of fact are required. *Shattuck v. Costello*, 8 Ariz. 22, 68 Pac. 529, 22 Morr. Min. Rep. 136.

So, where affirmative matter was set up in the answer, it was held that a finding that all the material allegations of the complaint were true

was insufficient. *Quinlan v. Calver*, 31 Mont. 115, 77 Pac. 428.

So a finding that all the issues of fact raised by the pleadings are found and decided in favor of the defendant and against the plaintiff was held insufficient. *Wood Broderson*, 12 Idaho, 190, 85 Pac. 490.

For other examples of insufficient findings, see *Bartholomew v. Faye*, etc. Co., 31 Utah, 1, 120 Am. St. R. 912, 86 Pac. 481; *S. C.*, 31 Utah, 2, 87 Pac. 707.

<sup>14</sup> 53 Cal. 37.

<sup>15</sup> *Bank of Woodland v. Treadwell*, 55 Cal. 379.

<sup>16</sup> *Breeze v. Doyle*, 19 Cal. 10; *Ladd v. Tully*, 51 Cal. 277; *Hardenbergh v. Hardenbergh*, 54 Cal. 52; *Cassidy v. Cassidy*, 63 Cal. 352.



intervention are true," was held insufficient for any purpose.<sup>16a</sup> So where the court below found certain facts covering a portion of the issues, and then added the following,—*"the foregoing are all the facts of the case, and all and singular the allegations of the second amended answer are untrue, except only in so far as the same accord with the foregoing facts,"*—it was held to be insufficient, the court saying: "The court below should have assumed the labor of comparing the allegations of the answer with the facts by it found; as it is we are not informed which of the allegations of the answer were in the opinion of the court below true, which untrue. We cannot assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony or to the facts actually found."<sup>17</sup>

Now, if the supreme court cannot know what were the facts which the court below considered to be "material," or what, in the view of the court below, were "the issues of fact raised by the pleadings," or what the idea of the court below as to which were the allegations and denials of the answer "contradicting the complaint in any respect," it may fairly be asked, how is it to know what in the view of the court below were "the facts" stated in the complaint or answer? So if the supreme court will not assume the labor of comparing the facts found by the court below with the allegations of an answer, why will it submit to being simply referred to the pleadings for information as to what the facts of the case are?

As above stated, the foregoing cases can be reconciled to the ones affirming the sufficiency of a finding by reference to the pleadings only by the exercise of considerable ingenuity. And it may easily be seen that the tendency of the court is to restrict that method of finding as much as possible. Where it is adopted care must be taken to see that the reference is coextensive with the pleadings. If they are not so, the findings will be insufficient. Thus where the answer contains an affirmative defense a statement that "the court finds all the facts as stated in the complaint" is insufficient.<sup>18</sup> Care should be taken also that the process does not result in con-

<sup>16a</sup> Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 Pac. 516.

<sup>17</sup> Harlan v. Ely, 55 Cal. 340; Goodnow v. Griswold, 68 Cal. 599, 9 Pac. 837; Warren v. Robinson, 71 Cal. 380, 12 Pac. 265; Perkins v.

West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118; Krug v. Brewing Co., 129 Cal. 322, 61 Pac. 1125.

<sup>18</sup> People v. Forbes, 51 Cal. 628; and see Cassidy v. Cassidy, 63 Cal. 352.

tradiictory findings, as was the case of *Reese v. Corcoran*<sup>19</sup> and *Manley v. Howlett*.<sup>20</sup>

But it is usual, convenient, and perfectly safe to refer to the pleadings for identification of documents. In this regard *Fier*. C. J., delivering the opinion in *Breeze v. Doyle*,<sup>21</sup> said: "There is no doubt that reference may be had to the pleadings in the findings. As for instance, it would be sufficient to find that the promissory note, mortgage, or other instrument set forth in the complaint was executed by the parties, and at the time as therein alleged, and so with other matters alleged which are established by the evidence. But in all such cases the reference should be distinct and pointed, so as to leave no doubt as to what particular facts are intended."

*2. Findings must not be of Mere Conclusions of Law, but Show the Ultimate Facts, or of Secondary Facts from Which the Ultimate Fact Necessarily Follows.* These propositions may be considered separately.

(a) Findings should not be of mere conclusions of law. This is well settled.<sup>22</sup> But it is not always easy to distinguish between conclusions of law and ultimate facts. Each case must depend, to a great extent, upon its own circumstances, and no general rule can be laid down. "In one connection a word or a phrase may stand for a fact, while in another the same word or phrase may designate a conclusion of law."<sup>22a</sup> But it may be of use to instance some of the decisions.<sup>22b</sup>

In *Gay v. Moss*<sup>22c</sup> it was held that a finding that "the assignment and delivery of the contract was a mortgage and not a pledge," although stated as a finding of fact, was, in view of the other facts admitted and found, a mere conclusion of law. Another instance of a finding of mere conclusion of law is to be found in the case of *Polhemus v. Carpenter*.<sup>23</sup> Another in *Paulson*

<sup>19</sup> 52 Cal. 495.

<sup>20</sup> 55 Cal. 94.

<sup>21</sup> 19 Cal. 101. Compare *Kelly v. McKibbin*, 54 Cal. 192; *Colton v. Raynor*, 57 Cal. 588; *Kelly v. McKibbin*, 53 Cal. 13.

<sup>22</sup> *Breeze v. Doyle*, 19 Cal. 101; *Hidden v. Jordan*, 28 Cal. 301; *Durycia v. Burt*, 28 Cal. 569, 11 *Morr. Min. Rep.* 395; *Bryan v. Maume*, 28 Cal. 238; *Jones v. Block*, 30 Cal. 227;

*James v. Williams*, 31 Cal. 211; *G v. Moss*, 34 Cal. 125; *Polhemus v. Carpenter*, 42 Cal. 375.

<sup>22a</sup> *Hill v. Finigan*, 77 Cal. 267, *Am. St. Rep.* 279, 19 *Pac.* 494.

<sup>22b</sup> For other instances, see note below.

<sup>22c</sup> 34 Cal. 125; and compare *Riards v. Dower*, 64 Cal. 62, 28 *P.* 113.

<sup>23</sup> 42 Cal. 375.

Nunan,<sup>22a</sup> where the question as to the right of exemption of certain personal property was in issue, and turned upon the question as to whether the claimant was habitually using the same (a team of horses) in earning a living, a finding "that the property was not exempt" was held to be a mere conclusion of law. And in *Estate of Langan*<sup>22b</sup> it was held that a negative finding as to whether the instrument offered for probate had been declared by the testatrix to be her last will and testament, and had been attested as required by law, was a mere legal conclusion. On the other hand, a finding in an action of ejectment that the defendant "has a good and perfect title to said property" was held to be a finding of fact.<sup>22c</sup> So in a similar action a finding "that the plaintiff did not own the several tracts of land described in the several answers of the defendants, but that the defendants owned the same in severalty as set forth in their answers," was held to be a finding of fact, and not a mere conclusion of law.<sup>24</sup> So a finding that "the plaintiff was the owner, and in possession of the property on the day that the defendants seized upon it and removed it from her possession, custody and control" is a sufficient finding upon the question of ownership in an action to recover damages for the conversion of personal property.<sup>25</sup> So a finding that certain premises were "conveyed" to a party was held to be a finding of fact, and not a mere conclusion of law.<sup>26</sup> So a finding that "neither the plaintiff, nor anyone under whom he claims title, ever were in or had possession of any of the lands in controversy," is a finding of fact, and not a conclusion of law.<sup>27</sup> So a finding that "there was not at the time of the commencement of this action any other action pending in this court between the parties to this action for the same cause of action mentioned and contained in the cause of action set forth in the complaint in this action," is a finding of fact, and not a conclusion of law.<sup>28</sup> So in an action against a railroad company for negligence in injuring cattle the following finding, viz., "that during the time aforesaid the said defendant failed to make and maintain a good and sufficient fence on either or both sides of its said railroad track and property, *as required by law*, and through the negligence of the defendant in that respect the

<sup>22a</sup> 64 Cal. 290, 30 Pac. 845.

<sup>22b</sup> 74 Cal. 353, 16 Pac. 188.

<sup>22c</sup> *Frazier v. Crowell*, 52 Cal. 399.

<sup>24</sup> *Smith v. Acker*, 52 Cal. 217.  
Compare *Knight v. Roche*, 56 Cal. 15.

<sup>25</sup> *Haley v. Nunan*, No. 8143, filed June 23, 1883.

<sup>26</sup> *Lewis v. Kelton*, 58 Cal. 303.

<sup>27</sup> *Porter v. Woodward*, 57 Cal. 535.

<sup>28</sup> *Newman v. Bird*, 60 Cal. 372.

locomotives and cars of said defendant ran against and over said cattle and horses of the plaintiff, and killed and destroyed the same," was held to be a good finding of fact, the supreme court saying: "If the court had omitted the words 'as required by law' in the above finding, it would be obnoxious to criticism even. For as the finding with or without these words means precisely the same thing, we think that it may properly be treated as a sufficient finding of fact."<sup>29</sup>

(b) Findings should be either of the ultimate facts, or of secondary facts from which the ultimate fact necessarily follows. The cases cited in the preceding subdivision show that findings are sufficient if they are of the ultimate facts involved. And this has been several times been affirmed by the court. Thus in *Mathews v. Kessel*,<sup>30</sup> Temple, J., delivering the opinion, said: "The findings are not such as were intended by the Practice Act. They should be mere statements of the ultimate facts in controversy, and the legal consequences from the facts admitted and proven." So in *Pico v. Cuyas*,<sup>31</sup> Niles, J., delivering the opinion, said: "We can consider upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts which have no proper place in the findings."

These cases seem to imply that findings of probative or secondary facts are in no case sufficient. But it has subsequently been held that they are sufficient if the ultimate fact necessarily follows from them.<sup>32</sup> Thus in *Coveny v. Hale*,<sup>33</sup> McKinstry, J., delivering the opinion said: "The findings of fact are sufficient, first, when the ultimate facts on which the judgment immediately depends are found; second, when probative facts are found, and the court declares that the ultimate facts necessarily result from the facts

<sup>29</sup> *Fontaine v. S. P. R. R. Co.*, 54 Cal. 645.

<sup>30</sup> 41 Cal. 512.

<sup>31</sup> 47 Cal. 174; and look at *James v. Williams*, 31 Cal. 211.

<sup>32</sup> These seem to be what are referred to by Field, C. J., in *Breeze v. Doyle*, 19 Cal. 101. The learned chief justice said: "The test, then, of the sufficiency of the findings of fact is this: Would they answer if presented by a jury in the form of a special verdict? 'A special verdict,' says the statute, 'shall present the

conclusions of fact as established by the evidence, and not the evidence which proves them; and those conclusions of fact shall be so presented as that nothing shall remain to the court to draw from them the conclusions of law.' Practice Act, sec. 174. A special verdict must therefore find the facts expressly and specially, and not generally or impliedly. It must present the facts so distinctly as to refer the court clearly to the question of law arising upon them."

<sup>33</sup> 49 Cal. 552.

which are found." So in *People v. Hagar*,<sup>34</sup> Crockett, J., delivering the opinion, said: "In respect to the finding, the court, it is true, does not in so many words find that there was a joint viewing and assessment of the land. But facts are found from which that conclusion is inevitable; and in *Coveny v. Hale*, 49 Cal. 552, we held this to be sufficient." And it has been held that "an affirmative finding of facts inconsistent with an averment, and from which it necessarily follows that the averment cannot be true, is a sufficient finding that the averment is not true."<sup>34a</sup> And so in other cases.<sup>35</sup> But, as shown in subdivision 3 of this section, the finding must not consist of mere statements of the evidence. And where probative facts only are found, "the fact to be inferred must follow inevitably from the facts found; or, in other words, the non-existence of the fact to be inferred must, upon every conceivable

<sup>34</sup> 52 Cal. 190.

<sup>34a</sup> *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770.

<sup>35</sup> *Osborne v. Clark*, 60 Cal. 622; *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159; *Turner v. Mahoney*, 56 Cal. 215; *Biddel v. Brizzolara*, 56 Cal. 374; *Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Southern Pacific Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083; *McCray v. Burr*, 125 Cal. 636, 58 Pac. 203; and see *Walker v. Buffandeau*, 63 Cal. 312; *Coglan v. Beard*, 65 Cal. 58, 2 Pac. 737; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194; *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14; and see, to same effect, citations in note 37, below.

The following decisions illustrate the rule here stated: Where the consideration for a note is alleged to be in settlement of the balance due on an account, which involves numerous transactions between the parties, the court is not required to make findings as to the various items entering into the statement of the account. *Scott v. Bourn*, 13 Wash. 471, 43 Pac. 372. A general finding, where a jury is

waived, is sufficient on which to base a judgment. The court is not bound to make special findings in the absence of a request. *Bank v. Baird etc. Co.*, 13 N. M. 424, 85 Pac. 970. Thus, upon an action for disbarment, where the petition contained distinct charges or specifications, it was not necessary to separate the findings thereon, it being sufficient that findings of fact and conclusions of law were stated separately. *State v. Grover*, 47 Wash. 39, 91 Pac. 564.

Findings should be limited to ultimate facts. *Sierra etc. Co. v. McCormick (Utah)*, 106 Pac. 666.

The findings should comprise a statement of the ultimate facts responsive to the issues. *McKenna v. Whittaker*, 9 S. D. 442, 69 N. W. 587.

But there are instances where specific findings of fact should be made, as where in an action for work done on a reservoir, involving a large mass of figures and extended mathematical calculations. *Hottel v. Poudre etc. Co.*, 41 Colo. 370, 92 Pac. 918.

Where the findings made are inconsistent with the material issue alleged to have been omitted, they will be deemed sufficient, as where, upon an issue of the statute of limitations, findings were made of transactions within the period, it was held that such findings negatived the statute. *Shurtliff v. Ditch Co.*, 14 Idaho, 416, 94 Pac. 574.

theory of which the case will admit, be inconsistent with the facts which are found." <sup>36</sup> That is, the ultimate fact, or the conclusion or inference of fact upon which the "conclusion of law," or the judgment, rests, must follow, as a matter of law, from the probative facts as found. Having accepted as proven, or "found," facts from which an ultimate inference must be drawn as a basis for conclusions of law and a support for a judgment, it is the duty of the court to draw that inference, and it is upon the proper performance of that duty that the judgment depends for its permanence and validity. <sup>36a</sup> If the trial court fails to do this, and the inference in question does not follow so inevitably as to be a matter of law, such failure is fatal to the judgment. The appellate court cannot draw the necessary inference. To do so would be to usurp the functions of the trial court. <sup>36b</sup> The trial court itself must draw its own inferences upon which its judgment is based, and it cannot be excused from the performance of this indispensable duty, unless the inference follows inevitably, as a matter of law, from the facts found; and, if the ultimate fact does not nec-

<sup>36</sup> *Emmal v. Webb*, 36 Cal. 197. Where the ultimate fact necessarily results from the probative facts as found, the finding is sufficient. *Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374; *Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

<sup>36a</sup> See *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319. The rule of presumption in support of the judgment authorizes the presumption that necessary inferences have been drawn, and it is even to be presumed, when there is no contrary showing and more than one inference might have been drawn, that the one which would support the judgment was actually drawn.

<sup>36b</sup> In *Coveney v. Hale*, 49 Cal. 552, the court said: "Of course, it is only when the conclusion follows as a matter of law that such a finding will be held sufficient." In *De Celis v. Porter*, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120, the court said: "The only inferences that we can draw from the findings are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court would infer a fact from other facts, it would be usurping the

province of the trial court, which alone can find the facts in issue. This is the rule in regard to special verdicts, and we are of the opinion that the same rule applies to findings of fact." And see *Chandler v. People's Sav. Bank*, 65 Cal. 498, 4 Pac. 502; *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; and see section 296, *post*.

As suggested in *Porter v. De Celis*, *supra*, the findings of the court should be as definite in character as the special verdict of a jury, as to which section 624, Code of Civil Procedure, provides: "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law."

So, if the findings of the court are not sufficiently definite as to leave nothing to the court but to draw therefrom its conclusions of law, they are defective.

arily follow from the facts found, it is not only insufficient,<sup>37</sup> as as though there were a total absence of a finding upon the material issue involved.<sup>37a</sup> As a corollary of this rule, where the ultimate fact is found, findings of probative facts tending to contradict it cannot be considered.<sup>38</sup> This statement must be understood in the strict significance of the phraseology used. In *Howe v. Sullenger*<sup>38a</sup> this was clearly pointed out in the following language:

The sixth finding having shown that the claim was so marked on the ground that its boundaries could be readily traced, the seventh finding is a mere conclusion from the specific facts found, and is wholly inconsistent therewith. If the seventh finding stood alone as the finding of an ultimate fact, it would support the judgment; but if the specific findings of probative facts set out in the sixth finding are true the seventh cannot be true, and, in such case, the specific findings cannot be disregarded. (*Geer v. Sibley*, 83 Cal. 1, 23 Pac. 220; *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 1 Pac. 474.) In *Smith v. Acker*, 52 Cal. 217, it was said: 'It has been held that where facts are found from which the existence of an ultimate fact must be conclusively inferred, the finding is sufficient as the finding of an ultimate fact. But when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the principal finding.' The qualifying words in this statement must not be overlooked. If the existence of the ultimate fact must be *conclusively inferred* from the probative facts found,

*Glasscock v. Ashman*, 52 Cal. 374; *Biddel v. Brizzolara*, 56 Cal. 374; *Light v. Roche*, 56 Cal. 15; *Packard v. Johnson*, 57 Cal. 180; *Soto v. Soto*, 60 Cal. 436; *Younger v. Younger*, 60 Cal. 517; *Oneto v. Restano*, 60 Cal. 374, 20 Pac. 743; *Estate of Estate of*, 131 Cal. 472, 63 Pac. 775; see cases cited in note 35, *supra*, where the same principle is enunciated.

The contention of the appellant always that there is no finding upon the particular issue in question, and the response of his adversary is always that the omitted finding follows inevitably from the findings of probative facts actually made. If the contention is maintained successfully, the reversal of the court is based upon

the want of a finding of fact upon a material issue.

<sup>38</sup> *Barrante v. Garratt*, 50 Cal. 112; *Pico v. Cutas*, 47 Cal. 174; *Smith v. Acker*, 52 Cal. 217; *Hellman v. Levy*, 55 Cal. 117; *Edwards v. Sonoma Valley Bank*, 59 Cal. 148; *Gill v. Driver*, 90 Cal. 72, 27 Pac. 64; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Commercial Bank v. Redfield*, 122 Cal. 405, 55 Pac. 160, 772; *Brown v. Mutual Life Assn.*, 137 Cal. 278, 70 Pac. 187; *Sharp v. Bowie*, 142 Cal. 462, 76 Pac. 62; and see *Wood v. Pendola*, 78 Cal. 287, 12 Am. St. Rep. 50, 20 Pac. 678; *Rankin v. Newman*, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304.

<sup>38a</sup> 113 Cal. 547, 45 Pac. 841.

it is the equivalent of a finding of an ultimate fact; but, if the probative facts found simply *tend* to show that the ultimate fact was found against the evidence, the finding of the ultimate fact cannot be questioned on appeal without bringing up the evidence.

From this and other cases <sup>38b</sup> is to be deduced the general rule that the "finding of the ultimate fact prevails in support of the judgment, notwithstanding a finding of a probative or evidentiary fact which tends to show that the ultimate fact was found against the evidence," <sup>38c</sup> and, expressing the same principle from a different viewpoint, "findings of probative facts will not invalidate the finding of an ultimate fact unless the latter is based on the former, and is entirely overcome thereby, and unless, also, it appears that these findings of probative facts dispose of all the facts involved in the pleadings, and that the facts found constitute all the facts in the case." <sup>38d</sup> So, in *People v. McCue*, <sup>38e</sup> Angellotti, J., for the court, thus expressed the rule:

"It is well settled in this state that a clear, specific finding of an ultimate fact must prevail over findings of probative facts where there is no necessary conflict between the probative facts found and the finding of the ultimate fact."

And, "It is only where the probative facts found are necessarily in conflict with the ultimate fact found, that the findings of probative facts can prevail over a clear and express finding of an ultimate fact."

In the same case it was held that upon an appeal on the judgment-roll alone, a judgment based upon allegations and findings of sufficient ultimate facts cannot be successfully assailed because the complaint and the findings contain, in addition, a showing of probative facts, which taken alone might not support the judgment. So in *Zihn v. Zihn*, <sup>38f</sup> citing the *McCue* case, the court held that it is immaterial that the evidence is insufficient to sustain a finding as to probative facts, where such facts are of such a character that a finding thereon could not affect or contradict the clear and specific findings of ultimate facts upon which the judgment is founded, and which fully support it. And in *Corea v. Higuera*, <sup>38g</sup>

<sup>38b</sup> See cases cited below.

<sup>38c</sup> *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24.

<sup>38d</sup> *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24; and see

*Wood v. Pendola*, 78 Cal. 287, 12 Am. St. Rep. 50, 20 Pac. 678.

<sup>38e</sup> 150 Cal. 195, 88 Pac. 899.

<sup>38f</sup> 153 Cal. 405, 95 Pac. 868.

<sup>38g</sup> 153 Cal. 451, 95 Pac. 882, 1 L. R. A., N. S., 1018.



upon the authority of the same case (*People v. McCue*), it was held that it is immaterial that probative facts are insufficient to establish the ultimate fact upon which the judgment is based, if such facts are not inconsistent with such ultimate fact, and the latter fully supports the judgment.

The question here under consideration is not one of contradictory findings. That is treated in another place.<sup>32h</sup> It is fundamentally a question as to whether the finding of probative or the finding of the ultimate fact is the recognized finding of the court. The ultimate fact is always, and under all conditions, the official finding, and while it may be attacked as unsupported, and even discredited, and the judgment reversed, such attack cannot be made otherwise than in the manner prescribed by the code.<sup>32k</sup> Its character as a finding may possibly be stripped from it. This has been sometimes suggested, and possibly it has been actually done. In all such cases, however, this is not the result of inconsistencies between two findings, one of a probative and the other of an ultimate fact; but it is the result of a conclusion that the finding of probative facts is the actual and official finding, and the so-called finding of ultimate fact in reality a conclusion of law.<sup>32</sup>

<sup>32h</sup> See subdivision 5, below. If the probative facts found are necessarily in conflict with the finding of an ultimate fact, and it appears that the latter is in truth a finding of fact and not a conclusion of law, the conflict will be treated as a case of contradictory findings, and it may be that the finding of probative facts will, in the end, prevail.

<sup>32k</sup> In *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740, quoting from *Smith v. Acker*, 52 Cal. 217, the court said: "This point [the question whether an ultimate fact which has been found can be overcome by a finding of probative facts] could only have been made on motion for new trial, or on appeal on a statement or bill of exceptions specifically pointing out the deficiencies in the evidence." In other words, the opposing party must be allowed to show what the evidence was, and is not concluded by the finding of probative facts."

So in *Sharp v. Bowie*, 142 Cal. 462, 76 Pac. 62, the court said:

" . . . But it has been held by this court that findings of probative facts

will not, in general, control, limit, or modify the finding of the ultimate fact, and that although the finding of probative facts from which the ultimate fact conclusively follows is sufficient, yet when the ultimate (the issuable) fact is found no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the principal finding. In such case the only remedy of the party injured by the principal finding is to move for a new trial on the evidence."

<sup>32</sup> In at least one early case (*Warder v. Enslen*, 73 Cal. 291, 14 Pac. 874; and see *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247) it was held that where there is a discrepancy between specific findings of fact and findings that are general in their nature, the former must control. This was upon the authority of *Hidden v. Jordan*, 28 Cal. 301, where it was said: " . . . If a discrepancy exist, the more specific findings of particular facts must control." As will hereafter more particularly appear, contradictory findings can have no other

result than to neutralize one another, unless they can be reconciled and harmonized. To hold, therefore, that either one of two contradictory findings should be allowed to overcome the other, without considering whether the one or the other supports the judgment, is to deny the rule as to contradictory findings. The only escape from this dilemma is to accept the finding of the ultimate fact as a conclusion of law, and this was no doubt what the court meant in the two cases, and all others of like description, cited.

There is a line of cases which seems to support the rule stated in *Hidden v. Jordan*, but, upon searching analysis, the most favorable conclusion is a doubt as to whether the finding of ultimate fact under investigation in each was not in reality a conclusion of law. The first of these cases is *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474, where, with reference to the ultimate fact of dedication for public use, there was a finding as follows: "By the acts, facts, and matters above found, said premises were by said parties dedicated," etc. This was denominated a "conclusion of fact," and was apparently assumed to be a finding of an ultimate fact. It was wholly unsupported "by the acts, facts, and matters above found," and the court said:

"It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so *where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts*. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed."

So in *Geer v. Sibley*, 83 Cal. 1, 23 Pac. 220, there was a similar ruling. So in *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922, the find-

ing of ultimate fact was actually incorporated in the conclusions of law, and the appellate court did not determine the question of its true character in response to the contention of the respondent that it was a finding of an ultimate fact, but reversed the judgment on the ground that "a general finding, drawn as a conclusion from facts previously found, cannot stand if the specific facts do not support it," citing *People v. Reed* and *Geer v. Sibley*, *supra*. The court treated the question as to whether it was a finding or a conclusion of law as indifferent. If it was the latter, it was unsupported, and the judgment, as well. If the former, the same result followed from the authority of the cases cited. The same view was taken in *Re Smith*, 108 Cal. 115, 40 Pac. 1037; and in *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190, the finding in question was also included in the "conclusions of law," and the court followed the above authorities.

In none of these cases was the character of the finding as such unequivocally determined. In the last three, there was little or no doubt but that it was a conclusion of law. The court has often held that there must be a finding of the ultimate fact in controversy; and if not expressly found it must follow, or be implied, as a matter of law, from the findings of probative facts which are made. So it has been held that a judgment rests partly upon findings of ultimate facts and partly upon findings of probative facts. *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040. But this does not relieve the court of its duty with respect to the making of findings of ultimate facts; for in such a case, as in others, the probative facts must suggest inevitably the ultimate fact in issue, and if it does not, a fatal error has been committed. The above decisions are to be reconciled with this essential principle only upon the theory that the so-called ultimate fact was in reality a conclusion of law; or, the findings of probative facts, so called, were in reality findings of ultimate facts, and in themselves sufficient to sustain a judgment, and the finding of ultimate fact was erroneously made. In the latter event

the question would be one of contradictory findings, as to which see subdivision 5, below.

A general finding includes findings of all necessary facts tending to support it. *Gardenhire v. Gardenhire*, 2 Okl. 484, 37 Pac. 813. A finding of ultimate facts includes a finding of all probative facts necessary to sustain it. *Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374.

Where the questionable finding is supported by other findings, it is of no consequence whether it is a finding of an ultimate fact or a conclusion of law. *Snyder v. Emerson*, 19 Utah, 319, 57 Pac. 300.

*Facts and Conclusions of Law.*—As has been stated (see subdivision 1, above) it is sufficient if facts are stated in findings in the same way they are stated in pleading. And, in view of this, it may be of service to give some of the decisions in relation to facts and conclusions of law in pleadings.

In trover for sheep an allegation that the defendant took the sheep *unlawfully* is a mere conclusion of law. *Triscony v. Orr*, 49 Cal. 612; *Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129.

In an action to set aside a judgment an averment that "no notice was given of said proceedings *as required by law*" is not an averment of a fact, but of a conclusion of law. *Stokes v. Geddes*, 46 Cal. 17. An allegation that the board of supervisors "duly made and passed a resolution" is a sufficient averment of a fact, the word "duly" being treated as surplusage. *Et per curiam*: "Such words as 'duly,' 'wrongfully,' and 'unlawfully,' so frequently used in pleading might better be omitted. They tender no issue, and serve only to detract from the logical directness and simplicity of statement which ought always to be observed in a pleading." *Miles v. McDermott*, 31 Cal. 270. And the same may be said of the use of the word "fraudulently." An allegation of fraud in general terms presents no issuable fact. It is a mere conclusion of law. *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *People v. Neil*, 91 Cal. 465, 27 Pac. 760. And such words and phrases are not treated as surplusage, as the

word "duly" in the above-cited case. An allegation "that the board had no authority or jurisdiction to order the work to be done," is a conclusion of law. *Spaulding v. Wesson*, 84 Cal. 141, 24 Pac. 377. In an action on a contract for the payment of money, an averment that the sum "is now due" is a mere conclusion of law, and will not support a judgment by default. *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264. See, also, *Roberts v. Treadwell*, 50 Cal. 520; *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891. But an averment that the plaintiff "made due demand" was held to be sufficient, in the absence of a special demurrer, as an averment that plaintiff first offered to account. *Hill v. Haskin*, 51 Cal. 175. So an averment that "due notice of said award" was published, includes the idea that the award was published by order of the board of supervisors. *Himmelman v. Haskell*, 46 Cal. 66. An allegation that plaintiffs were "lawfully entitled to the possession of the premises" is a mere conclusion of law. *Payne v. Treadwell*, 16 Cal. 220, overruling *Godwin v. Stebbins*, 2 Cal. 103. In an action to foreclose a mechanic's lien a denial "that the plaintiff *has any lien*" is a denial of a mere conclusion of law, and raises no issue. *Bradbury v. Cronise*, 46 Cal. 287, 9 Morr. Min. Rep. 366. An averment in an answer that the plaintiff's claim is *barred by a discharge in insolvency* is a mere conclusion of law. *Christy v. Dana*, 42 Cal. 174. In an action to foreclose a mortgage, an averment that certain defendants took the land "subject to the mortgage" is a mere conclusion of law and need not be denied. *Wormouth v. Hatch*, 33 Cal. 121. In an action against a sheriff and the sureties on his bond, an averment as to the sureties that they were "securities" on the bond is but of a conclusion of law, and does not make up for the absence of an averment of the execution of the bond. *Ghirardelli v. Bourland*, 32 Cal. 585. A complaint which states that plaintiff rendered services to the defendant to the amount of three thousand two hundred dollars, "and that the defendant thereby became and is liable to pay the said sums," does not state a cause of action. *Miner v. Solano*

County, 26 Cal. 115. An allegation that an ayuntamiento "had full power and authority" to make a mortgage is a mere conclusion of law. *Branham v. Mayor of San Jose*, 24 Cal. 585. A general averment that a party *has used diligence* is insufficient. *Williams v. Price*, 11 Cal. 212. An averment that a party will sustain *irreparable injury* is not sufficient in a complaint for an injunction. *Branch Turnpike Co. v. Yolo County*, 13 Cal. 190. An averment that defendant "had acquired all the interest of said Morgan in the contract and rights flowing therefrom" is a good averment of the assignment of the contract as against a general demurrer. *Stearns v. Martin*, 4 Cal. 227. An averment in an answer that the goods were purchased "on credit," and that such "term of credit" had not expired, is a mere conclusion of law. *Levinson v. Schwartz*, 22 Cal. 229. It is not sufficient to state in a pleading that an assessment "is unjust, disproportionate and unequal" without stating wherein it is so. *Guy v. Washburn*, 23 Cal. 111. In an action for the amount of a license an averment that "by virtue of the provisions of a certain ordinance passed, etc., . . . the defendant was and is required to take out a license," is not a good averment of the ordinance. *Sacramento v. National Gold Bank*, 51 Cal. 504. An averment that a party had lost his rights "by a failure to comply with the rules, regulations, and customs" of a mining district without stating what those rules are is too loose and vague. *Dutch Flat Co. v. Mooney*, 12 Cal. 534, 6 *Morr. Min. Rep.* 303; but compare *Coleman v. Clements*, 23 Cal. 245, 5 *Morr. Min. Rep.* 247. An averment that "by reason of some defect in the deed or acknowledgment" a mortgage is not available as security is too general. *Hunt v. Waterman*, 12 Cal. 301. An averment that claims were rejected "without right and against facts" is a mere conclusion of law. *San Luis Obispo v. Gage*, 139 Cal. 398, 73 *Pac.* 174.

It is not to be forgotten that the supreme court has held, and that it is a well-established principle of the law, that the context may determine the fact whether an allegation or a

finding is a fact or a conclusion of law. *Levins v. Rovegno*, 71 Cal. 273, 12 *Pac.* 161; *Hill v. Finigan*, 77 Cal. 267, 11 *Am. St. Rep.* 279, 19 *Pac.* 494; *Lataillade v. Orena*, 91 Cal. 565, 25 *Am. St. Rep.* 219, 27 *Pac.* 924; *Duff v. Duff*, 101 Cal. 1, 35 *Pac.* 437. In *Duff v. Duff*, 101 Cal. 1, 35 *Pac.* 437, it was said that the context determined that ownership referred to was a mere conclusion of law. Also, to same effect, see *Weidenmueller v. Stearns et. Co.*, 128 Cal. 623, 61 *Pac.* 374. "Ownership" is sometimes treated as a conclusion of law and sometimes as a fact. Thus an averment that "defendant became vested with an absolute title in fee simple to said premises" is a conclusion of law, and its place is among the conclusions of law. *Hunter v. Milam*, 133 Cal. 601, 65 *Pac.* 1079; and see *Lawrence v. Johnson*, 131 Cal. 175, 63 *Pac.* 176, as to an averment of ownership of a mortgage. So where the complaint averred title to a promissory note, alleging plaintiff to be the "owner and holder," it was held to be a mere conclusion of law, but, under the circumstances, was treated as surplusage. *Kennedy v. Construction Co.*, 123 Cal. 584, 56 *Pac.* 457. On the other hand, an averment that "during the cohabitation of said parties he was possessed of certain real estate, their common property," is a sufficient averment of the character of the property in the absence of a demurrer. *Gimmy v. Doane*, 22 Cal. 635; but compare *Dye v. Dye*, 11 Cal. 163. It is sufficient to aver in general terms that the plaintiff is a corporation incorporated under the laws, etc. *California Nav. Co. v. Wright*, 6 Cal. 258, 65 *Am. Dec.* 511. An allegation that plaintiff is "the owner" of land is a good allegation of seisin in fee. *Garwood v. Hastings*, 38 Cal. 216; *Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 416; *Levins v. Rovegno*, 71 Cal. 273, 12 *Pac.* 161; *Turner v. White*, 73 Cal. 299, 14 *Pac.* 794; and see, also, *Payne v. Treadwell*, 16 Cal. 220; *Murphy v. Bennett*, 68 Cal. 528, 9 *Pac.* 738, and cases cited; and see, also, *Daly v. Sorocco*, 80 Cal. 367, 22 *Pac.* 211, and cases there cited. That ownership or (in technical language) seisin of real property is a fact that may be

pleaded, proved and found as a material ultimate fact in all cases involving the title to real property, is unquestionable in this state." *Gavin v. Swain*, 113 Cal. 324, 45 Pac. 677; and see *Corea v. Higuera*, 153 Cal. 451, 95 Pac. 882. An averment that plaintiff is "the owner" of the property is sufficient in replevin. *Grewell v. Walden*, 23 Cal. 165; look at *Moore v. Murdock*, 26 Cal. 514; *Ham v. Henderson*, 50 Cal. 367; *Rollins v. Forbes*, 10 Cal. 299. "That Elizabeth Zink has no right, title, interest, claim or lien of, in, or to or against any of the land or premises" was held a finding of fact. *Dam v. Zink*, 112 Cal. 91, 44 Pac. 331.

As above suggested, averments of *fraudulent* acts or acts *fraudulently* done are usually mere conclusions, and not averments of fact. Thus it has been held that an allegation that plaintiff "did thereby defraud his other creditors" by making certain specified payments was a conclusion of law, and insufficient in the absence of a statement of the facts alleged to constitute the fraud. *Dyer v. Bradley*, 89 Cal. 557, 26 Pac. 1103. And the same may be said of the use of such words as "wrongfully" and "unlawfully." A finding that "all of said payments were made by said treasurer wrongfully and without right or authority, and in violation of his duty as such treasurer," is a mere conclusion of law. *Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556. An averment in the pleadings in the same language would also be held insufficient, as a matter of course. An averment that "on December 11, 1890, defendant did oust and eject plaintiff from the possession of said lot 5, block 3, and has ever since wrongfully and unlawfully withheld said possession from plaintiff," was, however, held a proper finding, although stated as a conclusion of law, and the words "wrongfully and unlawfully" were regarded as mere harmless surplusage. *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14. The test would seem to be that if there is a sufficient averment of fact without using the words referred to, they will be treated as surplusage. Otherwise, they will be regarded as conclusions.

An averment that a sum specified is "chargeable to the city and payable out of its municipal treasury" is a mere conclusion of law. *McBean v. San Bernardino*, 96 Cal. 183, 31 Pac. 49. A finding that "plaintiff did not rescind said sales, or either of them," was said to be an ultimate fact and not a conclusion of law. *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872. But it is probable that the court so determined from the context, at least in this particular case, and therefore, it would not be safe to trust to its always being so determined. An averment that "the level at which plaintiff had been accustomed to receive his water was not established by defendant as the level at which plaintiff had the right to receive the water, and that the plaintiff had no prescriptive or other right to receive water from said canal at any other level than the bottom of said canal," was held to be a finding of ultimate facts and not a conclusion of law. *Weidenmueller v. Stearns etc. Co.*, 128 Cal. 623, 61 Pac. 374. An averment that plaintiff succeeded to and became and is the owner of a half interest, etc., is a conclusion of law. *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999. An averment that a certain road or street is a public highway is a statement of fact. *Bequette v. Patterson*, 104 Cal. 282, 37 Pac. 917; *People v. McCue*, 159 Cal. 195, 88 Pac. 899.

"Whether a cause of action is barred by the statute of limitations is, like ownership, a mixed question of law and fact, and may be either according to the manner in which it is presented. As a recital in the nature of a right or a defense, it is a fact, while as the determination of an issue in the case pending before the court, it is a conclusion of law. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077. It does not cease to be a conclusion of law by reason of being found among the findings of fact (as will appear more particularly hereafter), and is to be regarded according to its character notwithstanding its misplacement." *Towle v. Sweeney*, 2 Cal. App. 29, 83 Pac. 74; and see, also, *Savings Bank v. Burnett*, 106 Cal. 514, 39 Pac. 922;

(c) It often happens that findings of fact are stated as conclusions of law. But this does not prevent the finding from being accepted as a good finding of fact. Thus, in *Jones v. Clark*,<sup>40</sup> the supreme court said: "The court finds several facts which, in the opinion of the court, tend to establish the fact of ratification, and then finds as a conclusion from them that the note has been fully ratified and confirmed by the company. This was the ultimate fact to be ascertained, and it is none the less a finding of fact because it is stated as a conclusion from the other stated facts." So, in *Breuner v. Insurance Co.*,<sup>41</sup> which was an action upon a policy of insurance, the supreme court said: "The court found as a conclusion of law 'that before said fire said building had become a fallen building within the terms of the policy set forth in plaintiff's complaint, and that the falling down was not the result of a fire.' This finding, although stated among the conclusions of law, is the finding of an ultimate fact."

*Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Hamilton v. Delhi Mining Co.*, 118 Cal. 148, 50 Pac. 378. And see *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161, for an elaborate distinction between facts and conclusions in general.

A general finding of "adverse possession" was, in *Clark v. Bundy*, 29 Or. 190, 44 Pac. 282, held insufficient as a finding of fact, the court holding that the facts tending to the general finding of "adverse possession," such as that the possession was open, notorious, etc., were necessary to be found. The implication was that instead of a finding it was a conclusion of law.

A finding that plaintiff and his predecessors have been and that plaintiff is the owner and entitled to the possession of the premises in controversy is a finding of an ultimate fact and not a mere conclusion of law, and the mere fact that it was entered among the conclusions of law does not make it one. *Curtis v. Boquillas et al.*, 9 Ariz. 62, 76 Pac. 612.

On the other hand, a finding that money was "paid by plaintiff to defendant as legatee," included in the conclusions of law, is a conclusion of law, and cannot be treated as a finding of fact. *Scott v. Ford*, 45 Or.

531, 78 Pac. 742, 80 Pac. 899, L. R. A. 469.

A finding that a certain course of conduct was negligent is a conclusion of law. *Warren v. Robison*, 25 Utah 205, 70 Pac. 889.

A conclusion that a valuation premises in a tax suit was fair and just may be treated as a finding of fact. *Coolidge v. Pierce Co.*, 28 Wash. 95, 68 Pac. 391.

In the following decisions the distinction between findings and conclusions was drawn:

Conclusions of law: *Brauer v. Portland*, 35 Or. 471, 58 Pac. 861, 100 Pac. 117, 60 Pac. 378; *Houtz v. Union Pac. Co.*, 33 Utah, 175, 93 Pac. 439; *Hailey v. Riley*, 14 Idaho, 48, 95 Pac. 986, 17 L. R. A., N. S., 80; *Darling v. Miles (Or.)*, 111 Pac. 70; *Henderson v. Reynolds (Or.)*, 111 Pac. 979; *In re Blake's Estate*, 111 Cal. 448, 108 Pac. 287; *Gay v. Young Men's etc. Inst. (Utah)*, 107 Pac. 23.

Findings of fact: A finding that C. was "duly" appointed to an office is not a conclusion of law. *Snyder v. Emerson*, 19 Utah, 319, 57 Pac. 300; *Utah National Bank v. Nelson (Utah)*, 111 Pac. 907.

<sup>40</sup> 42 Cal. 180, 11 Morr. Min. Rep. 473.

<sup>41</sup> 51 Cal. 101, 21 Am. Rep. 703.

*Edwards v. Sonoma Valley Bank*,<sup>42</sup> the supreme court said: "The court below found as a fact (although the finding is among conclusions of law), that there was not an immediate delivery or continued change of possession by and from A. S. Edwards to Parazthy. We cannot see that this finding was not sustained by the evidence." And upon the same principle where the court in a written opinion containing a statement of the facts it was stated as a finding.<sup>43</sup>

It is the fact that findings of fact are misplaced and appear under the head of "conclusions of law" ground for a reversal.<sup>43a</sup>

It is believed, however, that while (as in the above cases) it may be apparent that statements placed among the conclusions are really of facts, yet that where the statement is of such character that it is not clear that it is of a fact, the circumstance that it is stated as a conclusion of law should prevent its being considered as a finding of fact.<sup>43b</sup> And the supreme court has

more than once expressed its reluctance to take doubtful statements from the context where they were placed by the judge of the trial court, and treat them as of a different character. Full priority should, if possible, be given the declaration of such a judge, who, by incorporating the declaration in the conclusions, for example, signifies that he has reached the result by the application of the law to the facts. At least some weight should be given his action unless the error is clearly a misprision.<sup>43c</sup>

It would seem to be the guiding rule in those cases, more particularly, where it is not always easy to determine whether the statement is a finding of fact or a conclusion of law, and its character is determined by a reference to the context, which is to control in some cases, as in the case of ownership.<sup>43d</sup> But these cases themselves illustrate the principle involved.<sup>43e</sup>

<sup>42</sup> 59 Cal. 148.

<sup>43</sup> *Meek v. McClure*, 49 Cal. 623. An opinion is something very different from a finding. See cases in subdivision 4, below.

<sup>43a</sup> See *Burton v. Burton*, 79 Cal. 21 Pac. 847; *Millard v. Legion Honor*, 81 Cal. 340, 22 Pac. 864; *Gur v. Heard*, 90 Cal. 221, 27 Pac. 198; *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14; *Santa Paula Lumber Works v. Peralta*, 113 Cal. 38, 45 Pac. 168; *Hamilton v. Delhi* etc. 118 Cal. 148, 50 Pac. 378.

Also, *Curtis v. Boquillas etc. Co.*, 9 Ariz. 62, 76 Pac. 612; *Gay v. Young Men's etc. Inst. (Utah)*, 107 Pac. 237.

<sup>43b</sup> See in this regard *Figg v. Mayo*, 39 Cal. 262.

<sup>43c</sup> See *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190.

<sup>43d</sup> See *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161; *Turner v. White*, 73 Cal. 299, 14 Pac. 794; and see note 39, *supra*.

<sup>43e</sup> See *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Foot v. Murphy*, 72 Cal.

3. *The Findings Should not Consist of Mere Statements of Evidence.*—Mere statements of the evidence are of no validity, either in pleadings<sup>44</sup> or findings. It is obviously of no use to send up a part of the evidence in a finding. For the supreme court cannot know that the omitted evidence did not countervail the part sent up. If, therefore, any part of the evidence is to be sent up the whole must be, or at least all that is material. But to incorporate all the material evidence in the findings would be to turn them into a mere transcript of the evidence, and would compel the supreme court to make its own findings from the evidence sent up, and so to act as a court of original jurisdiction. Accordingly, it is well settled that a mere statement of the evidence cannot be accepted as a finding.<sup>45</sup> Nor does a statement that no evidence was given upon any point amount to a finding upon it.<sup>46</sup> But as above shown, a finding of probative facts from which the ultimate fact necessarily follows is sufficient.<sup>47</sup>

104, 13 Pac. 163; *Hunter v. Milam*, 133 Cal. 601, 65 Pac. 1079; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Kidwell v. Ketter*, 146 Cal. 12, 79 Pac. 514; and cases cited in previous notes, 40 et seq. Also, *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

<sup>44</sup> See cases cited in note 48, below.

<sup>45</sup> See *Heredink v. Holton*, 16 Cal. 103; *Hurlburt v. Jones*, 25 Cal. 225; *Hidden v. Jordan*, 28 Cal. 301; *Pico v. Cuyas*, 47 Cal. 174; *Rice v. Inskeep*, 34 Cal. 224; *Packard v. Johnson*, 57 Cal. 180; *Knight v. Roche*, 56 Cal. 15; *Hibernia etc. Soc. v. Moore*, 68 Cal. 156, 8 Pac. 824; *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799. And it is well understood that the findings are not the place for the evidence. *Ornbaum v. His Creditors*, 61 Cal. 455.

<sup>46</sup> *Campbell v. Buckman*, 49 Cal. 362; and see *Speegle v. Leese*, 51 Cal. 415.

<sup>47</sup> See subdivision 2 above.

*Averments of Evidence in Pleading.*—As has been shown (see subdivision 1, above), it is sufficient if facts are stated in findings in the same way they are stated in pleadings. And in view of this it may be of service to give some of the decisions in relation to averments of evidence in pleading.

An allegation in a complaint in partition that one of the parties "ex-

cuted an instrument in writing, record in Book A of Deeds, Maricopa County Records, page 257, purporting to convey to John Tustin a specific tract of one hundred and sixty acres of land by metes and bounds, and being portion of said rancho," is an allegation of mere evidence which might be stricken from the complaint and must be regarded as surplusage. *Gates v. Salmon*, 46 Cal. 361. Allegations of conversations which took place at the time a paper was signed and of assertions and admissions of parties concerning their rights or liabilities are matters of evidence mere and should be stricken out on motion. *Bowen v. Aubrey*, 22 Cal. 566. Ejectment averments concerning title or deraignment of title are mere evidence. *Coryell v. Cain*, 16 Cal. 567, 5 Mo. Min. Rep. 226, and need not be denied. *Siter v. Jewell*, 33 Cal. 92. In an action to set aside certain conveyances as fraudulent it is useless to give a history of the manner in which the plaintiff acquired his title. But it is proper to give a history of the alleged fraudulent conveyances as part of the scheme to defraud plaintiff. *Perkins v. Center*, 35 Cal. 713. In trover of sheep where the plaintiff relies on the transfer of the sheep to him, who then transferred the defendant claims to be fraudulent, allegations in the answer respecting the possession and p-



4. *The Facts Should be Stated Directly and Positively Without Argument or Hypothesis.*—It has already been shown that the findings should be of the facts, avoiding conclusions of law on the one hand and statements of mere evidence on the other. And the facts should be stated directly and positively, without admixture of hypothesis or argument. This has several times been laid down by the court. Thus, in *Hidden v. Jordan*,<sup>49</sup> Sawyer, J., delivering the opinion, said: "In many instances the finding is an opinion rather than a finding of facts and conclusion of law. In it the facts found, a rehearsal of evidence, without stating the fact supposed to be proven by it, conclusions of law and argument, are all mixed up in such a way that it is difficult, if not impossible, to tell what the ascertained facts of the case are. The finding of facts and conclusions of law contemplated by the statute is something different from an opinion. The finding should consist of a concise, distinct, pointed and separate statement of each specific, essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found. This is the finding contemplated by the statute which is to be annexed to and form part of the judgment-roll. If an opinion is written, and we are always glad to find one in the transcript, it should be entirely separate from the finding and filed among the papers in the case." So in *James v. Williams*,<sup>50</sup> Rhodes, J., delivering the opinion, said: "The opinion of the judge who tried the cause, stating the evidence or his analysis of it, or some portion of either, coupled with the reasons for his rulings, is always valuable and generally

tended sale of the sheep, the place where they were, and the person who had charge of them, are mere matters of evidence. *Moore v. Murdock*, 26 Cal. 514. In an action of replevin for wood the ultimate fact to be averred is the ownership of the wood. Averments of the ownership of the land from which it was cut are mere evidence. *Grewell v. Walden*, 23 Cal. 165. Upon a question of the statute of limitations, averments in the complaint to the effect that the defendants paid interest upon the note, and indorsed such payment upon the note, and took receipts therefor, and made entries in their books of such pay-

ments, are at most averments of evidence to prove the new promise or acknowledgment, and need not be denied. *Wormouth v. Hatch*, 33 Cal. 121. An allegation that the defendant "assumed to exercise and did exercise acts of control over and possession of portions of said rancho" is not equivalent to an averment that he had actual possession of said rancho or any part of it. *Brennan v. Ford*, 48 Cal. 7.

<sup>49</sup> 28 Cal. 301. And see *Victor etc. Co. v. Bank*, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72.

<sup>50</sup> 31 Cal. 211.

of great assistance to the appellate court in their examination of the questions arising upon motion for new trial or bill of exceptions or statement on appeal; but neither the opinion nor the evidence form a part of the findings of fact, though it may happen to be incorporated therein. The findings in this case are liable to the objections noticed in the opinion of Mr. Justice Sawyer in *Hidden v. Jordan*." So, in *McClory v. McClory*,<sup>51</sup> Sanders J., delivering the opinion, said: "It is a gross misnomer to call this a 'finding of facts' within the meaning of the Practice Act; it is merely an opinion by the judge, in which he states his reasons why, in his judgment, the finding of facts ought to be against the plaintiff and in favor of the defendants. We cannot regard it as a finding; to do so would be to countenance a practice which we have repeatedly denounced as wholly at variance with the meaning and intent of the Practice Act in relation to findings (*Hidden v. Jordan*, 28 Cal. 301; *Jones v. Block*, 30 Cal. 227; *James v. Williams*, 31 Cal. 211.)" So, in *Figg v. Mayo*,<sup>52</sup> Crockett, J., delivering the opinion, said: "We have had occasion very often to animadvert upon the practice of blending together the findings in a confused mass the facts found and the conclusions of law. But, from the example now before us, our previous admonitions appear to have had but little effect in correcting a most pernicious practice. In such cases, when the facts are obscurely found, or are so blended with legal conclusions as to render it doubtful whether the facts are only hypotheticals stated, we must disregard it as a finding of fact." And so in other cases.<sup>53</sup> Findings must not be uncertain,<sup>54</sup> argumentative,<sup>54a</sup> nor alternative in form.<sup>54b</sup>

5. *The Findings Should not be Contradictory*.—It is manifest that if two findings are in direct contradiction of each other, it is impossible for the appellate court to know which states the truth, and the case is no better than if the issue had been left unfound. Accordingly, it has been held that contradictory find-

<sup>51</sup> 38 Cal. 575.

<sup>52</sup> 39 Cal. 262.

<sup>53</sup> *Bryan v. Maume*, 28 Cal. 238; *Duryea v. Burt*, 28 Cal. 569, 11 Morr. Min. Rep. 395; *Jones v. Block*, 30 Cal. 227; *Mathews v. Kinsel*, 41 Cal. 512.

<sup>54</sup> *Kelly v. McKibbin*, 53 Cal. 13; but see *S. C.*, 54 Cal. 192; *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574. As

to uncertain verdicts, see section 2 *ante*.

<sup>54a</sup> See *People v. Reed*, 81 Cal. 15 Am. St. Rep. 22, 22 Pac. 4 and *Geer v. Sibley*, 83 Cal. 1, 23 Pac. 220.

<sup>54b</sup> *Estate of Benton*, 131 Cal. 4 63 Pac. 775.

ings will not support a judgment.<sup>55</sup> Findings, however, should be construed together<sup>56</sup> and reconciled, if possible, and if they contain no material contradictions or inconsistencies, they will be upheld.<sup>56a</sup> Where a finding of fact is susceptible of two constructions, one of which is supported by the evidence and the other is not, only that which is so supported will be considered.<sup>56b</sup> It matters not that the finding accepted is inconsistent with other findings and with the judgment.<sup>56c</sup> But the rule as to contradictory findings applies only to those which are material, and it is not reversible error where immaterial findings are contradictory.<sup>56d</sup>

Findings that are self-contradictory are said to be particularly obnoxious.<sup>56e</sup> Contradictory findings are sometimes said to be "against law."<sup>56f</sup>

6. *How Findings are to be Construed.*—As has been stated, findings must be construed with some reference to the way the facts are alleged.<sup>57</sup> And they must be construed together. "It is elementary that if findings of fact are reasonably susceptible of such a construction as will support the judgment, they must receive that construction rather than one that will not so support it."<sup>57a</sup> They must therefore not only be construed together,

<sup>55</sup> *Reese v. Corcoran*, 52 Cal. 495; *Manly v. Howlett*, 55 Cal. 94; *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574; *Kerns v. McKean*, 65 Cal. 411, 4 Pac. 404; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429; *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *Jackson v. Torrance*, 83 Cal. 521, 23 Pac. 695; *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490; *Dorsey v. Newcomber*, 121 Cal. 213, 53 Pac. 557; *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *McElligott v. Krogh*, 151 Cal. 126, 90 Pac. 823. As to when findings are contradictory, see *Barrante v. Garratt*, 50 Cal. 112; *Smith v. Acker*, 52 Cal. 217. As to contradictory verdicts, see section 235, *ante*. As to contradictory instructions, see section 123, *ante*.

<sup>56</sup> See subdivision 6, below.

<sup>56a</sup> *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429.

<sup>56b</sup> *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490.

<sup>56c</sup> *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490.

<sup>56d</sup> *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683.

<sup>56e</sup> *Jackson v. Torrance*, 83 Cal. 521, 23 Pac. 695.

<sup>56f</sup> See section 99, *ante*.

<sup>57</sup> See subdivision 1, subhead b.

<sup>57a</sup> *People v. McCue*, 150 Cal. 195, 88 Pac. 899. And see *Barthel v. Board of Education*, 153 Cal. 376, 95 Pac. 892; *Zihn v. Zihn*, 153 Cal. 405, 95 Pac. 863; *Corea v. Higuera*, 153 Cal. 451, 95 Pac. 882, 17 L. R. A., N. S., 1018.

That findings must all be construed together was held in *El Reno etc. Co. v. Jennison*, 5 Okl. 759, 50 Pac. 144; *Beaverhead Canal Co. v. Dillon etc. Co.*, 34 Mont. 135, 85 Pac. 880; *Cantwell v. Nunn*, 45 Wash. 536, 88 Pac. 1023. The findings must be liberally construed in support of the judgment. *Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

but must be so construed, if possible, to support the judgment rather than to destroy it. In *Murray v. Tulare Irr. Co.*<sup>57b</sup> the preme court held that findings must be construed together in harmony, if possible, so as to justify the conclusion reached by the court; and in another case<sup>57c</sup> it was said that "findings are to be liberally construed in support of a judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points, and unless the conflict is clear, and the findings incapable of being harmoniously construed, a judgment will not be reversed on the ground of a conflict in the findings." Again: "We do not think the court should strain the language of the findings to make out a case of conflict."<sup>57d</sup> And, "The findings of a case cannot be altogether detached from each other and considered piecemeal."<sup>57e</sup> If a particular finding be doubtful or obscure, inference may be had to the context for the purpose of ascertaining the meaning."<sup>58</sup> But the court has gone even further, and has held that "the findings of a trial court are to receive such construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inferences will be deemed to have been made by the trial court, and upon an appeal from that judgment, this court will not depart from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of defeating the judgment."<sup>59</sup>

<sup>57b</sup> 120 Cal. 311, 49 Pac. 563, 52 Pac. 586.

<sup>57c</sup> *Ames v. San Diego*, 101 Cal. 390, 35 Pac. 1005; and see *Paine v. San Bernardino etc. Co.*, 143 Cal. 654, 77 Pac. 659.

<sup>57d</sup> *Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; and *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053.

<sup>57e</sup> Or "dug up from the ruins of ancient cities at different epochs." *Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379.

<sup>58</sup> *Millard v. Hathaway*, 27 Cal. 119; *Kimball v. Lohmas*, 31 Cal. 154; *Polack v. McGrath*, 38 Cal. 666; *Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053;

*Heaton-Hobson etc. Offices v. A.* 145 Cal. 282, 78 Pac. 721; *Mitchell v. Hutchinson*, 142 Cal. 404, 76 Pac. 55; *Haight v. Haight*, 151 Cal. 90 Pac. 197; and see cases cited in note 59, below.

<sup>59</sup> See *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. B. A. 100; *Warren v. Hopkins*, 110 Cal. 500, 34 Pac. 986; *Krasky v. Wollpert*, 111 Cal. 338, 66 Pac. 309; *People's Bank v. Rickard*, 139 Cal. 285, 66 Pac. 858; *Ripperdan v. Weldy*, 140 Cal. 667, 37 Pac. 276.

The language of an equitable finding should be construed, if possible, to harmonize with the pleadings and to support the judgment. *Lock v. Manciet*, 10 Or. 166; *Brown v. Sabron*, 10 Nev. 217, 4 Morr. Rep. 673.

§ 243. **Conclusions of Law.**—The provision of the statute is that “the facts found and conclusions of law must be separately stated.”<sup>1</sup> The interpretation placed upon this language by most practitioners is that it is necessary to state the principles or rules of law which govern the decision as applied to the facts found, such principles or rules to be stated separately from the facts. In *Emeric v. Alvarado*,<sup>2</sup> Thornton, J., for the court said:

“The statute requires of the court in giving the decision, to state separately the facts found and the conclusions of law. We interpret this to require of the court to find the facts specially unmixed with the law, so that the judicial mind may see that the conclusion of law is a deduction of the law from the facts—and unmixed and ultimate facts—found.”

It is probable that this is what the provision means; but, if so, it is merely directory. For, if the judgment which is directed and entered is right upon the facts found, it makes no difference that it is not in accordance with the “conclusions of law” of the kind above mentioned. A judgment which is right will not be reversed because wrong reasons were given for it. This is a general rule, as is elsewhere shown,<sup>3</sup> and it has been held to apply in the case under consideration. Thus, in *Helm v. Dumars*,<sup>4</sup> Heydenfeldt, J., delivering the opinion, said: “Some of the conclusions of law attained by the court below may properly be complained of as erroneous, but a judgment which is right will not be reversed because it was rendered upon a wrong reason.” So, in *Haffley v. Maier*,<sup>5</sup> Baldwin, J., delivering the opinion, said: “The judgment was right on the undisputed facts, though a wrong reason was given for it. But we do not reverse for what we regard as bad logic, but for what we consider bad law.” The same point was decided in *Kidd v. Teeple*,<sup>6</sup> and in the recent case of *Davis v. Baugh*,<sup>6</sup> where it was contended that there should be a reversal because “the findings and conclusions of the court are inconsistent with each other,” McKinstry, J., delivering the opinion, said: “Where some of the conclusions of law in a decision are not properly drawn

<sup>1</sup> Section 633, Code of Civil Procedure; old Practice Act, sec. 180 (Laws 1851, p. 78).

<sup>2</sup> 64 Cal. 529, 2 Pac. 418.

<sup>3</sup> See section 284, *post*.

<sup>4</sup> 3 Cal. 454; and see *Blevins v. Freer*, 10 Cal. 172.

<sup>5</sup> 13 Cal. 13.

<sup>6</sup> 22 Cal. 255.

<sup>6</sup> 59 Cal. 568.

from the facts found, this is no ground for reversing the judgment, if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found. In such cases the minor conclusions are at most but errors—erroneous deductions which do not injure the party complaining of them.”

It follows from these decisions that if the “conclusions of law” which are ordinarily appended to findings cannot be differentiated from the written “opinion” of the trial judge, stating his reasons for deducing the judgment from the findings, which is sometimes appended to the papers in a case, such conclusions of law are unnecessary, and if so, they had better be omitted. But while it is true that the only useful purpose which “conclusions of law” serve is to inform the clerk of what judgment is to be entered,<sup>7</sup> and this purpose is fulfilled by a “conclusion” that the prevailing party “is entitled” to obtain relief (stating it) without giving any reasons whatever, and while the actual “conclusions of law” are always merged in and are superseded by the judgment,<sup>8</sup> no decision of the appellate courts has ever gone to the length of holding that the conclusions of law, as a legal deduction from the findings of fact, can be wholly dispensed with.

In *Butler v. Beach*,<sup>9</sup> the following conclusions of law, verbatim, “and as a matter of law resulting from the foregoing findings of fact, I do further find that the plaintiff is entitled to have recover of the defendant the sum of four thousand five hundred and ten dollars and seventy-five cents,”—was held to be sufficient.

So, also, was, “Let judgment be entered in accordance with the foregoing findings, in favor of the plaintiff, for the reasons

<sup>7</sup> A cause may be decided by simply filing the findings. No announcement from the bench or entry in the daily minute-book is necessary. And in such case the conclusions of law constitute the only order for judgment which is made. It is customary, however, to make the announcement from the bench as a convenient way of notifying the attorneys; and the clerk usually enters in his minutes an “order” in accordance with the announcement. This is so customary that

it is common to speak of such “order” as something necessary. But it has no place under the system of entering findings. Under that system “conclusions of law” constitute the order for judgment.

<sup>7a</sup> *Roberts v. Hall*, 147 Cal. 41, 100 Pac. 66; *Mentone Irr. Co. v. Reardon*, etc. Co., 155 Cal. 323, 100 Pac. 22; *L. E. A., N. S.*, 382, 17 Ann. 1222.

<sup>8</sup> 55 Cal. 28; and look at *Lytle v. Leimback*, 29 Cal. 139.

tion of the premises, and for his costs and disbursements in this action." <sup>aa</sup>

In *Blish v. McCornick* <sup>ab</sup> it was recited in the decree that findings of fact and conclusions of law had been filed, and in the findings, after setting forth the facts under seven subdivisions, there was added, "Upon the conclusions of law and the foregoing facts, the court finds that the plaintiffs have no cause of action herein against the defendants, and the defendants are entitled to a judgment against the plaintiffs for the costs of this action, taxed at \$——." This was held to be sufficient as a conclusion of law.

There is at least one decision to the effect that the supreme court will disregard erroneous conclusions of law, and direct entry of judgment in the trial court in accordance with the findings. <sup>ac</sup>

<sup>aa</sup> *Murphy v. Snyder*, 67 Cal. 451, 8 Pac. 2. See, also, *Rea v. Haffenden*, 116 Cal. 596, 48 Pac. 716, where it was held that the direction, "Let judgment and decree be entered accordingly," followed the findings and was a sufficient statement of the conclusions of law; and see *Miller v. Hicken*, 92 Cal. 229, 28 Pac. 339, where there was not even this much, and where the supreme court held that in a case where a conclusion as to constructive notice necessarily followed from the facts found, an express conclusion of law was immaterial. These cases seem to have been controlled by the rule that where the rights of the losing party are unaffected, and the judgment must have been the same in any event, errors or informalities which do not affect the substantial rights of the parties must be disregarded. See section 475, California Code of Civil Procedure.

A conclusion that the plaintiff is entitled to judgment against the defendant for the sum found due and the foreclosure of his lien upon the property described, and to have the same sold to satisfy the judgment, is a sufficient conclusion. *El Reno etc. Co. v. Jennison*, 5 Okl. 759, 50 Pac. 144.

<sup>ab</sup> 15 Utah, 188, 49 Pac. 529.

<sup>ac</sup> *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979. In *Gaffney v. McGrath*, 11 Wash. 456, 39 Pac. 973,

it was held that where the issue is not complicated, and the facts found lead to but one conclusion, the conclusions of law need not be separately stated. This is doubtful law, however, to say the least.

The supreme court of Idaho, in *Dukes v. Commissioners*, 17 Idaho 736, 107 Pac. 491, thus construed section 4407, Revised Codes of that state: "Section 4407, Revised Codes, provides: 'In giving the decision the facts found and conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.' Under this statute the court makes its findings and conclusions of law, and bases the judgment upon the same; but there is nothing in the statute requiring that the judgment should be written upon a separate piece of paper from the findings, and we are not advised of any reason why this should be required. As long as the court complies with the statute by making findings and conclusions of law, and states them separately, followed by a judgment based thereon, it can make no difference whether they are written on one or two different pieces of paper."

In *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256, it was held that the provision as to the separate statement of the findings and conclusions was complied with where they were incorporated under separate titles, and that

Such a practice, if it were universal, would dispense with the special procedure provided in sections 663 and 663a, Code of Civil Procedure, at least so far as those sections relate to erroneous conclusions of law. But the court will disregard statements in the conclusions of law which are only surplusage.<sup>64</sup>

The rule of separate statement applies where the action is dismissed equally as in other cases.<sup>65</sup> But it is restricted, at least in some jurisdictions, to actions at law and not to equitable or probate proceedings.<sup>66</sup>

**§ 244. Effect of Findings.**—Findings are conclusive if not attacked in the mode prescribed by the statute. In the early history of the court it was supposed that this rule did not apply to equity cases. It was at that time supposed that, as under the old chancery practice, an appeal took up the whole case, and that the appellate court examined the evidence as if it were a court of original jurisdiction. But this theory was soon exploded, and the rule that findings were conclusive in all cases unless attacked in the modes pointed out by statute became well settled. The subject has been considered in another place.<sup>1</sup>

The supreme court will not disturb the findings of fact if there be a substantial conflict in the evidence.<sup>2</sup>

**§ 245. Preparation of Findings.**—With reference to the proper manner of preparing findings, under the system of implied findings, Sanderson, J., delivering the opinion in *Tewksbury v. Magraff*,<sup>1a</sup> said:

“The practice which prevails to a very considerable extent, if not universally, of allowing the successful party to draw the find-

it was not necessary to bring them under separate covers.

Where findings and conclusions were written on the same page, but clearly segregated by separate statement and paragraph, they were separately stated. *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361.

In *Garr-Scott Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867, it was held that the provision requiring the separate statement of findings and conclusions is mandatory.

Upon a suit to have the holder of the legal title adjudged a trustee, founded upon a contract, a finding

that no enforceable contract existed between the parties was held to be a combined finding and conclusion, and not sufficient. *Chadwick v. Arnold*, 34 Utah, 48, 95 Pac. 527.

<sup>64</sup> *Thompson v. Hays*, 24 Utah, 275, 67 Pac. 670.

<sup>65</sup> *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173.

<sup>66</sup> In *re Farnham's Estate*, 41 Wash. 570, 84 Pac. 602; *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361.

<sup>1</sup> See section 96, *ante*.

<sup>2</sup> See section 288, *post*.

<sup>1a</sup> 33 Cal. 237.



ings after the judgment of the court has been announced, does not favor the end which a finding is designed to accomplish. To be of any use under the operation of section 180, as amended in 1866, the finding should contain all the facts disclosed by the evidence, which, in the judgment of counsel on both sides, have any bearing upon the question as to what the judgment should be. Unless it does, it is no better than a general verdict, and wholly fails to accomplish the object intended, which is to obviate the necessity of a motion for a new trial, and a preparation of a statement of the evidence preliminary to an appeal. In a vast majority of cases there would be no occasion for a motion for a new trial, and as incidental thereto, for the trouble, labor, and expense of getting up a record upon which the motion is to be heard, if the findings were what they were designed to be, and what they ought to be; for in nine cases out of ten, where the trial is by the court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this court in any form. Every such case ought to come here upon the judgment-roll. But under the present practice in getting up the findings, serious obstacles are thrown in the way, and the end of a finding often defeated, and therefore a motion for a new trial attended by delay, labor, and expense made necessary. Instead of announcing its judgment, and then, if findings are demanded by the unsuccessful party, directing the successful party to draw them, it would be a better practice for the court to first ask counsel upon both sides if they desire findings; and if they do, reserve its judgment and direct each side to prepare and submit such questions of fact as they desire to have found. This being done, the court should answer from the evidence every question submitted, and then, having first determined and settled all the facts, pronounce its judgment, and not before. By such a course a defective finding will rarely happen, or a motion for a new trial be required. If exceptions have been taken to the ruling of the court upon demurrers to evidence, they can be embodied in bills of exceptions and brought up for review in that form. If, however, the practice of first announcing the judgment and preparing the findings afterward is followed, the court ought to direct the losing party to draw the findings; for the successful party under the operation

of the act in question has no motive to make the findings, in first instance, at least, which they ought to be. Under the former practice the successful party was primarily interested in having the findings full and complete for the purpose of sustaining judgment, and it was therefore proper that he should be allowed to draw them; but under the present practice the conditions are inverted, and the losing party has become primarily interested in the fullness and completeness of the findings, and by parity of reasoning, he should be allowed to draw them. The course suggested, however, is in all respects the better practice."

The foregoing expression of opinion was approved in several subsequent cases.<sup>2</sup> The old Practice Act contained no provision in regard to the preparation of findings. The Code of Civil Procedure, as first enacted, contained the following:<sup>2a</sup>

"Sec. 635. At the time the cause is submitted, the judge may direct either or both of the parties to prepare findings of fact, unless they have been waived; and when so directed the party must, within two days, prepare and serve upon his adversary, and submit to the judge such findings; and may, within two days thereafter, briefly suggest in writing to the judge why he desires to amend the findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary. The judge may adopt, modify, or reject the findings so submitted. If at the time of the submission of the cause the judge does not direct the preparation of findings, or if none are prepared and submitted within the time prescribed, or those prepared are rejected, then he may himself prepare the findings."

This section was repealed in 1876. Since that time there has been no statutory provision on the subject, the matter being left to be regulated by the discretion of the judge. In practice the successful party is usually directed to draft the findings, and too often the judge signs the draft presented to him without sufficient examination. This practice cannot be too strongly condemned. It results in the preparation by the attorney of findings favorable to himself on every issue, while the judge may have decided in favor on some only of the issues. In view of the rule that a finding

<sup>2</sup> *Emmal v. Webb*, 36 Cal. 197; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

<sup>2a</sup> A similar provision is to be found in section 7042, Revised Code of North Dakota.

fact will not be disturbed if there be a substantial conflict of evidence, this practice results in the grossest injustice to the party. It is the duty of the judge to make his own findings.

He may with perfect propriety require either or both counsel to draft the findings they desire. But that is only to lighten the burden, and he may refuse to sign the findings presented to him by the parties.<sup>3a</sup> To adopt any such draft without the most careful examination, both as to the subject matter and the phraseology, abdicate one of his most important functions, and utterly subvert the purpose of findings as stated in *Tewksbury v. Magraff*, supra, quoted. Under the system of express findings, as heretofore, requests for findings are unnecessary. The court must find the material issues, whether requested or not, and it is not therefore, to refuse findings offered for his acceptance by the party to the cause.<sup>3b</sup>

Each side is entitled to notice of the time and place at which findings will be signed.<sup>4</sup>

Findings need not follow any special form. A brief expression of the fact found is all that is required, provided it be unequivocal and specific. It may, as stated above, follow the pleadings, as to the manner of expression, as well as to their legal substance, so long as the pleadings give expression without prolixity or useless phraseology to the facts averred. The practitioner is to be admonished, however, against the habit that formerly prevailed to make findings consist of a detailed statement of the evidence, the pleadings, and, in some cases, of the views of the court upon matters of law. This is a practice without anything whatever to commend it. It has been said in this connection that if it is desirable in any case to place the evidence before the appellate court, a motion for a new trial should be made.<sup>5</sup>

The practice of referring to extraneous matter in findings is not in any means a commendable one, and should be discouraged; but is sometimes necessary. Thus where the reference is to maps or plats on file for a definite description of the property involved, it is held to be excusable, and not ground for reversal.<sup>6</sup>

<sup>3a</sup> *Porter v. Woodward*, 57 Cal.

<sup>4</sup> *Hathaway v. Ryan*, 35 Cal. 188.

<sup>3b</sup> *Carnhart v. Fulkerth*, 73 Cal. 5 Pac. 89.

<sup>5</sup> See *Boskowitz v. Nickel*, 97 Cal. 19, 31 Pac. 732.

<sup>6</sup> *Ferreira v. Smith*, 79 Cal. 232, 21 Pac. 39.

<sup>6</sup> *Murry v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

Good practice requires that the findings should be prepared after they have been settled, so that they may be presented to the appellate court in a concrete form.<sup>7</sup>

§ 246. **Filings of the Findings—Time of Filing.**—The statute requires that where the cause is tried by the court sitting without a jury, the “decision must be given *in writing* and *filed* with the clerk.”<sup>1</sup> And, as has been shown, unless sufficient findings be filed or waived the judgment cannot stand.<sup>2</sup> In the language of Crockett, J., in *Polhemus v. Carpenter*<sup>3</sup> “the court had no power to render an oral decision, and the trial, therefore, was not ended until written findings were filed.” The cause, therefore, is not decided until written findings are filed. And if judgment be ordered and entered before findings of fact are filed or waived, it will be set aside.<sup>4</sup>

In *Mace v. O'Reilly*,<sup>4a</sup> where the term of office of the judge who tried the case expired after the order for judgment had been entered, but before the findings had been filed, it was held that no valid judgment could be entered without a new trial being had, unless the parties should file agreed findings or waive findings. It was also held that if a judgment should be entered in conformity with the order of the judge, after the expiration of his term of office, in the absence of agreed findings or a waiver of findings, such an order might be set aside on motion of the party in whose favor the judgment ran, without notice to the opposite party, notwithstanding the latter offers to waive findings, or to have them made by the new judge, and tenders the amount of the judgment.

The mere signing of the findings does not amount to a decision. Accordingly, where the findings were signed in another county from that in which the action was pending, and forwarded to the clerk, it was held that the fact that the signature of the judge was

<sup>7</sup> *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084.

<sup>1</sup> Section 632, California Code of Civil Procedure.

<sup>2</sup> See sections 239, 240, *ante*.

<sup>3</sup> 42 Cal. 375.

<sup>4</sup> *Van Court v. Winterson*, 61 Cal. 615. But where the findings and judgment were signed and filed the same day, it will be presumed that the signing and filing of the findings preceded the signing and filing of the

judgment; and if the appeal is from the judgment, it will be presumed in support thereof that findings other than those which appear to have been subsequently filed were duly filed, or that such findings were waived. See *Benton v. Benton*, 122 Cal. 395, 55 Pac. 152.

<sup>4a</sup> 70 Cal. 231, 11 Pac. 721. See, also, *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211.

affixed in another county was immaterial, and the court said: "It was not the signing, but the filing of the findings and order for judgment that determined the action."<sup>5</sup> So it would seem that until the findings which have been signed are filed, the judge may change them in any respect or may revoke his signature.<sup>6</sup> But, as above suggested, if not filed until after the expiration of his term of office, even the order for judgment, in effect the judgment itself, would be ineffective.<sup>6a</sup>

But when signed and filed, and the findings and conclusions of law separately stated, as provided in sections 632 and 633, Code of Civil Procedure, the decision becomes a judgment rendered;<sup>6b</sup> and the court no longer has any control over it, except to correct clerical misprisions and omissions,<sup>6c</sup> otherwise than in the manner provided by statute,<sup>6d</sup> and it becomes the duty of the clerk to enter the judgment thus rendered in the manner provided by statute.<sup>6e</sup>

There is no time after the submission of the cause within which the findings must be filed. The statute in relation to implied findings did not attempt to fix any such limitation of time.<sup>7</sup> The act of 1851, establishing a system of express findings, provided that the decision should be filed "within ten days after the trial took place."<sup>8</sup> The Code of Civil Procedure, which reproduced the system of the act of 1851, provided that the "decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision, and unless the decision is filed within that time the action must again be tried."<sup>9</sup> This provision, however, was held to be merely directory in *McQuillan v. Donahue*.<sup>10</sup> In that case the submission was on January 19, 1874, and on the same day the court orally announced its decision in favor of plaintiff, but no findings were filed. On the 1st of June of the same year the defendant moved to have the cause placed on

<sup>5</sup> *Comstock Q. M. Co. v. Superior Ct. Santa Cruz Co.*, 57 Cal. 625.

<sup>6</sup> *Anglo-Cal. Bank v. Mahony M. Co.*, 5 Saw. 255, Fed. Cas. No. 392, 2 Pac. C. L. J. 128.

<sup>6a</sup> See cases cited in note 4a, *supra*.

<sup>6b</sup> See *San Joaquin etc. Co. v. West*, 99 Cal. 345, 33 Pac. 928; *National Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476; and see section 183, *ante*, as to definition of final judgment.

<sup>6c</sup> See sections 16, 53, 54, 164, 167 and 199, *ante*. It is not error for the court to correct an obvious mistake

in a conclusion of law. *Merrill v. Miller*, 28 Mont. 134, 72 Pac. 423.

<sup>6d</sup> See section 247, *post*.

<sup>6e</sup> See section 183, *ante*; and see *National Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476.

<sup>7</sup> See section 180 of Practice Act, and *Polhemus v. Carpenter*, 42 Cal. 375.

<sup>8</sup> Laws of 1851, p. 78, sec. 180.

<sup>9</sup> Section 632 as first enacted.

<sup>10</sup> 49 Cal. 157. And see *McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760.

the calendar for retrial. The court below denied the motion, the supreme court affirmed the order, saying: "We are of opinion that this provision of the statute is directory merely." After the decision the statute was amended so as to omit the provision requiring the cause, and so as to provide that the decision must be filed "within *thirty* days after the cause is submitted for decision."<sup>11</sup> And so the statute stands at present. But under the decision in *McQuillan v. Donahue*, above cited, this provision is merely directory.<sup>12</sup> Therefore, as stated above, there is no objection after the trial in which the findings must be filed.

With reference to the entry of judgment, it was held under the system of implied findings that the findings could be filed after the judgment was entered.<sup>13</sup> And the same has been held under the system of express findings.<sup>14</sup> So far as the validity of the findings is concerned, this decision seems to be sound. But it is not perceived how a judgment entered by the clerk before the case has been decided can be of any validity.

The superior courts are "always open (legal holidays and judicial days excepted)."<sup>15</sup> And therefore the findings may be filed in term or "session" time, or in vacation or "recess."<sup>16</sup>

The act of filing is not a formal one, involving the performance of any specific or well-defined functions. When the court enters findings and conclusions with the clerk and orders them filed, they are just as effectually filed as though the clerk had marked them filed.<sup>17</sup>

Findings may be filed *nunc pro tunc*, but only where everything was actually done except the mere act of filing, which was inadvertently omitted.<sup>18</sup>

**§ 247. Amendment of Findings.**—It is a general principle that when the lower court has given a final decision upon any matter

<sup>11</sup> See section 632, California Code as amended in 1874.

<sup>12</sup> The act of 1851 provided that the report of a referee should be filed within ten days. See Laws of 1851, p. 80, sec. 187. This provision was held to be merely directory. See *Keller v. Sutrick*, 22 Cal. 471.

<sup>13</sup> *Broad v. Murray*, 44 Cal. 228; and look at *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213.

<sup>14</sup> *Vermule v. Shaw*, 4 Cal. 214. In *Schwartz v. Stock*, 26 Nev. 128, 65 Pac. 351, it was held that a request

for findings after rendition of judgment was properly refused.

<sup>15</sup> California Const. 1879, art. 5, sec. 5; and section 30 hereof.

<sup>16</sup> Sections 73, 74, California Code of Civil Procedure. See, also, *O'Connor v. Connor*, 46 Cal. 346, 13 Am. Rep. 213.

<sup>17</sup> *Fisher v. Emerson*, 15 Utah 50 Pac. 619. Also, *Billings v. Sons*, 17 Utah, 22, 53 Pac. 730.

<sup>18</sup> See *School Dist. v. W. Tube Co.*, 13 Wyo. 304, 80 Pac.

it has no power to set aside or change it except in the cases and in the manner pointed out by statute.<sup>1</sup> More generally stated, no court, whether *nisi prius* or appellate, has the power to make a material change in its record, amend or set aside a judgment, order or decree, when once it is made a part of the records of the court, otherwise than in the manner and under the conditions provided by law for that purpose. The single exception to this general rule is, that so long as the record, or the judgment, order or decree, has not passed out of its control, any court may correct mistakes, clerical misprisions and omissions, so as to make the record speak the truth, but for no other purpose.<sup>1a</sup> The principle is clear enough and well enough settled, but its application to the subject under consideration here is not so well understood.

1. *Substitution of One Finding of Fact for Another.*—It seems clear that under neither system of findings could there be a substitution of one finding of fact for another. Under the system of implied findings, as has been shown, there was an express provision of statute for amending the findings in certain cases. The statute provided that where there were defects or omissions in the findings

<sup>1</sup> For example: In an action to foreclose a mortgage of real property and a pledge of water stock, whether the water stock should be sold at all, or whether it should be sold before resorting to the real estate, or whether it should be surrendered to the defendant, were judicial questions, failure to decide which was error of law, which the court could not correct except on a motion for a new trial. See *National Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476. To same effect, see *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775.

As to the general rule and the exceptions to it, see sections 167, 199, *ante*. As to the old rule as to effect of adjournment of the term, see note 9 to section 16, *ante*.

<sup>1a</sup> The rule is based upon the "inherent power which courts of record have to correct their records so that they shall conform to the actual facts, and speak the truth of the case." *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572; and see

sections 16, 53, 54, 164, 167, 199, and 246, *ante*, and see below.

For the application of section 473, Code of Civil Procedure, see section 308, *post*, and cases there cited; and see particularly *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344, for a history of the legislation and decisions on the subject. And see *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. 646, and cases there cited, as to the control of the court over orders inadvertently entered, and its power to make its records speak the truth. Also, to same effect, *People v. Curtis*, 113 Cal. 68, 45 Pac. 180. As to the power to amend judgments, see note 5, section 53, *ante*. As to modification of findings by recitals in the order denying the motion, see *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142, 51 Pac. 846. As to the functions of *nunc pro tunc* orders in the correction of errors, and their limitations, see *In re Skerrett*, 80 Cal. 62, 22 Pac. 85; *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Estate of Potter*, 141 Cal. 424, 75 Pac. 850.



it was the duty of the court to amend them upon exceptions taken. But it was several times held that the provision referred to did not authorize the court to set aside its finding of fact upon any error and substitute a different finding in its place. Thus in *Hidden v. Jordan*,<sup>3</sup> Sawyer, J., delivering the opinion, said: "The exceptions are not, as seems to be supposed, to be taken to the findings on the ground that a fact is erroneously found. Errors in the findings are not to be corrected in this mode. . . . If the judge errs in the findings the remedy for the error is by motion for a new trial. So in *Cowing v. Rogers*,<sup>4</sup> Rhodes, J., delivering the opinion, said: "A party, according to these provisions, may object for the weight of findings, or on the ground that there is no finding as to a particular fact in issue, and if the defect is not remedied may take his exception. But when he thinks any finding is contrary to the evidence unsupported by the evidence he must make that a ground of motion for a new trial. He cannot avail himself of the alleged error in any other manner. This has been so often repeated that a citation of authorities is useless." So in *Prince v. Lynch*,<sup>5</sup> the court said: "Under the act of 1861 and section 180 of the Practice Act as amended in 1866 the court is authorized to supply omissions and defects. . . . But these provisions do not authorize an examination of the evidence for the purpose of correcting former errors and changing the findings of facts. The mode provided for reviewing its former action by the same court as to the sufficiency of the evidence to justify the finding is by motion for new trial."

It is plain, therefore, that the statute referred to only authorized the supplying of defects or omissions in the findings, and that it was not permissible to substitute one finding of fact for another. There is no such provision of statute under the system of express findings, and the rule laid down by the cases cited applies *a fortiori* under this system.<sup>6</sup> But as stated in the preceding section findings do not take effect until they are filed, and therefore until that time they may be changed in any respect.

<sup>2</sup> See sections 238, 239, *ante*.

<sup>3</sup> 28 Cal. 301; and look at section 239.

<sup>4</sup> 34 Cal. 648.

<sup>5</sup> 38 Cal. 528, 99 Am. Dec. 427. See, also, *Rice v. Inskeep*, 34 Cal. 224; *Hathaway v. Ryan*, 35 Cal. 188; *Car-*

*roll v. Benicia*, 40 Cal. 386; *Gates v. Salmon*, 46 Cal. 361. See, also, *same effect*, *National Bank v. D.* 110 Cal. 69, 42 Pac. 476, and cases there cited; and *Knowlton v. Kenzie*, 110 Cal. 183, 42 Pac. 580.

<sup>6</sup> See in this regard *Smith v. Adams*, 52 Cal. 217.



2. *Supplying a Finding on an Omitted Issue.*—As stated in the preceding subdivision, there was, under the system of implied findings, an express provision of statute authorizing the supplying of omissions in findings upon the exception of the losing party.<sup>7</sup> There is no such provision under the system of express findings. And the question is whether in the absence of such provision the court has power to find upon omitted issues of fact by way of amendment to the findings filed. It would seem upon principle that the court has not such power. For the finding upon the omitted issue may give rise to different legal principles, and may therefore require the direction of a contrary judgment from the one ordered; and this would be the change of the final decision of the court in a way not pointed out by the statute.<sup>8</sup> Such an omission is ground for an appeal from the judgment, and is ground for a motion for new trial,<sup>9</sup> and it would seem that the party should be confined to these remedies. But the supreme court has held that it is proper to supply findings upon omitted issues. In *Hayes v. Wetherbee*,<sup>10</sup> it appears that the court below filed additional findings, supplying omissions in the ones originally filed. This was held to be proper, and Sharpstein, J., delivering the opinion of the court in bank, said: "The other point made on this appeal that the court had no power to file additional findings is not well taken. It is true that it was held in the case of *Baggs v. Smith*, 53 Cal. 88, that the court had no authority to make the further findings; but in that case the additional findings were filed after the case had been appealed to the supreme court. The following cases are, however, authority for holding that the further findings in the cases

<sup>7</sup> It is not clear under the decisions whether the judge had power to supply omissions in the findings in the absence of an exception by the losing party. The question was raised but not decided in *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160, and in *Gay v. Moss*, 34 Cal. 125. And there does not appear to be any decision directly upon it. In *Carpentier v. Gardiner*, 29 Cal. 160, it was held that the findings could not be changed in a material particular *after the adjournment of the term*. In *Thompson v. Lynch*, 43 Cal. 482, it was said that "the motion to amend the decree and findings was not proper practice, and was correctly denied"; but the report

does not show precisely what was decided in this regard. In *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213, it was held that where additional findings appeared in the record, it *would be presumed* that proper exceptions had been taken. The implication from these cases is that the court could not act in the absence of an exception by the party.

<sup>8</sup> The findings constitute the decision. *Thompson v. Hancock*, 51 Cal. 110; *Polhemus v. Carpenter*, 42 Cal. 375; and see section 239.

<sup>9</sup> See *Soto v. Irvine*, 60 Cal. 436; *Brown v. Burbank*, 59 Cal. 535; and see section 1.

<sup>10</sup> 60 Cal. 396.

were not improperly filed. (*Pratalongo v. Larco*, 47 Cal. 378; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Bosquet v. Crane*, 51 Cal. 505.)”

It is to be observed of this case that the decision upon the point under consideration is rested entirely upon authority, and that the authorities relied upon do not sustain it.<sup>11</sup> But there has been a subsequent decision directly upon the point,<sup>12</sup> and therefore the rule laid down in *Hayes v. Wetherbee* must be taken to be the prevailing one. As stated in the preceding section, findings do not take effect until they are filed, and consequently before that time they can be changed in any respect. As to what may be done in this respect after filing, and before entry of judgment, more recent decisions seem to establish the rule that omitted findings may be supplied, even after filing, but beyond this no dependable principle can be said to have gone; and such supplying of an omission must be in the nature of the correction of a clerical error, as to make the record speak the truth. In *Wunderlin v. Cogan*,<sup>12a</sup> where a second set of findings was filed with the consent of some of the defendants, but without notice to the others (the

<sup>11</sup> In *Pratalongo v. Larco*, 47 Cal. 378, the court below struck out the finding of a referee and substituted a finding of its own therefor. The supreme court said with reference to this: “We cannot commend the practice adopted in this case,” but refused to disturb the action of the court below on the ground that the finding stricken out was immaterial, being “merely a matter of arithmetical calculation.” *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213, was under the system of implied findings under which, as stated in the text above, there was an express provision of statute for amending the findings upon exception taken, and the decision merely was that where additional findings appeared in the record on appeal the supreme court *would presume* that exceptions had been duly filed as provided by the statute. In *Bosquet v. Crane*, 51 Cal. 505, there was no amendment or change of the findings by the court below. The supreme court reversed the judgment for omissions in the findings and remanded the cause with directions to the court below to find upon the omitted issues from the evidence already taken if

that could be done, and if not to take additional evidence. The same course was taken in other cases. *Evans v. Jacob*, 59 Cal. 628; *Swift v. Canaan*, 52 Cal. 417; *Phipps v. Harlan*, 52 Cal. 87; *Watson v. Cornell*, 52 Cal. 91; *Le Clerf v. Oullahan*, 52 Cal. 101; *Glascock v. Ashman*, 52 Cal. 101; *Billings v. Everett*, 52 Cal. 661; *Giblett v. Investment Co.*, 94 Cal. 29, 29 Pac. 505; *Tunis v. Lakeport A. Co.*, 98 Cal. 285, 33 Pac. 33, 447. It is by no means follows that it is proper for the court below to do so in the absence of an appeal, when it may be commanded by the supreme court to do upon an appeal. When, for example, the court below has granted the motion for new trial (see section 167), or dissolved or refused to dissolve an injunction (see section 199), it cannot afterward set aside its order; but the supreme court, on appeal, may command it do so, as in other cases.

<sup>12</sup> Look at *Condee v. Barton*, quoted in subdivision 3 of this section. *Bixby v. Bent*, 59 Cal. 522, does not seem to have been concurred in by a majority of the court.

<sup>12a</sup> 75 Cal. 617, 17 Pac. 713.

been in favor of all, and the second, of a part only), on ground, as stated therein, that the original findings "were under a misapprehension," and judgment was entered upon not set in favor of those defendants who had consented to the same, and against those who had not been notified, the court said: It is to be observed that what the court did in the first instance was not merely to supply an omission in the findings first filed, or to give the direction for judgment, but was to substitute one set of findings of fact for another. This we are inclined to think the court had no power to do. Even under the system of implied findings where there was an express provision of statute for the supply of omissions in findings, upon exception taken, it was held it was not proper to substitute one finding of fact for another. (See *Men v. Jordan*, 28 Cal. 301; *Cowing v. Rogers*, 34 Cal. 648; *Men v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.) And *a fortiori* it seems to be so under the present system of findings where there is no such provision of statute. The remedy for erroneous findings of fact is by motion for new trial. And the relief to be granted upon such motion is the awarding of a new trial to be had in regular course. It is not proper for the court upon a motion of that kind to immediately render a contrary decision. (See *McNeill v. Hackett*, 14 Cal. 661.) These rules rest upon the principle that the modes in which a decision may be reviewed are prescribed by statute, and that the court has no power to substitute other modes in their place. The rules, however, do not prevent the court from correcting mere misprisions and orders inadvertently and unintentionally entered. That a given order is of an unusual character is not to be presumed, but must be affirmatively shown."

There are other decisions of like import.<sup>12b</sup> In *Spaulding v.*

*See Smith v. Taylor*, 82 Cal. Pac. 217, where the second set of findings were practically a copy of the first, with the addition of a few certain probative facts, not necessary to have been found, the ultimate facts already found having been established, the court said:

"In sets of findings were filed before judgment. Both are brought up before the court. Either is sufficient to support the judgment, and there is

nothing in either that conflicts with the other in any matter material to the issues in the case or the judgment entered. While it is true that a court cannot change its findings after the entry of judgment without granting a new trial, and doing it upon new trial, it does not follow that it may not make such modification or correction of its findings before judgment as shall make them conform to

Howard<sup>120</sup> alone is to be found a discordant note, the *carguendo*, saying that the trial court might modify its findings any time before entry of judgment; but the *dictum* is founded upon a manifest misunderstanding of the scope of the decision in *Hayes v. Wetherbee*, and has never been sustained by any expression.

But even if omitted findings are filed, it would seem that it is not to be properly done without notice.<sup>124</sup>

3. *Changing the Conclusions of Law*.—The question whether, under the system of implied findings, the court below had power to change the conclusions of law in findings which had been stated and filed, was raised but not decided in *Sichel v. Carrillo*.<sup>125</sup> U

the truth and cover the issues in the cause."

In *Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556, the trial court attempted to change the findings by the addition of what would at the outset have been deemed a valid finding, but the change was sought to be made after entry of final judgment. The court held that the superior court had power to set aside judgments and findings upon various grounds, as provided in the Code of Civil Procedure, but that there was no provision of law authorizing any change in the findings of fact after entry of judgment thereon, while the judgment was allowed to stand. And this decision was favorably referred to in *Knowlton v. MacKenzie*, 110 Cal. 183, 42 Pac. 580, where by stipulation the parties themselves sought to change the findings after judgment. See, also, *Ayres v. Burr*, 132 Cal. 125, 64 Pac. 120, where a similar situation was similarly dealt with.

See, also, *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225, where it was held that the findings might be corrected or modified before judgment was entered, but that afterward, judicial error could only be corrected by motion for new trial or appeal. And see *National Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476; *Richter v. Henningson*, 110 Cal. 530, 42 Pac. 1077.

<sup>120</sup> 121 Cal. 194, 53 Pac. 563.

In *Hayes v. Lavagnino*, 17 Utah, 185, 53 Pac. 1029, 19 Morr. Min. Rep. 485, it was held that the court might amend the findings while a motion for a new trial is pending, where the

amendments are responsive to those presented by the pleadings and supported by the evidence; but in *Johnson v. Wallace*, 16 Utah, 300, 53 Pac. 9, an earlier case, the same court said: "It is not good practice, either in cases at law or in equity, nor is it proper in either class of cases, to change findings and judgment, for the purpose to supplement such findings, and to add additional findings at the request of either party, while the judgment is allowed to stand"; citing, among other cases, that of *Crim v. Keene*, 89 Cal. 478, 23 Am. St. Rep. 478, 10 Pac. 1074; *Kahn v. Smelting Co.*, 10 Utah, 371; *Fisher v. Emerson*, 10 Utah, 517, 50 Pac. 619; *Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556; and sections 246 and 247 of this treatise. And, in *Kloppenstien v. Hays*, 20 Utah, 45, 57 Pac. 7, it was said that it was not good practice, after findings and judgment, for the court to supplement such findings and file additional findings, while allowing the judgment to stand. And, expressly following the decision in *Johnson v. Wallace*, *supra*.

<sup>124</sup> See *Wunderlin v. Cadogan*, 100 Cal. 617, 17 Pac. 713.

<sup>125</sup> 42 Cal. 493; *Carpentier v. Diner*, 29 Cal. 160, decides that the findings could not be changed after the adjournment of the term. In *Derwood v. Peyser*, 31 Cal. 33, it is decided that the court below may change the conclusions of law of a referee. But whether this decision applies upon any idea as to effect to be given to the report of a referee is not

the system of express findings it has been held that the court may change its conclusions of law. The court said:

"We can see no objection to the practice of changing the conclusions of law based upon the findings of fact at any time before judgment is entered. The declaration of the general conclusion of law from the facts found is the rendition of the judgment in so far as that when entered the judgment entered may relate to such rendition for certain purposes. But this does not make the conclusions of law first announced final and beyond the reach of the court. There is no judgment which is final until a judgment is recorded."<sup>14</sup>

If the foregoing case means merely that the court may change the conclusions of law which many practitioners are in the habit of placing before the direction as to what judgment shall be entered, it is only saying that the findings may be changed in an immaterial particular.<sup>15</sup> But it seems to mean the direction for judgment which, as has been stated, is the only proper "conclusion of law."<sup>16</sup> And assuming it to mean this, it follows that under the decisions the court below may change the direction for judgment in the findings filed, and may direct a contrary judgment at any time before the direction first given is carried out by the clerk by recording the judgment. It is believed, however, for the reasons stated in the preceding subdivision, that the rule is not a sound one.

4. *Time Within Which a Change in the Findings must be Made.* As shown in the preceding subdivisions, the decisions are to the effect that while the court below cannot substitute one finding of fact for another, yet that it may, in proper cases, supply omissions in the findings of fact, and may substitute different conclusions of law. But it would seem clear upon principle that if such changes are to be made at all they must be before the entry of judgment; and the decisions are to this effect.<sup>17</sup> And still less can such changes be made after an appeal from the judgment.<sup>18</sup> But there

<sup>14</sup> *Condee v. Barton*, 62 Cal. 1; look at *Bixby v. Bent*, 59 Cal. 522, which, however, does not appear to have been concurred in by a majority of the justices. And see *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; and *Herrlich v. McDonald*, 104 Cal. 551, 38 Pac. 360.

<sup>15</sup> Such "conclusions of law" are necessary. See section 243, *ante*.

<sup>16</sup> See section 243, *ante*.

<sup>17</sup> See *Condee v. Barton*, and other cases cited, *supra*; and see *Bate v. Miller*, 63 Cal. 233.

<sup>18</sup> *Baggs v. Smith*, 53 Cal. 88; but look at *Bixby v. Bent*, 59 Cal. 522. This latter case, however, does not seem to have been concurred in by a majority of the justices.

does not seem to be any other limitation of time, unless section 473 of the Code of Civil Procedure applies, in which case the change would have to be made "within a reasonable time, but in no case exceeding six months" after the findings were filed. Under the old rule no material change could be made in the findings after the adjournment of the term.<sup>19</sup> But since the abolition of terms this limitation is done away with. And it is not perceived that there is any other except the ones mentioned.

Mere clerical errors can be corrected at any time.<sup>20</sup>

<sup>19</sup> *Carpentier v. Gardiner*, 29 Cal. 160.

<sup>20</sup> As to clerical errors, in judgments, see *Estate of Schroeder*, 46 Cal. 304, and see citations in note 1a, section 247, *ante*. The following cases illustrate the principle of the authority to make corrections of clerical misprisions and omissions: In *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15, it was held that clerical misprisions in the findings in a foreclosure suit, as to the amounts due on the note, and in the decree as to the description of the property, which were apparent on the face of the record, might be corrected at any time by the court, on motion of the parties or on its own motion, with or without notice. In this case the court amended its decree one month after notice, and the supreme court, sustaining the action of the lower court, cited in support of the decision the following cases: *Bostwick v. McEvoy*, 62 Cal. 496; *Beatty v. Dixon*, 56 Cal. 619; *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381; *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22. In *Mitchell v. Patterson*, 120 Cal. 286, 52 Pac. 589, it was held that a mere clerical error in inserting the name W. T. Gerry for W. F. Perry in the findings might be corrected by the trial court at any time before the appeal or after the case is remanded, in other words, at any time while the record is under its control. In *Chicago Clock Co. v. Tobin*, 123 Cal. 377, 55 Pac. 1007, a similar mistake in the name was held to be a mere misprision, which might, if desired, be corrected at any time on motion. (But similar errors as to the service of summons cannot be so readily cor-

rected. In *Houghton v. Tibbets*, 126 Cal. 57, 58 Pac. 318, it was held that W. F. Curtis could not be presumed to be William T. Curtis.) In *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561, a mistake in the caption of the complaint as to the capacity of plaintiffs in the suit was repeated in the judgment, it appearing that while the caption referred to them as heirs and administrators, the body of the complaint described them as administrators only, was held to be a clerical misprision, although the judgment had been signed by the trial judge, and it was held that such error might be corrected at any time. In *Leonis v. Leffingwell*, 126 Cal. 371, the principle was stated, but the court held it not to be applicable, inasmuch as it did not appear that the judgment as entered was not the judgment as ordered; in other words, it did not appear that there was a mere clerical misprision, but rather that there was an error of the court which required to be corrected, as other judicial errors, by appeal. In *Hull v. Calkins*, 137 Cal. 84, 69 Pac. 838, a suit in equity was brought to correct a mere clerical error in the judgment, and the relief sought was refused on the ground that the court which rendered the judgment had the power to correct such an error at any time, on mere motion. In *Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174, it was held that a clerical misprision in the name of the party against whom the judgment was rendered might be corrected at any time, even after an appeal, although the result of such correction was to eliminate the appellant from the judgment, and so call for an affirmation of the same. In *Fox v.*

Stubenrauch, 2 Cal. App. 88, 83 Pac. 82, the court of appeals of the third district, having the subject matter of the same case under consideration, held that the judgment was affected in no material respect by the correction. In *Erickson v. Stockton etc. Co.*, 148 Cal. 206, 82 Pac. 961, it was held that the trial court might correct an error in the calculation of interest, after judgment, without vacat-

ing the latter, so as to make the conclusions of law and the judgment speak the truth. And see *Rountree v. Lime Co.*, 106 Cal. 62, 39 Pac. 16. The entry of a judgment different from that rendered is a clerical misprision; which the court which rendered the judgment may correct at any time. *San Francisco v. Brown*, 153 Cal. 644, 96 Pac. 281.



## CHAPTER XLII.

## RECORD ON APPEAL FROM THE JUDGMENT—OPINION OF THE COURT BELOW.

§ 248. The Opinion of the Court Below was a Part of the Record on Appeal Under the Old Practice Act, but is not Under the Code of Civil Procedure.—The old Practice Act expressly provided that if any written opinion was given by the judge “on considering the judgment or making the order in the court below” should be furnished to the supreme court upon the appeal.<sup>1</sup> This provision stood from 1851 until the adoption of the Code of Civil Procedure; and it authorized the appellate court to look to the opinion to see upon what ground the court below based its decision.<sup>2</sup> But the opinion was not designed to take the place of the other papers designated by the statute, and could not, for example, supply deficiencies in a statement on motion for a new trial.<sup>3</sup> Its only office was to inform the supreme court as to the *reasons* which induced the action of the court below presented for review.

There is no provision in the Code of Civil Procedure authorizing the opinion of the court below to be placed in the record on appeal. Therefore such opinion does not constitute a portion of such record, and, if printed in the transcript, cannot be looked into for information as to the history of the case.<sup>4a</sup> For it is a cardinal rule of our appellate practice that the record on appeal consists of the papers designated by the statute, and that the supreme court is confined to such papers, and cannot derive information of the case from any other source.<sup>4</sup> But if all the facts and history of the case appear in the record, the supreme

<sup>1</sup> See the statute quoted in section 229, *post*.

<sup>2</sup> See *Dickey v. Davis*, 39 Cal. 565; *Sexey v. Adkerson*, 40 Cal. 408.

<sup>3</sup> *Cochran v. O'Keefe*, 34 Cal. 554, 3 Morr. Min. Rep. 288.

<sup>4a</sup> See *In re Shively's Estate*, 145 Cal. 400, 78 Pac. 869. And see cases cited in note 14, below.

<sup>4</sup> See section 229, *ante*, and sections 265 and 283, *post*; and see *Hewlett v. Steele*, filed February 15,

1883; *Williams v. Norris*, 12 Vt. (U. S.) 117, 6 L. ed. 571; *Manigan C. R. R. v. M. S. R. R.*, 10 How. (U. S.) 378, 15 L. ed. 101; *Rector v. Ashley*, 6 Wall. (U. S.) 18 L. ed. 733; *Gibson v. Chouteau*, 18 Wall. (U. S.) 314, 19 L. ed. 317. The course adopted in *Bronner v. Winans*, 55 Cal. 419, and *Winans v. Chouteau*, 55 Cal. 567, seems in contravention of this principle, but in all probability was not designed to be so.



court may refer to the opinion of the judge in the same way as it would refer to the reasoning of a text-book.<sup>5</sup>

The opinion is no more than its name imports—the informal expression of the views of the court upon the issues of law and fact. It cannot be treated as the findings of the court, which is the legal expression of the views found in the opinion—their crystallized form. The opinion is subject to modification after argument, and there is no limit to the changes permissible therein. But the formal findings of fact and conclusions of law, when signed and filed, are not thus subject to indefinite modification, and can seldom be modified at all.<sup>6</sup> The following are some of the more recent expressions upon the subject:

In *Newman v. Overland Pacific Ry. Co.*<sup>7</sup> there was a written opinion of the court, in which was discussed several of the grounds upon which the motion for a new trial was made, and no reference was made to that of insufficiency of the evidence, which was one of the grounds assigned. This omission was held not to affect the presumption that the motion was granted upon that ground, where the order itself was silent upon the subject. So in *Ben Lomond Wine Co. v. Sladky*<sup>8</sup> the same ruling was made, although in that case the trial judge, in the opinion upon the motion, specifically stated that he would not have disturbed the verdict on the ground of insufficiency of the evidence, the supreme court holding that the order itself was the sole record of the action of the court open to the review of the appellate court, and that it was to be measured by its own terms, and not by the reasons alleged to have actuated it as expressed in the written opinion of the judge. So in *Weisser v. Southern Pacific Co.*<sup>9</sup> it was held that the opinion of the trial judge could not operate as a limitation upon the effect of the order as entered in the minutes of the court, as such order “so entered is, under the decisions, the only record of the court’s ac-

<sup>5</sup> Look at *Norris v. F. & T. Co.*, 6 Cal. 590, 65 Am. Dec. 535; *Brown v. Smith*, 10 Cal. 508, 4 Morr. Min. Rep. 539; *Killey v. Scannell*, 12 Cal. 73; *Kline v. Chase*, 17 Cal. 596; *Hess v. Winder*, 30 Cal. 349, 34 Cal. 270; *Burrell v. Haw*, 48 Cal. 222; *In re Kingsley*, 93 Cal. 576, 29 Pac. 244; *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001.

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<sup>6</sup> See *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; also *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775; *O’Brien v. O’Brien*, 124 Cal. 422, 57 Pac. 225; *Estate of Shiveley*, 145 Cal. 400, 78 Pac. 869.

<sup>7</sup> 132 Cal. 73, 64 Pac. 110.

<sup>8</sup> 141 Cal. 619, 75 Pac. 332.

<sup>9</sup> 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636.

tion." In *White v. Merrill*,<sup>10</sup> where it was sought to bring the opinion of the trial court into the record, Fox, J., delivering the opinion of the court, said:

"The opinion of the court, given upon determining the motion for new trial, was brought up in the transcript. On the hearing, respondent moved to strike this opinion out, as it constitutes no part of the record on appeal, and the motion was granted. The court below may give an opinion, oral or in writing, upon any motion or question that arises in the course of proceedings before it, or upon the final determination of a cause, but such opinion constitutes no part of the record on appeal. No matter what reason the court below may assign for its action, this court is not bound by such reason. If this court finds that upon any ground or for any reason the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it. Counsel may cite it in argument, as they may any other opinion given at nisi, and it may sometimes aid the court in the solution of the question upon or to which it is cited; but it is not an act upon which error can be assigned. For this reason—possibly for others also—the legislature, in adopting the code, has omitted it from the list of papers required to be brought up on appeal."

An erroneous opinion of the trial court is not subject to review.<sup>11</sup>

The opinion of the court, here referred to, is not in any sense a finding of facts.<sup>12</sup>

Section 158, Lord's Oregon Laws, contains a provision for a separate opinion of the trial judge, at the time of the rendition of the decision (findings and conclusions of law), either oral or in writing, filed with the clerk. It does not appear that this provision has had the effect of making it a part of the judgment-roll, or alter, in any material sense, its informal character. In *Heywood etc. Co. v. Doernbecher etc. Co.*,<sup>13</sup> the court accepted an assertion or deduction contained in the opinion of the trial court, as entitled to consideration, and, in fact, conclusive, in the connection found, "though probably not equivalent to a statement to that effect, contained in the bill of exceptions." It does not appear that the opin-

<sup>10</sup> 82 Cal. 14, 22 Pac. 1129. And see section 284, *post*, for more exhaustive discussion of this point.

<sup>11</sup> *People v. Central P. R. R. Co.*, 105 Cal. 578, 38 Pac. 905.

<sup>12</sup> *Victor etc. Co. v. National Bank*, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72.

<sup>13</sup> 48 Or. 359, 86 Pac. 357, 87 Pac. 530.

ion referred to was incorporated in the bill of exceptions. The decisions generally sustain the California view.<sup>14</sup>

<sup>14</sup> The opinion of the lower court is no part of the record on appeal, and cannot be considered for any purpose. *Cornish v. Floyd-Jones*, 26 Mont. 153, 66 Pac. 838. Where the opinion is not embraced in a bill of exceptions, it is no part of the record, and cannot be considered. *Harrington v. Butte etc. Co.*, 27 Mont. 1, 69 Pac. 102. On appeal the opinion of the court has no place in the record, and a contention that it shows that the court did not consider certain evidence which was admitted without objection cannot be entertained. *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. 291.

These decisions, as expressed in the syllabi of the above cases, are somewhat ambiguous. To say that a paper is not a part of the record, and cannot be considered for any purpose, does not

seem to harmonize very closely with a statement that unless embraced in a bill of exceptions, it is no part of the record, and cannot be considered. The cases themselves, however, hold in support of the general rule, that the opinion is not entitled to any more consideration than fairly belongs to its character as the expression of the reason and argument of the court below which may or may not be anything at all, according to the circumstances of the case; and it cannot be considered at all unless incorporated in the bill of exceptions. The opinion may be suggestive of a just determination of the case. *Porter v. Printing Co.*, 26 Mont. 170, 66 Pac. 839, 67 Pac. 67. Otherwise, not at all, *Gus v. Nelson*, 14 Okl. 296, 78 Pac. 170.

## CHAPTER XLIII.

## RECORD ON APPEAL FROM THE JUDGMENT—AGREED STATEMENT OF FACTS.

§ 249. **Agreed Statement of Facts.**—The act of 1851 contained no provision for annexing an agreed statement of facts to the judgment-roll, nor that it should constitute a part of the record on appeal.<sup>1</sup> There could be no reason, however, why the parties could not make such a statement a part of the record on appeal, if they chose to make an express stipulation to that effect. And accordingly, it was held in *Burnett v. Pacheco*,<sup>2</sup> decided in 1865, that a stipulation to the effect that an agreed statement of facts, which was used on the trial, might be used by either party “in any and all proceedings in the action,” had the effect of making such statement a part of the record on appeal.

In 1866, section 180 of the Practice Act was amended so as to provide, among other things, that “when any cause is tried and submitted upon a written statement of facts, agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case, any additional fact may be found upon evidence which is not repugnant to the agreed statement.”<sup>3</sup>

This provision stood until the adoption of the Code of Civil Procedure. Under the language of the provision an agreed statement of facts used in the court below became a part of the judgment-roll, without any subsequent stipulation to that effect. It was necessary, however, that the statement should make a case to be determined. A mere transcript of the evidence is not such a case.<sup>4</sup> Nor is a stipulation concerning evidence to be offered, and agreeing on certain isolated facts sufficient.<sup>5</sup>

<sup>1</sup> See Laws of 1851, p. 78, and p. 106, sec. 346.

<sup>2</sup> 27 Cal. 408.

<sup>3</sup> Laws of 1865–66, p. 844, sec. 180.

<sup>4</sup> Look at *Suydam v. Williamson*, 20 How. (U. S.) 427, 15 L. ed. 973;

*Burr v. Des Moines R. R. Co.*, 1 Wall. (U. S.) 99, 17 L. ed. 561; *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. (U. S.) 592, 17 L. ed. 638.

<sup>5</sup> *People v. Hawes*, 41 Cal. 632.

The Code of Civil Procedure did not reproduce the provision of the act of 1866, or any similar provision, and the law rests entirely upon judicial precedent, which is not sufficiently definite to justify a positive deduction. In the earlier cases under the code there is a disposition to treat an agreed statement of facts as a mere stipulation,<sup>6</sup> which might, by express authorization, be made a part of the record on appeal,<sup>7</sup> thus following the principle of the decision in *Burnett v. Pacheco*, cited above. In the more recent cases, however, the courts have manifested a tendency to make an agreed statement of facts a part of the judgment-roll, as a finding. In *Gregory v. Gregory*,<sup>8</sup> where the statement was set out in the record without being included in a bill of exceptions, as though it were, in itself, an integral part of the judgment-roll, and the judgment itself recited that its decision was based upon such statement, the supreme court held that, "under these circumstances," doubtless referring to the recitals in the judgment and the stipulation, "we think the statement may be considered whether it in fact constitutes a part of the judgment-roll or not." In *McMenomy v. White*,<sup>9</sup> which was a case submitted upon an agreed statement, where it was contended that certain findings were not justified, the court held, "no findings were necessary, the only question being as to what was the law applicable to those facts. (*Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364.)" The two cases were similar in being decided upon an agreed statement of facts, but not otherwise. It is not easy, therefore, to divine why the case in the 115th Report was decided upon the authority of the case in the 102d. The situation is not made more clear by later decisions. In *Conway v. Supreme Council, etc.*,<sup>10</sup> it was held, upon the authority of *McMenomy v. White*, *supra*, and *Muller v. Rowell*, 110 Cal. 318, 42 Pac. 804, as follows:

" . . . But findings were waived because counsel stipulated as to the facts, and the facts thus stipulated became a part of the

<sup>6</sup> As to which see *Spinetti v. Brignardello*, 53 Cal. 281; *Hayden v. Hayden*, 46 Cal. 332; *People v. Hawes*, 41 Cal. 632; *Moore v. Semple*, 11 Cal. 360; *Ritter v. Mason*, 11 Cal. 214.

<sup>7</sup> Under the old Practice Act a statement on motion for new trial was not a part of the judgment-roll, and consequently could not be used on appeal from the judgment in the absence of a stipulation to that effect.

See cases cited in note 1 to section 251. But a stipulation to that effect made the statement on motion for new trial a part of the record on appeal from the judgment. See *Hastings v. Halleck*, 13 Cal. 203; *Carpentier v. Williamson*, 25 Cal. 154; *Cardinell v. O'Dowd*, 43 Cal. 586.

<sup>8</sup> 102 Cal. 50, 36 Pac. 364.

<sup>9</sup> 115 Cal. 339, 47 Pac. 109.

<sup>10</sup> 137 Cal. 384, 70 Pac. 223.

judgment-roll and the findings of the court on which its judgment rests."

In *Muller v. Rowell*,<sup>10</sup> authority for the decision in the *Conv. v. Supreme Council* case, last cited, the trial court adopted the stipulated facts, apparently as its findings, and the appellate court held that no more formal findings were required, and "the statements of facts so agreed took the place and served all the purposes of a formal finding by the court. (*Brewster v. Hartley*, 37 Cal. 15 Am. Dec. 237.)" But the case of *Brewster v. Hartley*, upon which this last decision rests, was decided under the law of 1881, which made the agreed statement a part of the judgment-roll with the effect, as a special verdict or a finding of facts. But even if it were otherwise, the case of *Muller v. Rowell* could not be given authority for a rule which makes agreed statements, in general, a part of the judgment-roll, for in that case the court adopted the agreed statement as its findings. In later cases, however, it may be confidently assumed that the above inconsistencies were effectively harmonized. In *Crisman v. Lanterman*,<sup>11</sup> it was held that where the facts stipulated were in a form merely evidentiary, consisting not of the ultimate facts put in issue by the pleadings, but of a recital of probative facts, as, for example, the circumstances of the sale, the ultimate fact being the consent of one of the parties thereto, it was not only proper, but it was essential for the trial court to make a finding of the ultimate fact; and where a finding might have been either way, the facts stated being sufficient to sustain an inference either way as to the ultimate fact of consent, it would be treated in the same way and was entitled to the same weight as any other finding on conflicting evidence. And in *Towle v. Sweeney*,<sup>12</sup> notwithstanding some manifest inconsistencies

<sup>10</sup> 110 Cal. 318, 42 Pac. 804.

<sup>11</sup> 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89.

<sup>12</sup> 2 Cal. App. 29, 83 Pac. 74. The dictum is as follows:

"Although findings of fact are not necessary to the validity of a judgment, where the case is submitted for decision upon an agreed statement of facts, yet the court is not thereby precluded from making such findings of fact. It may adopt the agreed statement as its own findings of facts, or it may make findings therefrom to correspond with the issues to be

determined; and as it is only required to find the ultimate facts in the case, it may find such ultimate facts upon the probative facts set out in the agreed statement, as well as from the evidence thereof. An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an 'agreed case,' which, under section 1138 of the Code of Civil Procedure, may be submitted for decision without any pleading.

It will be noted that it is stated that findings of fact are necessary to the validity of the judgment.

in the *dictum* of the court, the inference is clear that an agreed statement of facts is nothing more than a statement of the evidence, and cannot be held to dispense with findings of ultimate facts, though it may so dispense with findings that are described as findings of probative facts, but which are, in truth, themselves nothing more or less than mere statements of evidentiary facts, from which the ultimate fact in issue requires to be deduced. Nor can such agreed statement be regarded as a part of the judgment-roll, any more than any other statement or transcript of the evidence, though it may become so by adoption as the findings; and when it appears in the record as a part of the judgment-roll, it would no doubt be presumed to have been so adopted, particularly in a case, as *Gregory v. Gregory* above cited, where there are recitals in the judgment to that effect. Other cases seem to sustain this position, and it is believed to be the correct one.<sup>13</sup>

Where a case is submitted on an agreed statement of the facts, the court is restricted to the facts admitted, and its judgment cannot be based on any other facts which the parties may be supposed to be able to establish.<sup>14</sup> But it is probable that where there are several separate and distinct issues involved, one or more may be covered by an agreed statement of the facts, while the remainder may be made the object of proof, though this has not been specifically decided.

It is always essential that an agreed statement of facts, which purports to take the place of evidence, should be sufficient to sustain the finding to which it points.<sup>15</sup>

ment where there is an agreed statement, and afterward, that only ultimate findings of fact are required, and that these may be deduced from probative facts set forth in the agreed statement. Finally that the agreed statement is merely a substitute for the evidence. If a substitute for the evidence, it cannot very well be at the same time a substitute for the findings which are necessary to be drawn from the evidence. But on the whole, the meaning of the court is clear enough, and the inconsistencies referred to amount to no more than the use of the same form of expression for two entirely different things. Findings of probative facts so often referred to are not findings at all. At least, they are not such

findings as the code requires, for the code requires findings of ultimate facts. With this manifest distinction in mind, a statement of facts certainly takes the place of a finding of probative facts, and dispenses with the necessity for such a finding.

<sup>13</sup> See *In re Sylvester*, 105 Cal. 189, 38 Pac. 648; *Higgins v. San Diego etc. Co.*, 129 Cal. 184, 61 Pac. 943; *Los Angeles v. Los Angeles etc. Co.*, 152 Cal. 645, 93 Pac. 869, 1135.

<sup>14</sup> *Green v. Fresno*, 95 Cal. 329, 30 Pac. 544; and see *Crandall v. Amador Co.*, 20 Cal. 72.

<sup>15</sup> In *Estate of Carpenter*, 127 Cal. 582, 60 Pac. 162, there was a stipulation on appeal that evidence was introduced on the issue of menace, but the supreme court held it was not

Counsel cannot stipulate the legal conclusion to be drawn from the facts. The facts themselves may be stipulated, but the court cannot be bound by a stipulation which purports to go beyond a stipulation as to the facts, and agrees that a certain legal conclusion is to be drawn therefrom.<sup>16</sup>

Where the facts are stipulated and the appeal is from the judgment, a new trial is not necessary, and the appellate court will order judgment upon the stipulated facts.<sup>17</sup>

Although a new trial would not be proper in a case where the facts are stipulated,<sup>18</sup> yet the trial court cannot be said to be without jurisdiction to entertain a motion for a new trial, or the appellate court to lack jurisdiction to review the order made thereon.<sup>19</sup>

sufficient to support a finding: "Parties relying upon a stipulation which takes from the appellate court the power to determine an appeal upon the real facts should see that they are sufficient." The same principle, no doubt, applies to issues in the trial court. .

<sup>16</sup> *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864.

<sup>17</sup> *Eureka v. McKay & Co.*, 123 Cal. 666, 56 Pac. 439.

<sup>18</sup> See *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; and see section 1, *ante*.

<sup>19</sup> *Quist v. Michael*, 153 Cal. 365, 95 Pac. 658.



## CHAPTER XLIV.

## ORDER ON APPEAL FROM THE JUDGMENT—STATEMENT ON APPEAL.

Kinds of statement under old Practice Act and under the code.

Difference between statements on motion for new trial and statements on appeal under the old Practice Act—Office of statements on appeal.

Statements on appeal were part of the judgment-roll under the old Practice Act.

Preparation of statements on appeal under the old Practice Act.

**50. Kinds of Statements Under the Old Practice Act and under the Code of Civil Procedure.**—Under the old Practice Act there were two kinds of statements, viz., statements on appeal and statements on motion for new trial. Statements on motion for new trial have already been considered.<sup>1</sup> They were not part of the judgment-roll.<sup>2</sup> Statements on appeal derived their validity from section 338 et seq. They could be used as the record on appeal from an order (other than an order on motion for new trial) and as the record on appeal from the judgment. In the case the statement was part of the judgment-roll.<sup>3</sup> The section providing for statements on appeal were not reproduced in the Code of Civil Procedure, consequently the statement on appeal under the old Practice Act no longer exists. Their place has been taken by other papers,<sup>4a</sup> and there is no longer any such paper as a statement on appeal from the judgment,<sup>4b</sup> although provision is

see chapter 24, *ante*.

see section 230, *ante*.

see section 252, *post*.

Bill of exceptions and statement on motion for new trial, as provided in section 950, Code of Civil Procedure.

see *People v. Crane*, 60 Cal. 279; *People v. Chart*, 79 Cal. 185, 21 Pac. 1; *Witter v. Andrews*, 122 Cal. 1, 15 Pac. 276.

The language of the text applies to the state of California and to those Pacific coast states having a similar system of practice. The following synopsis is essential in this connection to an understanding, from

a comparative point of view, of those systems which vary materially from that of California.

*Arizona*: Chapter 19 of the Revised Statutes sets out the various papers, documents, etc., designed to constitute the record. Section 1485 provides that "every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence, or offered in evidence and rejected by the court, need be incorporated in a statement of facts in order to make it part of

the record." Section 1486 provides: "Either party to a suit may, if he so desire, make the oral evidence given in the case a part of the record of the case, either by a statement of facts or, at his election, by causing the court reporter's notes of the trial to be extended by him, and duly certified over his hand as being a full, true and correct copy of all the questions propounded to jurors and witnesses and their answer thereto, as well as all remarks, rulings, opinions and judgments given and rendered during the trial thereof by the judge presiding at the trial, and that it contains all the oral evidence given in the case; but in no case shall such extended notes contain a copy of any written evidence, depositions, exhibits or arguments of counsel. When thus made, certified and filed it shall constitute a part of the record of the case."

Section 1490 outlines the contents of the statement, and section 1491 is as follows: "After the trial, either party may, at any time during the term, or within the time stipulated, or within such reasonable time as shall be allowed by the court by an order for such purpose made and entered, tender to the opposite attorney a statement of facts, which must, in narrative form, contain all the evidence given in the case, but without repetition, prolixity or uncertainty. On its receipt by the opposite attorney he shall, within a reasonable time, not to exceed ten days in any case, unless the time be extended by written stipulation duly signed and filed, return it to the one who tendered or caused it to be tendered, together with a written statement signed by him, wherein he shall agree that the same is true and correct, or, he shall state that it is not correct, specifying where it is faulty, and setting forth such changes and amendments as he may deem necessary to make it correct; and thereupon such statement of facts and the agreement thereto of the opposing attorney; or the changes and amendments suggested shall be presented to the trial judge, who shall either certify thereto that the same is true and correct and sign such certificate, or first correct it as it may require, and

then add his certificate thereto and sign it. Failure on the part of the attorney to whom the statement of facts is tendered, to agree to the correctness thereof or to suggest changes or amendments thereto within the time above specified, shall be deemed an admission of its correctness. When so certified, signed and filed it shall become a part of the record of the case."

Section 1492 provides that it shall not be necessary to transcribe all the evidence when an instruction is objected to, but only so much as is pertinent to the error complained of.

The function of the statement is to present on appeal the record of everything necessary to a full consideration and review of the case, not appearing in the minute entries, judgment and decree, and the original files, including documentary evidence, depositions, etc., and omitting the exceptions taken and reserved, which should be presented by bill of exceptions. It thus appears that the statement is little else than a mere transcript of the reporter's notes of the evidence. It must be certified by the court. Section 1491, *supra*. This requirement cannot be dispensed with if it is desired to utilize the contents of the statement on the appeal. See *Myers v. Farmers' etc. Bank*, 7 Ariz. 67, 60 Pac. 880; *Tombstone v. Reilly*, 4 Ariz. 102, 33 Pac. 823; *Tietjen v. Snead*, 3 Ariz. 195, 24 Pac. 324; *Smith v. Blackmore*, 3 Ariz. 348, 29 Pac. 15; *Liberty etc. Co. v. Geddes*, 11 Ariz. 54, 90 Pac. 332; *Donohoe v. El Paso etc. Co.*, 11 Ariz. 293, 94 Pac. 1091. If properly certified, however, the bill of exceptions may be dispensed with, in whole or in part. Thus, if properly certified, it has been held that the evidence set out in the statement may be utilized in reviewing the assignments of error in the bill of exceptions, without the necessity of setting out the evidence in the latter. See *Montezuma etc. Co. v. Smithville etc. Co.*, 11 Ariz. 99, 89 Pac. 512; *Leatherwood v. Richardson*, 11 Ariz. 163, 89 Pac. 503, 94 Pac. 1110.

The rules governing the preparation, necessity, scope, etc., of the statement of facts above described are the same as those which governed

the preparation, etc., of statements on appeal under the California Practice Act. Thus it must be prepared and filed in time, unless the time be extended. *Leatherwood v. Richardson, supra*. And unless certified in accordance with the provisions of the statute, it cannot be considered, though signed by the attorneys for the parties and printed in the transcript. *Liberty etc. Co. v. Geddes*, 11 Ariz. 54, 90 Pac. 332. And papers and documents not expressly required to be embodied in the judgment-roll must be incorporated in the statement or a bill of exceptions, otherwise they cannot be considered. *Sherman v. Goodwin*, 11 Ariz. 141, 89 Pac. 517; *S. C.*, 12 Ariz. 42, 95 Pac. 121. And see chapter on "Judgment-roll" and "Bills of Exceptions."

*Nevada*: Statements on appeal have not been dispensed with entirely, though never indispensable in the practice. *Gillig v. Lake etc. Co.*, 2 Nev. 214. Statements on appeal were never necessary, even on motions for new trial. It was early held that the case might be reviewed on the statement on the motion, without the necessity of a statement on appeal. *Bryant v. Lumber Co.*, 3 Nev. 313, 93 Am. Dec. 403. It was said in this case that it was the uniform practice of the court to treat the statement prepared on the hearing of the motion as a statement on appeal. In the subsequent case of *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245, the court seemed to go further, and to hold that the word "order," in section 332 of the Practice Act (section 3427, Cutting's Compiled Laws), was not intended to refer to an order on motion for a new trial. See section 3292, Cutting's Compiled Laws, section 197, Civil Practice. See, also, *Gregory v. Frothingham*, 1 Nev. 253; *O'Neale v. Cleveland*, 3 Nev. 485.

Section 3427, Cutting's Compiled Laws (section 332, Civil Practice), is as follows: "When the party who has the right to appeal wishes a statement of the case to be annexed to the record of a judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall state specifically the particular errors or

grounds upon which he intends to rely upon the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more, and shall file the same with the clerk, and serve a copy thereof upon the adverse party. The respondent may, within five days thereafter, prepare and file amendments to the statement, and shall serve a copy thereof on the appellant. The statement and amendments shall be presented to the judge or referee who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by such judge or referee. If no amendments are filed, the statement may be presented to the judge or referee for settlement, without any notice to the respondent."

Section 3285, Cutting's Compiled Laws (section 190, Civil Practice), defines an exception to be "an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision." Section 3286 (section 191, Civil Practice) provides that "the point of the exception shall be particularly stated, and may be delivered in writing to the judge, or, if the party require it, shall be written down by the clerk. When delivered in writing or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing or written down as above, it may be entered in the judge's minutes and afterward settled in a statement of the case, as provided in this act; . . . ." Further, "Provided, that if the judge shall in any case refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the supreme court for leave to prove the same, and shall have the right to do so, in such mode and manner and according to such regulations as the supreme court may by rules impose, and such exceptions as are allowed by said supreme court

shall become a part of the record of the cause." Section 3287 (section 192, Civil Practice) provides: "No particular form of exception shall be required; the objection shall be stated with so much of the evidence, or other matter, as is necessary to explain it, but no more, and the whole as briefly as possible."

The exceptions thus provided for are defined in language closely following that used in other codes in connection with exceptions settled in bills of exceptions; and are doubtless such as may be so used. See note 6, section 254, *post*. That they may be settled in a statement of the case is also manifest, however, from the express reference contained in section 3286.

The statement thus provided for must be prepared in accordance with the provisions of this section, otherwise it cannot be considered. *Baum v. Meyer*, 16 Nev. 91.

It must be prepared, presented and filed within the statutory time. *Whitmore v. Shiverick*, 3 Nev. 288; *State v. Murphy*, 29 Nev. 247, 88 Pac. 335.

But failure in any of these respects may be waived, either expressly or by implication. *Curtis v. McCullough*, 3 Nev. 202; *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231; *Smith v. Wells Estate Co.*, 29 Nev. 411, 91 Pac. 315; *Henningsen v. Tonopah etc. Co.* (Nev.), 104 Pac. 223.

In general, it may be said that no distinction of a material character is to be noted between a statement on appeal, as herein provided, and a statement on motion for new trial, except that the one is intended for the presentation of the case on appeal from a judgment or order other than on motion for new trial, and the other, an appeal from an order on motion for new trial. See chapter on "Statement," *ante*.

Section 3428, *Cutting's Compiled Laws* (section 333, Civil Practice), provides that the omission of a party to make a statement within the time limited shall be deemed a waiver of the right to a statement. The rule is made to apply to both parties with respect to the proposing and acceptance of amendments, etc. Section 3429 provides for the extension by the judge of the time to perform the

various acts provided by section and section 3430 authorizes the parties themselves to sign and certify the statement. Section 3431 provides that a copy of the statement be annexed to the judgment or appealed from. Section 3432 provides that the preceding sections apply to appeals from orders upon affidavits, the affidavit taking the place of the statement in cases.

*North Dakota*: The statutes of the state make provision for a statement alone (no provision being made in the bill of exceptions) denominated "statement of the case." It is defined as follows: "A statement of the evidence or a part thereof settled by the court for the purpose of reviewing either errors of law or the sufficiency of the evidence, or both is designated in this code a statement of the case." Section 7055, Revised Codes. Section 7056 provides: "A statement containing exceptions to any ruling made presented to the judge for settlement at the time the ruling is made, or exception may be entered on the judge's minutes and afterward so settled. Such statement must be conformable to the truth or be at the time corrected until it is so, and signed by the judge and filed with the clerk." Section 7057 provides for exceptions to be taken in the same manner before referees as before the court.

It is thus apparent that the statement here provided is in every material particular a bill of exceptions and such it is intended to be in the absence of a bill of exceptions, so called, as provided in the North Dakota practice. Section 7058 provides as follows:

"When a party desires to have a statement of the case settled, he must, within thirty days after receiving notice of the entry of judgment, or such further time as the court may allow, prepare the draft of a statement and serve the same upon the adverse party. Such draft must contain all the exceptions upon which the party relies, but no particular form of exception is required. The objection must be stated with so much of the evidence or other matter as is necessary to explain it and no more. Only the substance of the report

notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied or the substance thereof stated. There shall be incorporated in every such statement a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision and of the errors of law upon which the party settling the same intends to rely. If no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal. Within twenty days after the service of the draft of the statement the adverse party may propose amendments to the same and serve such amendments upon the other party. The proposed statement and amendments must within twenty days thereafter be presented by the party seeking the settlement thereof to the judge who tried or heard the case upon five days' notice to the adverse party. At the time designated the judge must settle the statement. If no amendments are served, or if served, or allowed, the proposed statement may be presented with the amendments, if any, to the judge for settlement without notice to the adverse party. If the judge is absent from the district at the time when the proposed statement shall be presented to him for settlement, the time of such absence shall not be deemed any portion of the time herein limited for the settlement hereof. It is the duty of the judge in settling the statement to strike out of it all redundant and useless matter and to make the statement truly represent the case, notwithstanding the assent of the parties to such matter. When settled, the statement must be signed by the judge with his certificate to the effect that the same is allowed, and shall then be filed with the clerk."

The provisions of this section bring the statement therein provided for very closely within the provisions of sections 650 and 659 of the California Code of Civil Procedure, and corresponding sections of other codes, which provide for the preparation and settlement of both bills of exceptions and statements on motion for new trial. The same procedure with reference to the presentation of

amendments, and the supervision of the trial judge, appear. It is therefore to be expected that the same rules of practice will be found to control, and such is the fact. Thus it is well settled that the statement must contain specifications of the evidence, when the sufficiency thereof is attacked on the appeal. *Pickert v. Rugg*, 1 N. D. 230, 46 N. W. 446; *Holcomb v. Keliher*, 3 S. D. 497, 54 N. W. 535; *Narregang v. Brown Co.*, 14 S. D. 357, 85 N. W. 602; *Henry v. Deane*, 6 Dak. 78, 50 N. W. 487; *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50; *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439.

Also, it has been held that it is not the duty of the judge of the court to engross the statement. *Edwards Lumber Co. v. Baker*, 3 N. D. 170, 54 N. W. 1026. But it is his duty to strike out of the statement all redundant and useless matter. *Dewey v. Fieler*, 10 S. D. 623, 74 N. W. 1052. So the statement must be settled within the statutory limit, or some authorized extension thereof. *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497; *Gold Street v. Newton*, 2 Dak. 149, 3 N. W. 329.

So the statement must conform to the statutory requirements. *McTavish v. Great Northern Ry. Co.*, 8 N. D. 94, 76 N. W. 985.

So it is the duty of the clerk to present the statement to the judge for settlement. *Pollock v. Aikens*, 4 S. D. 374, 57 N. W. 1.

Section 7059 provides that exceptions to any decision after judgment may be presented and a settlement thereof in a statement had as provided in sections 7056 and 7058, *supra*.

Section 7060 contains provisions as to the allowance of exceptions in accordance with the facts, substantially in the same language as that of section 652 of the California Code of Civil Procedure, and corresponding sections of other codes, and rules of practice with respect thereto differ in no essential particular from those set out in section 155, *ante*, in connection with those code sections. See *Taylor v. Miller*, 10 N. D. 361, 87 N. W. 597; *Plano etc. Co. v. Person*, 11

S. D. 539, 79 N. W. 833; Baird v. Gleckler, 3 S. D. 300, 52 N. W. 1097.

Section 7061 provides for the settlement of a statement by the judge after he has ceased to be such, as in the case of section 653, California Code of Civil Procedure, and corresponding sections. See section 153, *ante*.

See sections 143-160, *ante*, inclusive, as to the statement on motion for new trial, and sections 254-260, *post*, inclusive, as to bills of exceptions. The principles and rules of practice there outlined apply with equal force to the North Dakota statement of the case, as above described. Section 7065 et seq., Revised Codes, provide for a statement on motion for new trial, in terms but slightly different from those set forth in sections 7055 et seq.

Section 7069, Revised Codes of North Dakota, is as follows: "A statement of the case settled as provided in section 7058, whether the same is used upon a motion for a new trial or not, may be used on appeal from the final judgment."

This section is somewhat ambiguous. A statement of the case "settled as provided in section 7058" is intended primarily for use on an appeal from the final judgment, and not for use in connection with a motion for a new trial, either upon the hearing in the trial court, or on appeal. Doubtless, it was the intention of the lawmakers to refer to section 7065, instead of 7058. If so, the rule thus provided is in accord with the rule of practice discussed in the text. See note 3c et seq.

*Oklahoma*: No express provision is made for a statement of any kind. Provision is made for a bill of exceptions. See note 6, section 254, *post*. Provision is also made for what may be properly described as a judgment-roll, although that designation is not applied to the record which sections 5937, 5938 and 5939 of the Compiled Laws of 1909 require the clerk to make. See note 3b, section 230, *ante*. But provision is made for a paper called a "case" or a "case-made," which possesses most of the characteristics of a statement on appeal as recognized by the practice in some states, or the statement, or statement

of facts, of that of others; while it takes the place of the complete transcript on appeal in a fashion very similar to the simplified record of the new and alternative method of prosecuting an appeal in California and other states. A fair definition would be, that it is a statement of the facts and proceedings, which, if the parties desire, may be used in the place of a complete transcript on appeal.

Section 6073, Compiled Laws (see note 3a, section 230, *ante*), provides that "A party desiring to have any judgment or order of the district or county court, or a judge thereof, reversed by the supreme court, may make a case, containing a statement of so much of the proceedings and evidence, or other matter in the action, as may be necessary to present the errors complained of to the supreme court." The function of the paper thus described is clearly identical with that of a statement on appeal or bill of exceptions—less the latter than the former; but, as will appear below (and see section 265, *post*), it is also intended to take the place of the transcript.

Section 6074 is as follows: "The case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing, and present the same to the party making the case, or his attorney. The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk and the seal of the court to be thereto attached. It shall then be filed with the papers in the case. A certified copy thereof shall be filed with the petition in error. The exceptions stated in a case-made shall have the same effect as if they had been reduced to writing, allowed and signed by the judge at the time they were taken."

Section 6075: "The court or judge may, upon good cause shown, extend the time for making a case and the time in which a case may be served; and may also direct notice to be given of the time when the case may be presented for settlement, after the

same has been made and served, and amendments suggested, which when so made and presented shall be settled, certified and signed by the judge who tried the cause; and the case so settled and made shall thereupon be filed with the papers in the cause; and in all causes heretofore or hereafter tried, when the term of the office of trial judge shall have expired or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign and settle a case in all respects as if his term had not expired; and if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true and containing a full record of the cause and certified accordingly." See, also, as to extensions of time, section 544.

The rules of practice which govern the preparation, settlement, amendment, engrossment, functions, etc., of statements and bills of exceptions, are applicable in every substantial particular to the case or case-made, herein described, in so far as the same takes the place of and corresponds with those papers. The Oklahoma code contains no provisions for statements or bills, and the case or case-made may be said to take the place of those papers in every essential respect. Matters which are not properly a part of the record on appeal come within the scope of the general rule that such matters must be presented to the appellate court by statement or bill of exceptions, and require to be incorporated in a case. *McCoy v. McCoy*, 27 Okl. 371, 112 Pac. 1040; *Singleton v. Kennamer*, 27 Okl. 564, 112 Pac. 1026; *Black v. Kuhn*, 6 Okl. 87, 50 Pac. 80; *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *United States v. Choctaw Ry. Co.*, 3 Okl. 404, 41 Pac. 729; *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Kingsfisher v. Pratt*, 4 Okl. 284, 43 Pac. 1068; *Lookabaugh v. La Vance*, 6 Okl. 358, 49 Pac. 65; *Menten v. Shuttee*, 11 Okl. 381, 67 Pac. 478; and numerous others. But if the matters in error appear on the face of the record, they will be considered, though there be no case-made, or the case-made fail of due service. *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388. So, as in the instance of the statement or bill of

exceptions, the case-made must be served within the statutory time, or some lawful extension thereof. *Lathim v. Schlack*, 27 Okl. 522, 112 Pac. 968; *Bettis v. Cargile*, 23 Okl. 301, 100 Pac. 436; *Willson v. Willson*, 27 Okl. 419, 112 Pac. 970; *Devault v. Merchants' etc. Co.*, 22 Okl. 624, 98 Pac. 342; *London etc. Co. v. Cummins*, 23 Okl. 126, 99 Pac. 654; *Carr v. Thompson*, 27 Okl. 7, 110 Pac. 667; *Commissioners v. Porter*, 19 Okl. 173, 92 Pac. 152; *Abel v. Blair*, 3 Okl. 399, 41 Pac. 342; *Polson v. Purcell*, 4 Okl. 93, 46 Pac. 578; *Horne v. Christy*, 4 Okl. 553, 46 Pac. 561; *Sigman v. Poole*, 5 Okl. 677, 49 Pac. 944; *McCoy v. McCoy*, 27 Okl. 371, 112 Pac. 1040; *School Dist. v. Cox*, 27 Okl. 459, 112 Pac. 1041; *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388. So, after the time prescribed by the statute to make and serve a case-made has expired, the court is without jurisdiction to allow a further extension of time for that purpose. *Mutual Trust Co. v. Farmers' etc. Co.*, 27 Okl. 414, 112 Pac. 967; *Maddox v. Drake*, 27 Okl. 418, 112 Pac. 969; *Ellis v. Carr*, 25 Okl. 874, 108 Pac. 1101; *Lathim v. Schlack*, 27 Okl. 522, 112 Pac. 968; *Insurance Co. v. Cummings*, 23 Okl. 126, 99 Pac. 654; *Abel v. Blair*, 3 Okl. 399, 41 Pac. 342; *United States v. Choctaw Ry. Co.*, 3 Okl. 404, 41 Pac. 729; *Sigman v. Poole*, 5 Okl. 677, 49 Pac. 944; *Blanchard v. United States*, 6 Okl. 587, 52 Pac. 736; *Board of Commissioners v. Hubble*, 8 Okl. 209, 57 Pac. 163; *Noyes v. Tootle*, 8 Okl. 505, 58 Pac. 652; *Board of Commissioners v. Porter*, 19 Okl. 173, 92 Pac. 152. Nor can the order of extension be made before the order or judgment itself is rendered. *Planters' etc. Assn. v. Rose*, 27 Okl. 530, 112 Pac. 966.

After a case-made had been prepared, settled, signed by the judge, and attested and filed by the clerk with the papers in the case, the party who has had it prepared, settled, certified and filed has the same right to have it restored to him for use on his appeal by attaching it to his petition in error as the appellant in other states has to have the statement on appeal or on motion for new trial returned to him for a like purpose.



made for using the statement on motion for new trial in that connection.<sup>20</sup>

The code as first enacted did not provide for any statements whatever. But the amendments of 1874 restored statements on motion for new trial, and provided that they could be used on appeal from the judgment. The provision to this effect was as follows:

"Sec. 950. On an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. *Any statement used on motion for a new trial*, or settled after decision of such motion, when the motion is made upon the minutes of the court, as pro-

The case-made is not a part of the record of the district court. *St. Louis etc. Co. v. Messenger*, 26 Okl. 590, 110 Pac. 893.

If the evidence is to be reviewed, the case-made must contain a recital that it contains all the evidence. *Board of Commissioners v. Burrow*, 8 Okl. 212, 57 Pac. 162; *Same v. Hubble*, 8 Okl. 209, 57 Pac. 163; *Board v. De Lana*, 8 Okl. 213, 57 Pac. 162.

The case-made must be served upon each adverse party or his attorney. A failure in this particular defeats the jurisdiction of the appellate court, as in the instance of the notice of appeal and other jurisdictional papers. *Spaulding etc. Co. v. Dill*, 25 Okl. 395, 106 Pac. 817.

*Washington*: The distinction between bills of exceptions and statements of facts (so called) is outlined in section 388, Rem. & Bal. Code (section 5057, Bal. Code), which is as follows:

"Any party to any action or proceeding may, at any stage thereof, have any rulings or decisions of the court, or a judge, referee or commissioner thereof, in the cause, together with the necessary evidence, papers or proceedings connected therewith or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, made a part of the rec-

ord in the cause, by the certifying of a bill of exceptions as in this chapter provided. And any such party may, *after the making of an appealable order or the final judgment in the cause*, have all rulings, decisions, evidence, papers, proceedings and exceptions in the cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, made a part of the record of the cause by the certifying of a statement of facts, as in this chapter provided. The certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause."

So far as the preparation of the two papers is concerned, therefore, no distinction is to be noted between bills and statements. The practice is the same. See section 389, Rem. & Bal. Code (section 5058 Bal. Code).

<sup>20</sup> See section 950, Code of Civil Procedure; and see *People v. Crane*, 60 Cal. 279; *Craig v. Fry*, 68 Cal. 363, 9 Pac. 550; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Witter v. Andrews*, 122 Cal. 1, 54 Pac. 276.



vided in section 661, or any bill of exceptions settled as provided in sections 649 or 650, or used on motion for new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial."

It would seem from the language of this provision that the only condition of the use of the statement on appeal from the judgment is that it shall have been "used on motion for new trial" or (where the motion was made upon the minutes of the court) that the statement shall have been settled after the decision in the mode prescribed for such case. It does not seem to be necessary that there should be an appeal from the order on motion for a new trial. But this question does not appear to have been directly decided.<sup>24</sup> The first condition, that of the *use* of the statement, or its *settlement*, in the case of a motion on the minutes, has been regarded in various ways. In *Brandt v. Clark*,<sup>25</sup> Works, J., for the court said:

<sup>24</sup> But see *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225, where it was incidentally said that appeal was not a prerequisite; and see below, comments on *Vinson v. Los Angeles-Pacific R. R. Co.*, 141 Cal. 151, 74 Pac. 757, and the opinion therein. And see note 3g below, reference to *Houghton v. Trumbo*, 103 Cal. 239, 37 Pac. 152, as to an appeal by a codefendant.

With respect to the use of a bill of exceptions on a new trial motion, although the new trial proceedings were not prosecuted beyond the district court, the supreme court of Montana, in *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934, held that the bill might be used on the appeal from the judgment. The court said: "Under the language of this section (section 1736, Code of Civil Procedure, same as section 950, Code of Civil Procedure, California) we cannot see any reason why the bill of exceptions in this case may not be used on appeal from the judgment. The record was made within the time fixed, and while the facts were fresh in the mind of the judge; and the purpose of the section being to prevent multiplication of the records, and this object having been attained, we cannot see any reason why such bill of exceptions may not be used on appeal from the judgment

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for all purposes for which a bill of exceptions may be properly used on appeal from the judgment."

In *Hyde v. Harkness*, 1 Idaho, 623, it was held that a statement which could not properly be used on the new trial motion could not be used on appeal from the judgment; and in *Bradbury v. Idaho etc. Co.*, 2 Idaho, 239, 10 Pac. 620, it was held that a new trial statement could be used on appeal from the judgment only when it was first used at the hearing of the new trial motion. See, also, *Steffy v. Esler*, 6 Idaho, 228, 55 Pac. 239. But these decisions are early in date, and the court seems to have adopted the California view in *Steve v. Bonners etc. Co.*, 13 Idaho, 384, 92 Pac. 363. Also *Quayle v. Ream*, 17 Idaho, 545, 106 Pac. 610, where it was held that a statement prepared and settled for use on a motion for new trial might be used on appeal from the judgment on all questions of law therein saved by exception, although never presented or used on a new trial motion.

<sup>25</sup> 81 Cal. 634, 22 Pac. 863. In this case Justice Works thus gave expression to an appropriate criticism of the multiplicity of papers used in the California procedure:

"We have never been able to understand why a statement was pro-

"As to the question presented by the motion in this case we have not been able to satisfy our own minds whether the point is taken or not. If the language of the section is to be construed generally, a statement prepared on a motion for a new trial cannot be used on appeal from the judgment unless it has been in the support of the motion. But there is no reason apparent why it should be so. We are inclined to the belief that the section should not receive this strict and literal construction, but the question we have reached on the merits of the case renders it unnecessary to decide the point, and we prefer to leave it open for further consideration, if it should ever become necessary."

It did become necessary, and at an early date, and the case was called upon to decide the matter, and did decide it negatively. In *Jue Fook Sam v. Lord* the court said:

"Unless the statement was *used* on motion for new trial, it cannot be used on appeal from the judgment. The letter and spirit of the code provisions unite in showing that it was the aim of the legislature to require a party desiring to review the decision of the trial court on matters of fact, or its rulings on the trial, to take some steps to correct the error while the history of the trial is fresh in the memory of the judge and the parties. If the aggrieved party desires the court which tried the case to review its own decisions of law or of fact, and grant a new trial, he 'must within ten days after the verdict of the jury, or after the action were tried by jury, or after notice of the decision of the court or referee, . . . file with the clerk and serve upon the adverse party a notice of intention, designating the grounds, etc.; and thereafter he must prepare and serve his bill of exceptions within the time fixed. (Code Civ. Proc., sec. 659.)

provided for in the code, and having been provided for, we are equally at a loss to know why it should ever be resorted to in practice. A bill of exceptions has always been a well-known means of preserving exceptions and bringing up the evidence on appeal. It is a simple and convenient method of accomplishing these results, and is equally applicable to any and all kinds of appeals provided for by the code. (Code Civ. Proc., secs. 646, 653, 661, 950.) If attorneys could be induced to abandon entirely the practice of using or attempting to use a state-

ment of the case, and resort exclusively to a bill of exceptions, the uncertainty and confusion which has crept into the practice on this point might in time be removed, and some degree of order and system in the practice in this respect be reasonably hoped for. As a great portion of the time of the court that should be devoted to the trial of cases on their merits is taken up with these petty questions of procedure."

83 Cal. 159, 23 Pac. 225.

such bill or statement used on motion for new trial may be used on appeal from a final judgment, although there has been no appeal from the order, if it appear from the certificate of the judge, or otherwise, that it was used on the hearing of the motion. If the proper steps have not been taken in time, and for that reason the judge has refused to settle the bill or statement, it is not one which has been *used on motion for a new trial*, and cannot, therefore, be used on appeal from the judgment."

So the doctrine prevailed, with slight change,<sup>28</sup> until the decision in *Wall v. Mines*,<sup>29</sup> where there was an *obiter dictum* to the contrary. This *obiter* was repeated by reference in later decisions,<sup>30</sup> and was finally adopted as a settled rule of practice in *Vinson v. Los Angeles-Pacific R. R. Co.*,<sup>31</sup> where the court held "that the effect of this section is to give the party who intends to appeal from a judgment an independent right to have settled a statement of the case for use upon such an appeal, and that by virtue of its provisions he is not limited to the use of such statements only as have been regularly and legally settled in the course of some proceeding upon motion for a new trial."

This is believed to be a fair expression of the modern view as first expressed in *Wall v. Mines*, above cited. In that case, which was a motion to dismiss an appeal from the judgment upon the ground that the appellant had failed to file his transcript within the required time, the court, in denying the motion, said:

"Upon the adoption of the code . . . the provisions of the Practice Act for a statement on appeal were not preserved; and the provision in section 346 of the Practice Act that the record on appeal should include 'the statement, if there be any,' was omitted in section 950 of the Code . . . as originally adopted. Neither did the code, as originally adopted, authorize a new trial

<sup>28</sup> The change here referred to is the decision in *Richardson v. Eureka*, 96 Cal. 443, 31 Pac. 458, where it was held that a statement in the transcript which appears to have been duly presented, settled and allowed will be presumed to have been used at the hearing of the motion, in the absence of a showing to the contrary.

The main question was decided as in the cases quoted in the text in *Mix v. San Diego etc. Co.*, 86 Cal. 235, 24 Pac. 1027; and in *Brind v. Gregory*, 120 Cal. 640, 53 Pac. 25; and in

*Houghton v. Trumbo*, 103 Cal. 239, 37 Pac. 152, it was held, besides the main ruling, that a statement used on a motion for a new trial by one who does not appeal cannot be used by an appellant codefendant on his appeal.

<sup>29</sup> 128 Cal. 136, 60 Pac. 682.

<sup>30</sup> *Kelly v. Ning Yung etc. Assn.*, 128 Cal. 602, 72 Pac. 148; *Bernard v. Sloan*, 138 Cal. 746, 72 Pac. 360.

<sup>31</sup> 141 Cal. 151, 74 Pac. 757; and see *Mendocino Co. v. Peters*, 2 Cal. App. 24, 82 Pac. 1122; *Pease v. Fink*, 3 Cal. App. 371, 85 Pac. 657.

to be had 'upon a statement of the case' or otherwise than bills of exceptions and affidavits. By the amendments to the code, which took effect July 1, 1874, the party seeking a new trial was authorized, under section 658, to have the same prepared at his option, upon a bill of exceptions, or statement of the case, prepared as thereafter provided, and section 659 prescribed the mode in which such statement of the case should be prepared. At the same time, section 950 was amended in its present form by providing that the record on appeal should include 'a copy of any bill of exceptions or statement in the case upon which appellant relies.' Section 950 consists of two parts, viz., one prescribing the record which the appellant is to furnish in support of his appeal, and the other the use which the court may make of the record which is furnished. Under the provisions of the former Practice Act it was held that a statement of the case on motion for new trial was not available upon an appeal from the judgment, even though such appeal was taken at the same time and heard upon the same transcript as the appeal from the order without a stipulation to that effect (*Tison v. Connolly*, 43 Cal. 636; *Hayne on New Trial and Appeal*, sec. 251); and the provision in the second sentence of section 950 that the documents therein named might be used on an appeal from the final judgment 'equally' as upon an appeal from an order granting or refusing the new trial was doubtless intended in view of these decisions.

"But the record which the appellant is required to furnish is not limited by the provisions of the second sentence of section 950 respecting its use. The requirement that he must furnish a copy of 'any statement' in the case upon which he relies, is not to be disregarded because the latter sentence in the section provides that 'a statement used on motion for a new trial may be used on the appeal from the judgment.' The only statement which provision is made by the code is a statement of the case, either prepared to be used on the motion for a new trial or such motion has been decided; and as this statement was authorized by section 658 at the same time that section 950 was amended by requiring the appellant to furnish a copy of 'any statement in the case,' it must be held that the statement referred to in the first sentence of section 950 includes the statement prepared for use on motion for a new trial, whether it has been ac-

used or not. If the legislature had intended that the appellant should furnish only a statement which had been used only on a motion for a new trial, it is reasonable to suppose that it would have so declared, rather than to require him to furnish any statement in the case upon which he relies.

"An appeal from a judgment may be taken within six months after its entry, while an appeal from an order denying a new trial must be taken within sixty days after its entry. In practice, the two appeals are more frequently taken at the same time than otherwise, but the record which the appellant is required to furnish upon the appeal from the judgment is the same whether there has been any appeal from the order or not. The legislature could not have intended that the statement could not be used upon the appeal from the judgment unless it had been actually used on a motion for a new trial before the appeal from the judgment was taken, since it might often happen that the appeal from the judgment would be taken, and might be heard, before the order denying the new trial would be made; but even in such case the appellant is required to furnish the appellate court with a copy of the statement whether it has been used or not. The legislature must have intended that the statement so required to be furnished should receive some consideration upon an appeal from the judgment, or it would not have required it to be furnished as a part of the record. And the requirement that the appellant shall furnish any 'statement in the case' upon which he relies implies that such statement may be considered upon his appeal; otherwise the requirement would be vain and futile."

This opinion, as has been twice noted, was *obiter*. There was pending for settlement a statement on motion for new trial, and under the provisions of Rule II this was an adequate excuse for the failure to file the transcript. Except as an exceedingly remote consideration, the question as to the use of this statement was not involved. Under the authority of *Somers v. Somers*,<sup>sm</sup> the motion to dismiss was denied. *Kelly v. Ning Yung etc. Assn.*<sup>sa</sup>

<sup>sm</sup> 83 Cal. 621, 24 Pac. 162. This was a motion to dismiss an appeal on the ground of failure to file the transcript in time. It was shown that more than forty days had elapsed since the appeal was perfected; but it was also shown that there was pend-

ing an unsettled statement on motion for a new trial, and under Rule II the appellant was entitled to have forty days from the settlement of such a statement within which to file his transcript.

<sup>sa</sup> 138 Cal. 602, 72 Pac. 148.

was a similar case, and was disposed of upon the authority of the cases last cited. Chief Justice Beatty, who delivered the opinion of the court, found a much better reason, and the only possible reason, it would seem, for adopting the same doctrine without advertent to that which, without specific reason, would separate the language of the section into two distinct and independent portions, the first of which must be construed to be unlimited in its scope, while the second must be regarded as being limited by the first. He said:

"There does not seem to be any good reason for giving legal effect to the word 'used' as employed in the provision quoted. When a statement on motion for new trial has been settled and conclusively presumed to show exactly what occurred at the trial, including the exceptions reserved to the rulings of the court on questions of law. As to these matters, it is in substance the same thing as a bill of exceptions, the only difference between the two being the difference in their labels. This being so, it is difficult to perceive why, if the statement contained exceptions to rulings which may be reviewed on appeal from the judgment, should not be used in support of such appeal, whether or not it has been 'used' on the motion for a new trial, and regardless of the question whether it is likely ever to be so used."

To this *obiter*, Justice McFarland declined to accede. He expressed his dissent in the following significant language:

"The word 'used' in section 950, in the phrase 'used on motion for new trial,' is, in my opinion, so clear and certain as to act, that it cannot be considered to mean anything else than that the statement had been used. A motion for a new trial is an independent proceeding, and nothing connected with it can be brought into an appeal from the judgment unless by virtue of an express statutory provision."

But by the case of *Vinson v. Los Angeles-Pacific R. R.* cited above, the question was disposed of more authoritatively. That was also a motion to dismiss, and upon the same grounds and the contention of respondent was answered in the same manner. But in this case the right of the appellant to have a statement had lapsed. The judgment was rendered (*sic*) May 15, 1902. The motion for a new trial was made on the minutes of the trial and was disposed of by denying the same on July 21, 1902. The appeal from this order was ever noticed or perfected, and



were taken to prepare a statement upon the motion until number 16, 1902, more than sixty days after the date of the denying the motion. The appeal from the judgment was set on November 17, 1902, and, no transcript having been taken, the motion to dismiss was made on January 10, 1903. It is obvious that the right to have a statement on motion for new trial upon the minutes of the court had lapsed, and that if there was authority for the settlement of the statement prepared on the 16th of December, 1902, nearly five months after the denial of the motion, it must be looked for elsewhere than in those provisions of the code which control the preparation and settlement of statements on motion for new trial. In other words, the statement so settled was in no proper sense a statement on motion for new trial. It will be remembered that statements on motion, such as formerly obtained under the old Practice Act, have no longer any place in latter day procedure. The only statement recognized by the code is the statement on motion for new trial, unless section 950 authorizes another statement. The code at bar is authority for the rule that that section does authorize a statement different and distinct from a statement on motion for new trial; i. e., one "regularly and legally settled in the course of some proceeding upon motion for a new trial." The reasons given for this startling innovation are, besides the case in *Wall v. Mines* and *Kelly v. Ning Yung etc. Assn.*, above set out, as follows:

... In department it was held that, because the moving party had lost by lapse of time his right to appeal from the order refusing his motion for a new trial, the trial court could not be compelled to settle the statement, and that any statement settled by the court might settle under such circumstances would be void and would be stricken from the files. This would be true if the right of the appellant to the statement was absolutely limited by his right to appeal from the order, or if, in other words, as the department opinion held, he must appeal from the order before he can exercise the right to use the statement upon his appeal from the judgment. We think, however, that this conclusion is erroneous; that it imposes onerous conditions upon the unfortunate litigant who moves for a new trial upon the minutes of the court—a practice which by this court has been commended (*Malcolmson v. Harris*, 90 Cal. 262, 27

Pac. 206), which are not brought to bear upon the litigant moves for a new trial in any other way. We think, moreover, that the conclusion is in hostility to the spirit of simplicity in practice, pleading, and procedure which animates our code system. To illustrate: If the motion for a new trial be made upon the bill of exceptions or upon the statement (Code Civ. Proc. 659, subds. 2, 3), it is not necessary that the moving party should appeal from the order denying him a new trial as a condition to his right to use the bill of exceptions or statement, upon appeal from the judgment, and no sound reason can be discerned to lead to the view that the legislature meant to make a distinction between those cases and that where the motion has been made on the minutes of the court. Nor does it seem a satisfactory answer to say that the appellant in this case cannot have any argument prepared because he could not use the statement upon appeal from the order denying him a new trial. The law does not require the trial court to settle such a statement without resort to the taking of an appeal from the order denying the new trial; the statement to be used upon appeal from the judgment; and we think a consideration of the code sections will disclose that the law contemplates that the trial judge should do precisely the same thing. It is to be remembered that a litigant's right to a new trial from the judgment and his right to appeal from the order refusing him a new trial are distinct and separate rights. He may waive either and rely upon the other. It is recognized that, though not all, of the propositions which may be advanced in support of a motion for new trial may likewise be urged on appeal from the judgment. The litigant who has failed in his motion for a new trial may conclude that all of the propositions which he desires to argue to the appellate court can be presented upon appeal from the judgment with the accompanying papers, and the law allows upon such appeal. He may decide as a matter of economy to avoid the expense of two appeals, or he may elect to present his appeal from the judgment alone, under the conviction that if the trial court was correct in its rulings as to such matters, no appeal can be raised only on motion for a new trial, and hence that an appeal from the judgment accords him a complete remedy. Therefore, to say that because he has not prosecuted an appeal from the order refusing him a new trial, he must lose his right to present those points which arise upon his motion for a new trial is to say that because he has not prosecuted an appeal from the order refusing him a new trial, he must lose his right to present those points which arise upon his motion for a new trial.



but which at the same time are proper to be presented upon his appeal from the judgment, is a construction so harsh as to be justified only by the express mandate of the law. Or it may be put in another way: Why should a litigant be compelled to take the useless and expensive procedure of perfecting an appeal which he does not care to prosecute in order to preserve rights which the law accords him on appeal from the judgment alone? And that the law does accord these rights we think manifest from a reading of section 950 of the Code of Civil Procedure. The first sentence of that section is mandatory, and declares that on an appeal from a final judgment the appellant must furnish this court with a copy of the bill of exceptions or statement of the case upon which he relies. And any statement settled after a decision of a motion for a new trial when the motion is made upon the minutes of the court may be used on appeal from a final judgment equally as on appeal from the order granting or refusing a new trial. There is in this no word as to the necessity of taking an appeal from the order denying the new trial as a prerequisite to the right to employ the statement on appeal from the judgment. It is a declaration, first, that the party appealing from the judgment has the right to use the statement settled after the decision upon his motion for a new trial upon appeal from the judgment, coupled with the mandatory provision that he must present such a statement to this court. This being his correlative rights and duties, it seems plain that he may demand of the trial court the settlement of a proper statement, not to be used upon an appeal from the order denying him a new trial, but to be based upon his appeal from the judgment which he has already taken, because the law says that he may use it, and further says that he must present it to this court if it contains any propositions upon which he relies for a reversal. And this will be found strictly within the reasoning of this court in *Wall v. Mines*, 128 Cal. 136, 60 Pac. 682, and in *Kelly v. Ning Yung etc. Assn.*, 138 Cal. 602, 72 Pac. 148. Of course it would be a vain thing to compel the trial court to settle such a statement if its only purpose was to be used on appeal from the order denying a new trial, because the right to appeal from that order is lost, but it is far from being a vain thing in the contemplation of the law, as above set forth, that the appellant from the judgment has a right

to use such a statement upon appeal from the judgment, and must present it to this court upon such appeal.”

It will be remembered that statements on motion for new trial under the old Practice Act could not be used on appeal from the judgment in the absence of a stipulation to that effect.<sup>4</sup> And it is believed that the object of the above provision was simply to do away with the necessity for such a stipulation, and to accomplish without it what could be effected by it, but nothing more. It is not believed that it was the intention of this provision to extend the operation of an appeal from the judgment. It would seem that the statement used on motion for new trial cannot be used on appeal from the judgment to present any question that could not be presented on appeal from the judgment by means of other records. Thus, questions as to irregularities of the court, jury, or adverse party, questions as to misconduct of the jury, or as to accident, or surprise, or newly discovered evidence, or excessive damages, cannot be presented on appeal from the judgment by any other record; and it does not seem that they can be presented on such appeal by means of a statement used on the motion for new trial.

So, notwithstanding the broad expressions used in *Vinson v. Los Angeles-Pacific Co.*, *supra*, it seems plain that a statement used on motion for new trial cannot present on appeal from the judgment any question that could not be presented on motion for new trial, as, for example, questions as to appealable orders other than on motion for new trial, and nonappealable orders reviewable on appeal from the judgment through other records on appeal. In other words, it is believed that the only purpose of allowing a statement which was used on motion for new trial to be used on appeal from the judgment is to present such questions as may be presented both on motion for new trial and on appeal from the judgment, viz., questions as to errors in law occurring at the trial and questions as to the insufficiency of the evidence to justify the decision.

**§ 251. Difference Between Statements on Motion for New Trial and Statements on Appeal Under the Old Practice Act—Office of Statements on Appeal.**—A statement on motion for new trial was not the same thing as a statement on appeal, and could not

<sup>4</sup> See section 251, *post*.

be used as such without a stipulation to that effect.<sup>1</sup> The two kinds of statements derived their existence and validity from different provisions of the statute. Statements on motion for new trial were prepared under section 195 of the Practice Act,<sup>2</sup> while statements on appeal was prepared under section 338.<sup>3</sup> The two kinds of statement, moreover, differed in function. A statement on motion for new trial was for the purpose of presenting in the lower court and in the appellate court such questions as arose on motion for new trial.<sup>4</sup> A statement on appeal was the record on appeal from appealable orders,<sup>5</sup> other than orders on motion for new trial, and was the record for presenting for review such questions as could be reviewed on appeal from the judgment, and which did not arise upon the ordinary judgment-roll,<sup>6</sup> viz., questions as to nonappealable orders affecting the judgment,<sup>7</sup> and questions as to errors in law occurring at the trial and excepted to by the losing party. A statement on appeal could not be used for the purpose of presenting questions of the insufficiency of the evidence to justify the decision.<sup>8</sup> Its sole purpose (aside from

<sup>1</sup> *Thompson v. Connolly*, 43 Cal. 636; *Casgrave v. Howland*, 24 Cal. 457; *Burdge v. Gold Hill Co.*, 15 Cal. 198; *Lower v. Knox*, 10 Cal. 480; *Meerholz v. Sessions*, 9 Cal. 277. The amendment of 1861 to section 195 provided, among other things, that the statement on which a motion for new trial was heard in the court below should be the record on appeal from the order granting or refusing the new trial. It had no relation to appeals from judgments. This amendment was entirely misconceived in *Towdy v. Ellis*, 22 Cal. 650. This case is inconsistent with the cases just cited, and is evidently unsound. It was cited with approval in *Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135, but is ignored in later decisions.

<sup>2</sup> As to preparation of statements on motion for new trial, see chapter 22.

<sup>3</sup> As to preparation of statements on appeal, see section 253, *post*.

<sup>4</sup> As to such questions, see chapters 3 to 19.

<sup>5</sup> See section 261, *post*.

<sup>6</sup> *Harper v. Minor*, 27 Cal. 107; *Wetherbee v. Carroll*, 33 Cal. 549; *Kavanagh v. Maus*, 28 Cal. 261; *McAbee v. Randall*, 41 Cal. 136.

In *Re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 33, with respect to the function of a bill of exceptions, the supreme court said: "The purpose of a bill of exceptions is to incorporate in an authentic form, as a part of the record, proceedings on the trial, including rulings of the trial judge alleged to be erroneous, the objections and exceptions taken thereto, with the grounds thereof, which would not otherwise appear therein." This was applied to statements in *Manuel v. Scott*, 37 Mont. 29, 94 Pac. 487, in the following language: "No paper or other matter, not made a part of the record in a cause by the statute, can be put into it or made a part of it, except by bill of exceptions or statement duly certified by the judge sitting in the cause." See section 229, *ante*.

<sup>7</sup> Such orders were and are reviewable on appeal from the judgment. See section 195, *ante*. And a statement was the proper record to present them. See section 261, *post*.

<sup>8</sup> Such questions could not, under the old Practice Act, be presented on appeal from the judgment, but only on motion for new trial. See section 96. Under the code such questions

its office as a record for the review of orders) was to present questions as to errors in law occurring at the trial.<sup>9</sup> Such questions could be reviewed either on motion for new trial or upon appeal from the judgment.<sup>10</sup> And as the framework of the two kinds of statements was the same, there was no substantial reason why (as to such questions) the statement on motion for new trial should not be used as a record on appeal from the judgment.<sup>11</sup> The technical difficulty in the way was that it was not a part of the judgment-roll,<sup>12</sup> nor designated as one of the papers to be furnished on appeal from the judgment, and hence was not brought up by such appeal. This difficulty was usually overcome in practice by a stipulation that the statement on motion for new trial should be used on appeal from the judgment. Such stipulation was held to make the statement on motion for new trial a proper record on appeal from the judgment<sup>13</sup> "so far as it presents any question that can be reviewed on appeal from the judgment, but no further."<sup>14</sup>

**§ 252. Statements on Appeal Under the Old Practice Act were Part of the Judgment-roll.**—Statements on appeal were not mentioned in the general section relating to the contents of the judgment-roll.<sup>1</sup> And perhaps it was from this circumstance that it was usual to speak of statements on appeal as of something distinct from the roll. Thus, in *Karth v. Orth*,<sup>2</sup> *Burnett, J.*, said: "There being in the record no statement on appeal, we are confined to the judgment-roll, which being regular the judgment must be affirmed." So in *Harper v. Minor*,<sup>3</sup> *Sawyer, J.*,

can be presented on appeal from the judgment if taken within sixty days from its rendition. Section 96, *ante*.

<sup>9</sup> *Gates v. Salmon*, 46 Cal. 361; *City of Stockton v. Creanor*, 45 Cal. 247; *Brown v. Brown*, 41 Cal. 88; *Yates v. Smith*, 40 Cal. 662; *Reed v. Bernal*, 40 Cal. 628.

<sup>10</sup> See cases cited in note 10 to section 100, *ante*.

<sup>11</sup> The Code of Civil Procedure provides that a statement on motion for new trial can be used on appeal from the judgment. Section 950, quoted in section 250, *ante*.

<sup>12</sup> Statements on appeal were part of the roll. See section 252, *post*.

<sup>13</sup> *Hastings v. Hallick*, 13 Cal. 203;

*Carpentier v. Williamson*, 25 Cal. 154; *Cardinell v. O'Dowd*, 43 Cal. 586. As to whether any particular statement was to be considered a statement on appeal or a statement on motion for new trial, see *Hagar v. Lucas*, 29 Cal. 309; *Levy v. Getleson*, 27 Cal. 685.

<sup>14</sup> See *Carpentier v. Williamson*, 25 Cal. 154.

<sup>1</sup> See statute quoted in section 230.

In the North Dakota practice the statement on appeal takes the place of the bill of exceptions in other systems, and is a part of the roll. See section 230, *ante*.

<sup>2</sup> 10 Cal. 192.

<sup>3</sup> 27 Cal. 107.

said: "On appeal from the judgment where there is no statement we can only consider matters appearing in the judgment-roll." So in *Solomon v. Reese*,<sup>4</sup> Sanderson, J., said: "The case comes here upon the judgment-roll, and where such is the case, no statement of the grounds of the appeal is required." And similar language is used in many other cases.<sup>5</sup> But this language is inaccurate. The statement was a part of the roll so far as the purposes of the appeal were concerned. This was provided by section 342, which as enacted in 1851 was as follows:<sup>6</sup>

"Sec. 342. The clerk shall annex the statement, if the appeal be from a final judgment, to the judgment-roll; if the appeal be from an order, to such order or to a copy thereof."

In 1864 the section was amended so as to read as follows:<sup>7</sup>

"Sec. 342. A copy of the statement shall be annexed to a copy of so much of the judgment-roll as shall be included in the transcript on appeal if the appeal be from the judgment; if the appeal be from an order, to a copy of such order."

The statement was for the purpose of bringing into the roll matter which otherwise would not appear there.<sup>8</sup>

**§ 253. Preparation of Statements on Appeal Under the Old Practice Act.**—The mode of preparing statements on appeal was similar in its general features to the mode of preparing statements on motion for new trial, which has been fully considered.<sup>1</sup> Inasmuch as statements on appeal have no longer any existence, it will not be necessary to do more here than to give the provisions of the statute. Section 338 as enacted in 1851 was as follows:<sup>2</sup>

"Sec. 338. When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall contain the grounds upon which he intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more; and shall serve a copy thereof

<sup>4</sup> 34 Cal. 28.

<sup>5</sup> See *Wetherbee v. Carroll*, 33 Cal. 549; *Dimick v. Campbell*, 31 Cal. 238; *Frank v. Doane*, 15 Cal. 302; *American River Co. v. Bear River Co.*, 11 Cal. 339; *McGill v. Rainaldi*, 11 Cal. 391.

<sup>6</sup> Laws of 1851, p. 105.

<sup>7</sup> Laws of 1863-64, p. 247.

<sup>8</sup> See cases cited in note 6, to section 251, *ante*.

<sup>1</sup> See chapter 22.

<sup>2</sup> Laws of 1851, p. 105.

upon the adverse party. The respondent may within five thereafter prepare amendments to the statement and serve a copy on the appellant. If such amendments are admitted the statement shall be corrected accordingly; and if not admitted the statement and amendments shall be presented to the judge who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by such judge."

In 1863 this section was amended so as to read as follows:

"Sec. 338. When the party who has the right to appeal a statement of the case to be annexed to the record of the judgment or order, he shall within twenty days after the entry of judgment or order prepare such statement, which shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified and no more, and shall serve a copy thereof upon the adverse party. The respondent may within five days thereafter prepare amendments to the statement and serve a copy on the appellant. The statements and amendments which may be served shall be presented to the judge who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by such judge. If no amendments are served the statement may be presented to the judge for settlement without any notice to the respondent."

This section stood until the adoption of the Code of Civil Procedure. After being settled as above provided the statement was to be authenticated. This was provided by section 341, which was enacted in 1851 was as follows:<sup>4</sup>

"Sec. 341. The statement when settled by the judge shall be signed by him with his certificate that the same has been settled and is correct; when the statement is agreed upon by the parties or their attorneys shall sign the same with their certificate that it has been agreed upon by them and is correct. In any case, when settled or agreed upon, it shall be filed with the clerk

<sup>3</sup> Laws of 1863, p. 644.

<sup>4</sup> Laws of 1851, p. 105. This section stood until the adoption of the Code of Civil Procedure. See also, *Van Pelt v. Littler*, 14 Cal. 2d 281; *Kavanagh v. Maus*, 28 Cal. 2d 281.

the appellant failed to propose a statement within the twenty above limited, or some lawful extension thereof,<sup>5</sup> he was deemed to have waived his right to have a statement.<sup>6</sup> And if the respondent failed to propose amendments within the five days allowed therefor,<sup>7</sup> or some lawful extension thereof, he was deemed to have agreed to the statement as proposed.<sup>8</sup> The subject is more fully considered in the chapter in relation to amendments on motion for new trial.

See section 340; Laws of 1851, p.

See section 339; Laws of 1851, p. 105; and Laws of 1855, p. 303, and of 1863, p. 644. See, also, *Harley v. West*, 2 Cal. 95; *Harley v. Stans*, 4 Cal. 284; *Heihn v. Stans*, 12 Cal. 412; *Macomber v. Cham*, 8 Cal. 322; *McIntyre v.*

*Willis*, 20 Cal. 177; *Harper v. Minor*, 27 Cal. 107; *Bryan v. Maume*, 28 Cal. 238; *Ryan v. Dougherty*, 30 Cal. 218.

<sup>7</sup> Section 340, *post*; Laws of 1851, p. 105.

<sup>8</sup> Section 339, *post*; Laws of 1851, p. 105; Laws of 1855, p. 303; and Laws of 1863, p. 644.

## CHAPTER XLV.

## RECORD ON APPEAL FROM THE JUDGMENT—BILLS OF EXCEPTIONS.

- § 254. Kinds of bills of exceptions under the old Practice Act and the code—Difference between bills and statements.
- § 255. Bills of exceptions constitute part of the judgment-roll.
- § 256. Bills of exceptions settled at the trial.
- § 257. Bills of exceptions settled after the trial—Time in which the proposed bill and amendments must be served.
- § 258. Contents of bills settled after the trial—Exceptions and matters in support and explanation thereof.
- § 259. Contents of bills settled after the trial—Specifications.
- § 260. Presentation for settlement, settlement, engrossment, authentication, and filing of bills of exceptions.

§ 254. **Kinds of Bills of Exceptions Under the Old Practice Act and Under the Code of Civil Procedure—Difference Between Bills of Exceptions and Statements.**—There was but one kind of bill of exceptions under the old Practice Act, viz., bills settled at the trial.<sup>1</sup> These bills could not be used on motion for new trial. Nor could they be used as the record on appeal from orders granting or refusing a new trial. Their sole office was to present on appeal from the judgment, questions as to errors in law occurring at the trial, and excepted to by the losing party.<sup>2</sup> Such questions could be presented on appeal from the judgment, either by bills of exceptions or by statements on appeal. In this regard Mr. Justice Rhodes, C. J., delivering the opinion in *Yates v. Smith*,<sup>3</sup> said: "A statement on appeal and a bill of exceptions are substantially the same, they differing only in the time and manner of settlement and in some particulars in form, and their purpose is the same, and that is, to present for review questions of law." This language is a little too broad, inasmuch as statements on appeal could be used as the record on appeal from orders other than on motion for new trial, while bills of exceptions could not. They differed moreover, as stated in *Yates v. Smith*, in the time of settlement.

<sup>1</sup> See sections 141, *ante*, and 256, *post*.

<sup>2</sup> See section 141, *ante*.

<sup>3</sup> See note 11 to section 261, *ante*, and see, also, section 141, *ante*.

<sup>4</sup> See note 6 to section 256, *ante*, and 40 Cal. 662.



s of exceptions being settled at the trial, and statements on appeal after the trial. But aside from this they were very similar, far as their common function was concerned.

Bills of exceptions settled at the trial are provided for by the Code of Civil Procedure.<sup>6</sup> But under the code they have an ex-

See section 649, California Code of Civil Procedure; and see section post.

Bills of exceptions are made an essential part of the record in the courts of practice, as outlined below:

Arizona: Section 1458, Revised Statutes (section 249, Civil Practice), is as follows: "Whenever in the progress of a cause either party is dissatisfied with any ruling, opinion or order of the court, he may object thereto at the time the same is made or announced, and at his request time shall be given to embody the exception in a written bill." Section 1459 (section 250, Civil Practice): "No particular form of words shall be required in a bill of exceptions, but the objection to the ruling of the court shall be stated, and in such circumstances or so much of the evidence as may be necessary to explain it and no more, and the bill shall be as briefly as possible." Section 1460 reiterates this reference to the evidence and provides, in addition, "and if all the evidence or sufficient thereof to explain the exceptions contained in the bill of exceptions, and a statement of facts shall be necessary." See note 3b, section 250, ante. Section 1461 provides that as many exceptions as the party may deem necessary may be embodied in a bill of exceptions, and that the signature of the judge at the end shall be a sufficient authentication thereof. Section 1462 provides that where the statement of facts contains all the evidence requisite to explain the exceptions, it shall not be necessary to set out the evidence in the bill, but it shall be sufficient to make a reference to the statement. See note 3b, section 250, ante.

Section 1465 is as follows: "It shall be the duty of the party taking any bill of exception to reduce the same to writing, and present the same to

the judge for allowance during the term, or within ten days after the term, if tried less than ten days before the end of the term, and the time may be further extended twenty additional days; provided, the order making such extension be made before the expiration of the term of court." Section 1466 as follows: "If the same shall be handed to the opposite attorney or lodged with the clerk, it shall be deemed to have been presented to the judge at that date, and the bill of exceptions as finally settled shall be signed by the judge as of that date." Section 1467: "It shall be the duty of the party taking any bill of exceptions to reduce the same to writing, and present the same to the judge for allowance during the term and within ten days after the conclusion of the trial." Section 1468: "It shall be the duty of the judge to submit such bill of exceptions to the opposite party or his counsel, if in attendance on the court, and if the same is found to be correct, it shall be signed by the judge without delay and filed with the clerk." Section 1469: "Should the judge find such bill of exceptions to be incorrect, he shall suggest to the party or his counsel who drew it such corrections as he may deem necessary therein, and if they are agreed to, he shall make such corrections and sign the same and file it as provided in the preceding section." Section 1470: "Should the party not agree to such corrections, the judge shall return the bill of exceptions to him, with his refusal indorsed thereon, and shall make out, sign and file with the clerk such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred." Section 1471: "Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding section, he may, upon procuring the signatures

of three respectable bystanders, citizens of this territory, attesting the correctness of the bill of exceptions, as presented by him, have the same filed as a part of the record of the cause, and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto."

*Colorado:* Section 385, Mills' Annotated Code, is as follows: "In all cases in courts of record where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and to sign and seal the same at any time during the term of the court at which such exceptions were taken or at any time thereafter to be fixed by the court, and at any time when any judge shall neglect or refuse to allow and sign and seal such bill of exceptions, then it shall be lawful for the suitor or his attorney to make and attach to such bill of exceptions the affidavit of two or more attorneys of the court, or other persons who were present at the time of the trial, and when such exceptions were taken, stating that such bill of exceptions is correct and true; and when such bill of exceptions is so allowed and signed and sealed by the judge, and so attested and proved by affidavit, it shall thereupon be filed by the clerk and shall become a part of the record of such cause; provided, that when a bill of exceptions is sought to be preserved by affidavits, the opposite party shall have timely notice thereof, and may, within a reasonable time thereafter file counter-affidavits, and the supreme court shall, upon notice and such proof as may be necessary, determine and settle what is the true bill in that behalf." Section 392: "When a bill of exceptions is duly filed in the court from which the appeal has been taken, the same may be by the appellant filed in the original form in the appellate court, and when such bill of exceptions seeks to embrace deposition, the same may be

done by reference without copying the same in full, and such deposition so referred to, shall thereby become a part of the bill of exceptions, and may be transferred to the files of the supreme court. Deeds and other papers offered in evidence, may be expressed in bills of exceptions by stating their purport and effect, so far as pertinent to the decision in the appellate court, and if the parties below fail to agree upon the essential parts of such papers, they shall be expressed in substance, or at length, as the judge signing such bill of exceptions shall, in his discretion decide."

The Idaho and Montana practice differs in no essential particular from that of California. Section 4428, Revised Codes of Idaho, corresponds with and contains practically identical language as section 648 of the California code, providing that "no particular form of exception is required," requiring specifications, "substance of reporter's notes," and reference to documents sufficient to identify the same. Section 4429 is the same as section 649 of the California code, except that the time within which a bill must be presented, instead of being limited to ten days, "may be presented . . . at the time the decision is made." Section 4430 varies slightly from section 650 of the California code, but is substantially the same, except as to the time limited at the outset, the phrase "at any time thereafter" being omitted; and except as to the "matters mentioned in subdivisions one and two of section 657 of this code," which is also omitted. The Idaho section also limits the requirement as to forwarding the papers to the judge to instances where he is "within the state." Section 4431 is identical in phraseology with California section 651, prior to the 1907 amendment, which changed the word "and" in the sentence, "and a bill thereof may be presented and settled afterward," to "or." Sections 4432 and 4433 are substantially the same as sections 652 and 653, California Code of Civil Procedure.

Section 6785, Revised Codes of Montana, which corresponds with section 648 of the California code, is as

follows: "No particular form of exception is required, but the grounds of the objection shall be particularly stated except as provided in the next preceding section. The objection must be stated with so much of the evidence taken from the stenographer's notes or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated or used as evidence. Documents on file in the action or proceeding may be copied or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made when that will sufficiently present the objections and exceptions." Section 6786 (section 1153, Code of Civil Procedure) provides for setting out the evidence by question and answer, when deemed necessary, as a part of the bill of exceptions. Section 6787 (section 1154, Code of Civil Procedure) is the same as California section 649, except as to the time prescribed for presentation for settlement, the phrase, "at the time the decision is made," appearing in place of "within ten days"; and except that the phrase, "but this shall not delay the hearing," is inserted after "filed with the clerk." Section 6788 (section 1155, Code of Civil Procedure) corresponds closely with section 650 of the California code, but is substantially the same as the Idaho section (4430) referred to above, and the same remarks used there as to the dissimilarity of that section with the California section are applicable here. The language of the Montana section is somewhat ambiguous, however, in another respect, aside from those features of dissimilarity referred to. "The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court, or judge." The language of the California and Idaho sections, in the place of the words, "or judge," here quoted, is "for the judge." This alone makes proper sense, for otherwise the alternative disappears. "The proposed bill . . . must . . . be presented . . . to the

judge . . . or be delivered to the clerk . . . or judge," is clearly an inadvertence or a typographical error. Section 6789 (section 1156, Code of Civil Procedure) is the same as section 4431 of the Idaho code, as to which see *supra*.

*Nevada:* Section 3285 et seq., Cutting's Compiled Laws (section 190, Civil Practice), defines and prescribes the taking and settling of exceptions in general, section 3286 providing, however, that such exceptions may be settled in a statement of the case. See note 3b, section 250, *ante*. Section 3860 provides as follows: "During the progress of a cause a party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the judges on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exceptions taken. The presiding judge shall sign the same as the truth of the case may be, and such bill shall then become a part of the record, and a party against whom judgment is rendered may appeal from judgment without any further statement or motion; and on such appeal it shall only be necessary to bring to the supreme court the transcript of the pleadings, the judgment, and the bill or bills of exception so taken."

*New Mexico:* Section 2685, subsection 172, Compiled Laws, makes provision for a transcript of the reporter's notes, and for the incorporation of the same in the record, when deemed necessary. Subsection 172 provides that all bills of exceptions shall be "settled and signed . . . at least thirty days before the beginning of the term of the supreme court to which," etc. Section 896 is as follows: "It shall not be necessary, when it is intended to review by appeal or writ of error any judgment of the district court, that a proposed bill of exceptions containing matters not apparent on the face of the record shall be or shall have been prepared, included in or served with a copy of any proposed record in any cause, nor shall it be necessary to prepare, or have prepared, any proposed bill of exceptions or serve the same on the opposite party within ten days after

judgment; but in any cause now pending, or which may hereafter be pending, in the supreme court to review the judgment of a district court, any party desiring to have any material matter not apparent on the face of the record made a part of the record may prepare a bill of exceptions, in which such proposed matter is incorporated, and present the same to the judge, at any time within twenty days before the first day of the term of the supreme court in which said cause shall be docketed, and shall give the opposite party, or his attorney, five days' notice of his intention to present such bill of exceptions to the judge, and the opposite party shall, within five days thereafter, have leave to propose any amendments to said bill of exceptions giving notice thereof to the opposite party of the time when such amendments will be proposed, and the time for proposing said bill of exceptions, and amendments, may at any time before or after its expiration be enlarged by the judge and the judge shall settle and sign the exceptions at least ten days before the term of the supreme court in which said cause shall be first docketed, unless for cause satisfactory to him, he shall delay the same, in which event he shall settle and sign the same as soon as possible, and either party may at any time before a bill of exceptions is settled and signed, be heard before the judge as to the matters to be included therein, on giving one day's notice to the opposite party or his attorney; and should any bill of exceptions not be settled before the time required for the filing of the record in the supreme court, such record may be filed in the supreme court at any time within ten days after said bill of exceptions shall be settled, and such cause shall be heard the same as if said record had been filed ten days before the first day of the term." Section 896 authorizes successors to the judges who presided at the trial to settle the bills of exceptions which the latter would have had the power to settle. Section 3145 provides that exceptions must be taken at the time of the decision excepted to, and that exceptions are not required in equity causes.

*North Dakota:* No provision is made in the practice for bills of exceptions, so called, although the statement which takes its place in the phraseology of the statutes takes the place of such a paper so completely that no distinction is possible to be drawn between them. Moreover, the paper is quite as often referred to as a bill, as statement, in the cases. See note 3b, section 250, *ante*.

*Oklahoma:* Section 5818, Compiled Laws, defines an exception to be "an objection taken to a decision of the court or judge upon a matter of law." Section 5819 requires the exception to be taken at the time the decision is made, but the judge must give time to reduce it to writing, not beyond the term, if in term time, and not exceeding ten days, if in vacation or at chambers. Section 5820 provides that no particular form of exception is required, but that it must be stated "with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." Section 5821 provides that where the decision excepted to is entered on the record, and the grounds of the exception appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts. Section 5822 provides that in other cases the exception must be reduced to writing and presented to the judge for his allowance. If true, the judge must allow and sign it. If not true, the judge must correct it, or suggest wherein corrections should be made, and then sign and allow it. Section 5824 provides for the withdrawal of exceptions from the files, by the party who made the same, at any time before proceedings in error are commenced.

*Oregon:* Section 169, Lord's Oregon Laws, defines an exception to be "an objection taken at the trial to a decision upon matter of law, whether such trial be by jury or court, or whether the decision be made during the formation of the jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. . . ." Section 170

is as follows: "The point of exception shall be particularly stated, and may be delivered, in writing, to the judge, or entered in his minutes, or taken down by an official stenographer, or by any competent stenographer, at the time it is made, and at the time or afterward, be corrected until made conformable to the truth. If an objection is made to any ruling of the court in the progress of a trial, and the truth of the statement thereof is not agreed upon between the counsel and the court, the counsel may verify his statement thereof by his own oath and that of two respectable and disinterested persons, or by his own oath and that of the stenographer who took the same down, and file the same as an exception to the ruling objected to. Such statement must be filed within ten days of the time that the objection is made, if the court at the time the objection is made refuses the exception; and if the disagreement does not arise until the time of the settling of the bill of exceptions, then the said statement may be made and filed within ten days of that time, and not otherwise. Within ten days thereafter the adverse party may file a statement of objection as prepared or approved by the court, together with the affidavits of not more than three respectable and disinterested persons, or the affidavits of himself and the stenographer who took the same down, concerning the truth or the falsity of the statement of the exception as filed by the counsel, and prepared or approved by the court. Each statement of the exception, and all affidavits concerning either of them when filed as herein required, shall be deemed a part of the record of the cause, and upon an appeal or review, the appellate court must first ascertain therefrom the truth of the matter as far as possible, and then determine the law arising thereon. The court must allow the counsel a reasonable time to procure the verification of the statement as herein required; and all affidavits of said persons shall be taken by the clerk of the court, who must certify thereon, if he is satisfied of the fact that the person is respectable and disinterested." Section 171: "No particular form of exception shall be required. The objection shall be stated

with so much of the evidence or other matter as is necessary to explain it, but no more." Section 172 makes the statement of the exception a part of the record, after being signed by the judge and filed by the clerk, and provides that no exception need be taken or allowed to any decision upon a matter of law, when it is entered in the journal, or made upon matters in writing or the files of the court.

*South Dakota:* Section 292, Code of Civil Procedure, defines an exception in the usual phraseology, and provides that exceptions must be taken at the time of the decision, excepting from this provision instructions and rulings and decisions deemed excepted to under the provisions of section 293, immediately following. Section 294 provides that exceptions need not be made in any particular form, but that when made to the verdict or decision on the ground of the insufficiency of the evidence, the objection must specify particulars, etc. Also, that the objection must be stated with so much of the evidence as is necessary to explain it, etc., but that only the substance of the reporter's notes need be given. Documents may be copied or the substance thereof stated, or reference sufficient to identify them made. Section 295 provides that the exception may be presented to the judge at the time the ruling is made, or the exception entered on the judge's minutes and afterward settled. The bill must conform to the truth or be corrected by the judge and filed with the clerk. Section 296 is as follows: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken, upon which the party relies. Within twenty days after such service the adverse party may propose amendments thereto and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must,

within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk, he must immediately deliver them to the judge, if he be in the county; if he be absent from the county and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill; if no amendments are served, or if served, are allowed, the proposed bill may be presented with the amendments, if any, to the judge for settlement, without notice to the adverse party. It is the duty of the judge, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions may be presented as briefly as possible. When settled, the bill must be signed by the judge, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk." Section 297 provides that exceptions to decisions made after judgment may be presented to the judge at the time of such decision, and may be settled or noted as provided in section 295 and a bill thereof presented and settled afterward as provided in section 296, and within like periods after entry of the order, upon appeal from which such decision is reviewable. Section 298 provides for settlement by application to the supreme court when the trial judge refuses, as in section 652, California Code of Civil Procedure; and section 299 provides for settlement by a judge "after, as well as before, he ceases to be such judge," as in section 653 of the same code. See section 155, *ante*.

*Utah:* Section 3282, Compiled Laws, defines an exception in the usual phraseology, and prescribes that it

must be taken at the time of the decision, except as to rulings and motions deemed excepted to, which are set out in section 3283, immediately following. Section 3284 is substantially the same as section 294 of the South Dakota code above referred to. Section 3285 provides that exceptions to decisions which are not made and prejudicial to the substantial rights of the party excepting shall be disregarded. Section 3286 does not differ from section 296 of the South Dakota code above referred to, except that the time within which the exceptions must be prepared is made to run from the determination of the motion for a new trial, where one is made. The section concludes with the following provision not found in the South Dakota section: "A bill of exceptions shall in all cases be prepared, signed, and filed within ninety days after the entry of judgment, or notice of the same, if the action be tried without a jury, or after the termination of a motion for a new trial." Section 3287 provides: "An exception to any decision may be presented to the court or judge, or judicial officer, or referee for settlement at the time the decision is made, and after having been settled and signed by the judge, judicial officer or referee, and filed with the clerk." Section 3288 provides that, "Exceptions to any decision made after judgment may be presented to the court at the time of such decision, and may be settled or noted as provided in section thirty-two hundred and eighty-two and a bill thereof may be presented and settled afterward, as provided in section thirty-two hundred and eighty-six, and within like periods after entry of the order, upon appeal from which such decision shall be reviewable." Sections 3289 and 3290 provide for settlement on the same ground, in practically the same way, as sections 652 and 653 of the California Code of Civil Procedure. See section 155, *ante*.

*Washington:* As heretofore (section 250, note 3b), the distinction between bills of exceptions and motions on appeal are not to be distinguished from each other other than in scope and time of preparation and settlement. The rules of procedure apply to both indiscriminately,

are identical with the rules which apply to bills and statements on appeal in general.

Section 381, Rem. & Bal. Code (section 5050, Bal. Code), defines an exception to be "a claim of error in a ruling or decision of a court, judge or other tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein." Section 382 (section 5051) provides that exceptions are not necessary when the ruling or decision is embodied in a written judgment, order or journal entry; but making an exception in the case of the report of a referee or commissioner, findings of fact and conclusions of law in such a report, or in the decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury. Section 383 (section 5052) fixes the manner of taking the exceptions described in the next preceding section, and provides that the exceptions there referred to must be taken within five days after the report or decision. Section 384 (section 5053) fixes the manner of taking exceptions in jury cases. Section 385 (section 5054) provides for the entry of exceptions in the minutes, and holding that such entry "shall import an exception by the party against whom the ruling was made." Section 386 (section 5055) prescribes the manner of taking and entry of exceptions. Section 387 (section 5056) prescribes the method of reviewing such exceptions. Section 388 (section 5057) prescribes what shall constitute a bill of exceptions and what a statement of facts. (Section 250, note 3b.) Section 389 (section 5058) is as follows: "A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party, any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the

judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and excepted (accepted), the bill or statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments."

Section 390 (section 5059) provides for making depositions and other written evidence a part of the bill or statement by attaching the same thereto and reference made. Section 391 (section 5060) prescribes the manner of certifying and settlement, and the contents of the certificate; and also provides that the certificate shall set forth that the paper contains "all material facts, matters and proceedings heretofore occurring in the cause, and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein." It also provides that the certificate shall be signed by the judge, but need not be sealed; and that "thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein." Also, "the judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to

tended function; for they can be used on motion for new trial<sup>7</sup> as well as on appeal from the judgment,<sup>8</sup> and on appeal from orders.<sup>9</sup>

In addition to bills of exceptions settled at the trial, the code provides for bills of exceptions to be settled after the trial. These latter take the place of statements under the old Practice Act. They resemble statements in form, in their mode of preparation, and, to a great extent, in function. Their function, however, is somewhat more extended than that of either of the statements under the old Practice Act. For as has been explained,<sup>10</sup> statements on appeal could not be used on motion for new trial, and statements on motion for new trial could not (in the absence of a stipulation to that effect) be used on appeal from the judgment.<sup>11</sup>

correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto."

Section 392 (section 5061) prescribes the method of settling and certifying the bill or statement by stipulation after the trial judge, by death or otherwise, has ceased to hold office. Also, it prescribes the manner of settling a bill or statement where the parties cannot agree as to the facts, etc. Section 393 (section 5062) prescribes that the bill or statement must be filed within thirty days after the time to take an appeal begins to run, with a proviso as to the enlargement of this time.

*Wyoming:* Section 4594, Compiled Statutes, defines an exception as an objection to a decision upon a matter of law. Section 4595 requires the exception to be taken at the time the decision is made, and requires time to be given the party to reduce the exception to writing, "but not beyond the first day of the next succeeding term." Section 4596 provides that no particular form of exception is required, "and the exception must be stated, with the facts, or so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." Section 4597: "When the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of

the entry that he excepts." Section 4598 provides that when the decision is not thus entered on the record, or the grounds do not sufficiently appear in the entry, "or the exception is to the opinion of the court on a motion to direct a nonsuit, to arrest the testimony from the jury, or, for a new trial for misdirection by the court to the jury, or because the verdict, or if a jury was waived, the finding of the court, is against the law or the evidence, the party excepting must reduce his exception to writing and present it to the court, or to the judge thereof in vacation, within the time given for allowance. If true, it shall be the duty of the court, if presented in open court, or the judge of the court before whom the cause was tried, if presented in vacation, to allow and sign it, whereupon it shall be filed with the pleadings as a part of the record, but not spread at large upon the journal. If the writing is not true the court or the judge in vacation shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid." Section 4600 authorizes the parties to withdraw their exceptions from the files at any time prior to the commencement of proceedings in error.

<sup>7</sup> See section 141, *ante*.

<sup>8</sup> See sections 229, *ante*, and 255, *post*.

<sup>9</sup> See section 262, *post*.

<sup>10</sup> See section 251, *ante*.

<sup>11</sup> See section 251, *ante*.



the bills of exceptions under the code 'not only take the place of the old statement on appeal, as the record on appeal from original judgment,<sup>13</sup> and as a record for presenting questions of law on appeal from the judgment,<sup>13</sup> but also can be used on motion for new trial.<sup>14</sup>

As has been stated, the code provides for statements on motion for new trial, which, *when used upon such motion*, can be used on appeal from the judgment. These statements differ from bills of exceptions settled after the trial only in that their function is more restricted, and in the fact that they can be used on appeal from judgment only when first used on the motion for new trial.<sup>15</sup> In other respects the documents are similar. And in *People v. ...*,<sup>16</sup> where the appellant, without moving for a new trial, presented a document entitled "statement on appeal," the supreme court awarded a *mandamus* to compel its settlement, saying:

The code makes no provision for the settlement of a 'statement on appeal.' It provides for the settlement of 'a statement of the case.' But that cannot be settled until after a notice of a motion for a new trial has been served. Such statement, when served, may be used on the motion for a new trial, and afterward on appeal, if one be taken from the judgment. (Code Civ. Proc., sec. 950.) The relator did not serve a notice of motion for a new trial, and therefore is not entitled to have a 'statement of the case,' to be used on a motion for a new trial, settled. And it appears that he did not prepare a 'statement of the case' for that purpose. But he did prepare something which he entitled 'plain and proposed statement on appeal,' for which the code makes no provision. And for that reason the respondent, as judge of the superior court in which the original action was tried, refused to settle it. The objection, however, as we view it, is rather to the form than to the substance of the thing. If it had been entitled 'plaintiff's bill of exceptions,' we think it clearly would have been the duty of the court to settle it. The exception appears to be to the decision upon the ground of the insufficiency of the evidence to justify it, and the objection specifies the particulars in which the evidence is alleged to be insufficient. Whether more of the evidence is stated with the objection than is necessary to explain

See section 262, *post*.

See sections 229, *ante*, and 255,

<sup>14</sup> See section 141, *ante*.

<sup>15</sup> See section 250, *ante*.

<sup>16</sup> 60 Cal. 279.

it, is a question which must be determined by the judge when he settles it. If more than is necessary for that purpose has been inserted, it is his duty to strike out so much as is unnecessary. But we do not think a mistake in entitling a bill of exceptions is a sufficient ground for refusing to settle it. In *People v. Lee*, 14 Cal. 510, this court held that there was no difference between a statement and a bill of exceptions.

"In this state there certainly is not in form or substance. But the code makes a distinction by providing that one may be settled within a certain time after the entry of the judgment, and the other within a specified time after the service of a notice of motion for a new trial. In this case the exception, with so much of the evidence as the relator claims was necessary to explain the objection, was presented to the judge for settlement within the time prescribed by the code for the presentation of a bill of exceptions, and we think that it should have been treated as such, notwithstanding the mistake in entitling it." <sup>17</sup>

**§ 255. Bills of Exceptions Constitute Part of the Judgment-roll.**—As stated in the next section, the only kind of bills of exceptions known to the old Practice Act were bills settled at the trial. Before 1862 there was no provision that they should constitute part of the judgment-roll. But in that year section 203 of the Practice Act was amended so as to include bills of exceptions in the enumeration of the documents declared to constitute the roll.<sup>1</sup> And accordingly, in the subsequent decisions bills of exceptions were declared to constitute part of the roll.<sup>2</sup>

The Code of Civil Procedure provides for bills settled after the trial as well as bills settled at the trial.<sup>3</sup> And section 670 as first enacted enumerated bills of exceptions among the papers declared to constitute the roll. The amendment of 1874 omitted them

<sup>17</sup> Of course, if the paper under consideration is not only designated as a statement, but is treated as such and described as such, and its settlement demanded as such, no such question could or would arise. See *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225.

See *Friel v. Kimberly etc. Co.*, 34 Mont. 54, 85 Pac. 734, where it was held that the fact that a statement was denominated by the moving party "a statement of the case and bill of

exceptions," did not render it objectionable as "a statement on motion for new trial, it being immaterial what a paper is called."

<sup>1</sup> See the statute quoted in section 230, *ante*.

<sup>2</sup> *More v. Del Valle*, 28 Cal. 170; *Wetherbee v. Carroll*, 33 Cal. 549; *Packard v. Bird*, 40 Cal. 378. See *Kranich v. Helena etc. Co.*, 26 Mont. 379, 68 Pac. 408, 71 Pac. 672, to same effect.

<sup>3</sup> See section 254, *ante*.

the enumeration. But nevertheless, under section 950 they are a part of the record on appeal from the judgment. And in section 670 was again amended so as to expressly provide that bills of exceptions should constitute part of the roll. The amendment of 1907 omitted them, however, and in California they are no longer a part of the roll.<sup>2a</sup>

Bills of exceptions constitute part of the roll, notwithstanding the fact that they may be settled after the roll is made up. In *Dwight v. Parks*,<sup>4</sup> it was contended that since under section 650 bills of exceptions may be settled after the roll is made up, and since there is no provision (similar to that of the old Practice Act with reference to statements on appeal) for annexing them to the roll, the language of section 670 should be confined to bills settled before the trial, and that bills settled after the trial under section 650 are not part of the roll. But the court held otherwise, and the conclusion seems to be sound; for it is the designation by the statute which makes a paper part of the roll, and the attaching of the papers together is not essential.<sup>5</sup>

**256. Bills of Exceptions Settled at the Trial.**—These bills are provided for under the old Practice Act, and are provided for under the Code of Civil Procedure.

*Under the Old Practice Act.*—The provision of the act of 1851 was as follows:<sup>1</sup>

This applies to the California Practice Act alone, however, and elsewhere a paper is expressly made a part of the roll, if made prior to the making of the record (see note 3b, section 670, *post*), and, as shown in the text, bills are sometimes made subsequently. It is thus a part of the roll by virtue of statute, it will not be taken out on motion, even when required for the presentation of errors complained of, but the parties themselves are at liberty to omit bills. *Couch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

*7 Cal. 640*; approved in *Berry v. N. P. R. R. Co.*, 47 Cal. 643. See *Beach v. Spokane etc. Co.*, 25 Cal. 367, 65 Pac. 106, where it was held that bills of exceptions made of matters occurring after entry of judgment were not a part of

the judgment-roll. But see *Bank v. Ada County Co.*, 11 Idaho, 756, 85 Pac. 919, where the California decision was sustained.

<sup>5</sup> *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Lumley*, 34 Cal. 611; *Sharp v. Daugney*, 33 Cal. 506.

Bills of exceptions are not always a part of the judgment-roll. See section 230, *ante*, and see *Graham v. Linehan*, 1 Idaho, 780.

<sup>1</sup> Laws of 1851, p. 80. Section 189. By another section of the act, viz., section 165, it was provided in relation to instruction, as follows:

"Sec. 165. The court shall furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge, or shall sign at the time a statement of such points prepared and sub-

"Sec. 189. The point of an exception shall be particularly stated, and it may be delivered in writing to the judge, or if the party require it, shall be written down by the clerk; when delivered in writing or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing or written down as above, it may be entered in the judge's minutes, and afterward settled in a statement of the case as provided in this act."

This section was not amended until 1863. But in 1861 the legislature passed an act (not as an amendment to the Practice Act but as an independent statute), section 4 of which was as follows:\*

"Sec. 4. During the progress of a cause a party may take his bill of exceptions to the admission or exclusion of testimony or to the rulings of the judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken. The presiding judge shall sign the same as the truth of the case may be, which bill shall then become a part of the record; and the party against whom judgment is rendered may appeal from such judgment without any further statement or motion; and on such appeal it shall only be necessary to bring to the supreme court the transcript of the pleadings, and the judgment and the bill or bills of exception so taken."

The foregoing provision does not appear to have been expressly repealed. In 1863 section 189 was amended by the addition to the language of the section as enacted in 1851, of a clause in relation to proving exceptions disallowed by the judge of the court below, but without changing the section in other respects. As thus amended the section stood until the adoption of the Code of Civil Procedure.

mitted by the counsel of either party." Laws of 1851, p. 76.

The California Code of Civil Procedure contains a similar provision, section 608. No provision was made for the incorporation in the "statement" so provided for, of an exception, or of any of the evidence, nor was it made a part of the judgment-roll. The provision was probably intended as a means of preserving the charge, or the material portions thereof, so that

it could be afterward incorporated in a proper record. But in any view the provision was superfluous. For section 189 provided for the settlement of bills of exceptions at the trial; and the report of the shorthand reporter is a much more convenient and effective mode of preserving the charge.

The existing Oregon law contains similar phraseology. See note 6, section 254, *ante*.

\* Laws of 1861, p. 589.

The bills of exceptions provided by the statutes above quoted were the only ones known to the old Practice Act.<sup>3</sup> They could not be used on motion for new trial,<sup>4</sup> or on appeal from orders,<sup>5</sup>—their sole office being to present questions as to errors in law on appeal from the judgment.<sup>6</sup> They were annexed to and formed part of the judgment-roll,<sup>7</sup> and hence were brought up by an appeal from the judgment without being incorporated in a statement on appeal.<sup>8</sup> Their preparation at the trial proceeded upon the idea that both sides were represented, and therefore had an opportunity to participate in the settlement.<sup>9</sup> The bill was to be a document filed in the cause, and not an entry in the minutes. In this regard Sawyer, J., delivering the opinion in *More v. Del Valle*,<sup>10</sup> said: "Exceptions taken during the progress of a trial under sections 188 and 189 of the Practice Act, whether 'delivered in writing to the judge' by the counsel, or 'written down by the clerk' should be written upon sheets of paper, settled and signed by the judge, and filed in the case; and when the judgment-roll is made up, attached to the judgment-roll. The proper place for these exceptions is not in the minutes of the court, for they are to form part of the judgment-roll. (Section 203, second clause.) When an appeal from the judgment is taken these bills of exceptions are certified up as a part of the judgment-roll, and not as copies of the minutes of the court." An entry in the minutes of the court signed by the judge, under the requirement that the judge shall sign the minutes was not a bill of exceptions.<sup>11</sup> The exception was to be stated with

<sup>3</sup> *Wetherbee v. Carroll*, 33 Cal. 549; and see section 254, *ante*.

<sup>4</sup> See section 141, *ante*.

<sup>5</sup> *People v. Doe*, 45 Cal. 43; *Caulfield v. Doe*, 45 Cal. 221; *Wetherbee v. Carroll*, 33 Cal. 549.

<sup>6</sup> *Harper v. Minor*, 27 Cal. 107; *Yates v. Smith*, 40 Cal. 662. They could not be used to present questions of fact, because such questions could only be presented on motion for new trial (section 96), and as stated in the text, these bills could not be used on motion for new trial. And since they could not be used on appeal from orders (note 5 above), the only thing left for them was to present questions of law on appeal from the judgment. The act of 1861, above quoted, provides these bills to present exceptions "to the admission or exclu-

sion of testimony, or to the rulings of the judge on points of law."

<sup>7</sup> *More v. Del Valle*, 28 Cal. 170; *Wetherbee v. Carroll*, 33 Cal. 549; *Packard v. Bird*, 40 Cal. 378; and see section 255.

<sup>8</sup> *De Johnson v. Sepulveda*, 5 Cal. 149.

<sup>9</sup> *Wetherbee v. Carroll*, 33 Cal. 549.

<sup>10</sup> 28 Cal. 170.

<sup>11</sup> Look at *Haraszthy v. Horton*, 46 Cal. 545; *Brown v. Kentfield*, 50 Cal. 129.

In *Big Kanawha etc. Co. v. Jones*, 45 Colo. 381, 102 Pac. 171, the appellant brought up a transcript of the reporter's notes as a bill of exceptions. The court said: "There is no bill of exceptions in the record. What counsel for appellant claims to be such is nothing more than a longhand exten-

so much of the evidence or other matter as was necessary to explain it, but no more.<sup>12</sup> There does not seem to have been any provision for specifications of error in these bills. The theory seems to have been that the bill was to be settled at the time the ruling was made, and before proceeding with any other matter,<sup>13</sup> and consequently that each ruling should have a bill of exceptions to itself. In this view there could be as many bills of exceptions as there were rulings.<sup>14</sup>

2. *Under the Code of Civil Procedure.*—The foregoing relates to bills of exceptions under the old Practice Act. The provision of the code corresponding to the ones above quoted is section 649, which as first enacted was as follows:

“Sec. 649. A bill containing the exception to any ruling may be presented to the judge at the time the ruling is made. It must be conformable to the truth, or be at the time corrected until it is so, and signed by the judge and filed with the clerk.”

In 1876 this section was amended so as to read as follows:

“Sec. 649. A bill containing the exception to any decision may be presented to the court or judge for settlement at the time the decision is made, and after having been settled shall be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to and settled and signed by such tribunal or officer.”

It was again amended in 1907,<sup>15</sup> and now reads as follows:

“Sec. 649. A bill containing the exception to any decision may be presented to the court or judge for settlement *within ten days after* the decision is made, and after having been settled, *must* be

sion of the notes which the official stenographer of the court certifies is a full, true and correct transcript of all the evidence which he, as official stenographer, took at the trial. A bill is something more than a transcript of the testimony. That is only a part of it. There is no beginning, or caption, or proper ending to this paper, such as we are accustomed to see in the ordinary form of bills of exceptions. It is true the trial judge signed and sealed this paper, but he does not certify that it was presented to him as a bill of exceptions, or that

he approved or settled it as such, or that it is correct, but merely permits it to be filed as a part of the record.” See note 14, section 158, *ante*.

<sup>12</sup> Section 190; Laws of 1851, p. 80.

<sup>13</sup> C. P. R. R. Co. v. Pearson, 35 Cal. 247.

<sup>14</sup> No decision has been found upon this point.

<sup>15</sup> Amendments Stats. 1907, p. 715. It was amended in 1901 by the omnibus bill of that year, which was declared unconstitutional in *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. 478, 55 L. R. A. 833.

signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions *must* be presented to, and settled and signed by, such tribunal or officer."

It is believed that prior to the amendments of 1907 this section made provision for bills of exceptions settled at the trial similar to those provided for by the old Practice Act, and that under it a party may, as formerly, have a separate bill of exceptions for each ruling, to be prepared in the same manner.<sup>16</sup> The word "decision" in the section, as amended in 1876, seems broad enough to include rulings at a trial. But the function of the bills provided for by section 649 of the code is more extended than that of the bills provided for by the old Practice Act. For they can be used not only, as formerly, to present questions of errors in law on appeal from the judgment, but also on motion for new trial,<sup>17</sup> and on appeal from orders other than on motion for new trial,<sup>18</sup> neither of which latter functions could be discharged by bills of exceptions under the old Practice Act. With this difference in function comes a difference in structure. When intended to present questions as to errors in law, either on motion for new trial or on appeal from the judgment, their structure may be the same as formerly. But when intended to present questions as to the correctness of orders other than on motion for new trial, the exceptions to be embodied in the bill must conform to section 648; and "when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." In any case "the objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made."<sup>19</sup>

<sup>16</sup> The case of *Niagara Con. G. M. Co. v. Bunker Hill Con. M. Co.*, 59 Cal. 612, affords an instance of a case reviewed on several bills of exceptions.

<sup>17</sup> See section 141, *ante*.

<sup>18</sup> See section 262, *post*.

<sup>19</sup> In the *Estate of Page*, 57 Cal. 238, which was an appeal from an or-

der settling the annual account of an administratrix, *McKee, J.*, delivering the opinion, said:

"The transcript on appeal contains what purports to be a bill of exceptions, in which it is stated, in substance, that the guardian of a minor child of the decedent had, by his attorney, filed written objections to the

account of the administratrix, and that after a hearing had the court allowed the account, to which the guardian excepted, and 'now proposes this, his bill of exceptions.' What purports to have been the testimony of the administratrix, and of her attorney, given at the hearing is then stated, and this is followed by the statement that 'no evidence was offered on behalf of the contestant,' and that 'upon such evidence the court erred in allowing the account as rendered,' and also in allowing certain enumerated items thereof. In all this no exception appears to have been taken to any ruling made by the court during the hearing of the cause, or to any decision of the court in the allowance of any objectionable item in the account. An exception is an objection upon a matter of law to a decision made by a court. (Sec. 646, Code Civ. Proc.) To make it effectual in a bill of exceptions the objection should be stated, and also the ground upon which it was made. If it was made upon the ground that the evidence was insufficient to sustain the decision, the deficiencies of the evidence should be specifically stated. (Sec. 648, Code Civ. Proc.) If it was made upon grounds of error of law, the proper mode in an action tried by the court without a jury is to ask the court to decide what counsel may consider an applicable principle of law, and upon a refusal to have it noted in the bill of exceptions. (*Griswold v. Sharp*, 2 Cal. 17; *Touchard v. Crowe*, 20 Cal. 150, 81 Am. Dec. 108.) But the mere statement in a bill of exceptions that a party excepted to a decision of the court, unaccompanied by the objection and the grounds—whether of law or fact—upon which it was made, does not constitute an exception upon which any question involved is examinable by this court; and under such circumstances we can only deal with such questions as may arise upon the judgment-roll."

The court considered, however, that there was enough in the "judgment-roll" to require a reversal of the order, so that the foregoing was not necessary to the decision. So far as it is to the effect that upon a claim that an order is not warranted by

the evidence the bill of exceptions must specify the particulars wherein the evidence is insufficient, it seems to be correct under the provisions of section 648. But no provision of statute has been found which requires a party to state in the court below the grounds or reasons why an order should or should not be made, or which requires a bill of exceptions to specify wherein an order or decision is erroneous *in point of law*. Counsel is supposed to do that in argument; but there is no provision which requires an argument to be made in the court below, or to be incorporated in a bill of exceptions. In the case of rulings upon the admissibility of evidence counsel is required to state his objections to the admission of the evidence, and if it be admitted to take his exceptions. But where the objections are sustained and the evidence excluded, the opposing counsel is not required to state any ground of exception. Nor is counsel required to state any grounds of exception where evidence is excluded by the court of its own motion. The simple statement that he reserves an exception is sufficient. And the rule requiring objections to evidence to be made in the first instance is not the result of any provision of statute, but is one of practice which has grown up from the nature of the case. It is difficult to see why it should be extended to the case of orders, such as in the *Estate of Page*. In the extract above given the court speaks of the exception as "unaccompanied by the objection." But under sections 646 and 648 the exception is the objection. "An exception," says the statute, "is an objection." And there is no provision for any objection other than the exception.

The course suggested by the court, viz., "to ask the court to decide what counsel may consider an applicable principle of law, and upon a refusal to have it noted in a bill of exceptions," was indeed suggested in *Griswold v. Sharp*, as stated by the court. But it was a mere suggestion and was not involved in the decision. But what was said in *Touchard v. Crowe* does not seem to be the same. All that was said in that case is merely that counsel should argue to the court



The case of *Estate of Carpenter*<sup>20</sup> contains a more recent construction of the scope of this section. In truth, it is, with a single exception,<sup>21</sup> the last reference to the section as it stood prior to the amendments of 1907. The transcript in that case contained three separate and distinct bills of exceptions, or papers so entitled.

"The first is certified to and settled by Hon. J. G. Swinnerton, judge of the superior court, and was filed May 17, 1899. It certifies to an exception as having been taken to a ruling made on the

such propositions of law as were supposed to be involved. Nothing was said about asking the court to decide the propositions advanced, or about exceptions to its refusal to do so. That is precisely what the court made fun of. See note 12 to section 120a. There is no example in the reports of a case reviewed in that manner. And it seems an entirely useless proceeding. For if the judgment or order be right upon the facts, of what avail would it be to the appellant that the court had refused to decide, or had decided incorrectly, some conundrum propounded by counsel? Look at section 284. And if the judgment be wrong upon the facts, would it help the matter that some principle of law asserted by counsel had been assented to by the court? The course suggested in *Griswold v. Sharp* and the *Estate of Page* was disapproved in the recent case of *Chandler v. People's Savings Bank*, No. 7802, filed February 25, 1882, in which the court said: "After the close of the evidence the plaintiff presented certain rulings (so called) to the court, asking the court to rule thereon. The court declined so to do on the ground that the findings of fact and conclusions of law were sufficient without special rulings on the points made. We see no error in this. *Under our system we do not see the office of rulings such as were presented.*"

The same idea was reasserted in *Wilson v. Wilson*, 64 Cal. 92, 27 Pac. 861, but in *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56, Mr. Justice Harrison delivering the opinion of the court, sought to reconcile the manifest inconsistencies of the various decisions above referred to in the following language: "We are aware that in *Touch-*

*ard v. Crow*, 20 Cal. 150, 163, 81 Am. Dec. 108, the court suggested that when a case was tried by a court without a jury, if counsel desired certain points of law to be considered as applicable to the facts established, the proper course would be to present them in the form of propositions; but it was not even suggested by the court that the refusal to entertain such propositions, or to rule upon them, could be made the subject of an exception, or afterward incorporated into a bill of exceptions. This case was subsequently referred to in *Estate of Page*, 57 Cal. 238, and in *Wilson v. Wilson*, 64 Cal. 92, 27 Pac. 861, where some similar suggestions were made, but in neither of these cases was the question presented for decision or decided by the court. In each of them the procedure that had been adopted was held to be erroneous; and the suggestions of the court must be regarded as tentative rather than as a rule to be followed."

And see *Richardson v. Eureka*, 110 Cal. 441, 42 Pac. 965, and *Haight v. Tryon*, 112 Cal. 4, 44 Pac. 318, to same effect. In the latter case the court said: "No such practice is recognized by our present method of procedure provided by the code. It is the duty of the court to find upon all the material issues, regardless of any request of the parties, and a failure in that respect is ground for a new trial to the party aggrieved as 'a decision against law.'"

See note 6, section 254, *ante*, as to corresponding provisions in other states.

<sup>20</sup> 127 Cal. 582, 60 Pac. 162.

<sup>21</sup> Otherwise than mere mention. See *Estate of Scott*, 128 Cal. 578, 61 Pac. 98.

25th of April, 1890, more than nine years prior to the filing of the bill of exceptions. Judge Swinnerton had ceased to be a judge of the court many years before the filing. There is no date on the judge's certificate, or to the bill, unless the filing be taken as the date. Respondents assert that they had no knowledge of the existence of this bill of exceptions until it was filed, but this cannot be so. No judge is authorized to settle or certify to a bill of exceptions without the presence of, or notice to, the opposite party. It is not permissible to think, therefore, that it was a secret or a surprise proceeding. It is evidently a bill containing an exception to a ruling, as is provided for in section 649 of the Code of Civil Procedure. A bill of exceptions under that section must be presented to the judge and settled at the time the ruling is made, and in the presence of the adverse party, and cannot properly be presented to the judge or settled at any other time. This is rendered plain by the provisions of section 651, which provides for bills of exceptions to rulings made after judgment. Exceptions to such rulings must be presented to the judge and settled at the time the ruling is made, or, as provided in section 649, within a short period after the ruling upon notice. No notice is required if the bill is presented to the judge at the time the ruling is made, because it is presumed that the adverse party is then present; but if not so presented then and there, the judge is not authorized to settle it save on notice. But when a bill is settled under section 649 or section 650, it was not in time. When a bill is settled when the ruling was made, it should have been filed as the statute directs. The filing would then show that the bill was timely settled so far as time is concerned."<sup>22</sup>

The recently adopted amendment which changed the phrase "at the time" in the second line of the section to "within ten days after" has practically changed the chief characteristic of the section, and there is now, except in section 651, as to decision after judgment,<sup>23</sup> no code provision which compels the settlement of bills of exceptions at the time the decision was made. The chan-

<sup>22</sup> See *Estate of Scott*, 128 Cal. 578, 61 Pac. 98, and *Estate of Gordon*, 142 Cal. 125, 75 Pac. 672, to same effect.

<sup>23</sup> That section is as follows: "Sec. 651. Exceptions to any decision made after judgment may be presented to the judge at the time of such deci-

sion, and be settled or noted, as provided in section six hundred and forty-nine, or a bill thereof may be presented and settled afterwards as provided in section six hundred and fifty and within like period of the entry of the order, upon appeal from which such decision is reviewed."

doubt made because of the well-settled rule that by an exception at the time was intended an exception reserved in a bill prepared and settled within a reasonable time after decision. The legislature has thus said that ten days was a reasonable time.<sup>24</sup>

**257. Bills of Exceptions Settled After the Trial—Time in which the Proposed Bill and the Proposed Amendment must be served.**—The general framework of all bills of exceptions settled after the trial is the same, whatever may be the purpose for which they may be intended. All such bills are settled under section 650 of the code, and the only difference is that the time in which the proposed bill must be served is different in different cases. Although this chapter is in relation to the record on appeal from the judgment, yet in view of the fact that all bills settled after the trial are prepared in the same way, it will, perhaps, be better to consider their points of difference in this place.

**1. Time to Propose a Bill for Use on Appeal from the Judgment.** This is regulated by section 650. As first enacted, this section provided that the proposed bill should be served within thirty days after the entry of judgment.<sup>1</sup> In 1874, however, the section was amended so as to read as follows:

“Sec. 650. When a party desires to have exceptions taken at a trial settled in a bill of exceptions he may *within ten days after entry of judgment*, if the action were tried with a jury or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. . . . ”

In *Flagg v. Puterbaugh*, 98 Cal. 32 Pac. 863, the doctrine of “reasonable time” was first permanently established as a settled rule. It was there said that it was seldom convenient to take up the settlement of all of exceptions *instantly*, and section 649 was therefore held to allow preparation and settlement within a reasonable time. And see *Smith v. Egan*, 122 Cal. 68, 54 Pac. 368, to the same effect.

No change has been made in the California and Montana codes. See note under section 254, *ante*.

<sup>1</sup> As first enacted section 650 of the California code was as follows: “Sec. 650. If a bill is not presented at the time of the ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to the time of the entry of judgment, may, upon one day’s notice to the adverse party, at any time after such ruling is made, and within thirty days after the entry of judgment be presented to the judge and settled, as provided in the preceding section.”

See section 254, note 6, *ante*, for synopsis of corresponding provisions in other states.

This provision was afterward amended by inserting after "may" and before "within ten days," etc., the phrase, "at any time thereafter, and."<sup>1a</sup> The effect of this amendment is to bring more closely together the scope of the two sections, 649 and 650, so that a bill of exceptions may now be prepared at the convenience of the party, at any time after the decision excepted to, provided it be within ten days after entry of judgment, or after notice of such entry.

The limitation of time in this section applies whenever a bill of exceptions is prepared after the decision, and is for use upon appeal from the judgment, whether the question to be presented is as to error of law occurring at the trial,<sup>2</sup> or as to the insufficiency of the evidence to justify the decision,<sup>3</sup> or as to intermediate orders reviewable on appeal from the judgment.<sup>4</sup> With respect to the last mentioned, viz., intermediate orders reviewable on appeal from the judgment, it was at one time supposed by many practitioners that the question must be settled at the time *the order* was made, under section 649. But under the case of *Tregambo v. Comanche Mining Co.*,<sup>5</sup> it is now held that a bill of exceptions to present such an order for review may be prepared within ten days after *the entry of judgment*, if the case was tried with a jury, or within ten days after notice of entry, if the action were tried without a jury. In that case an order refusing to set aside a default was made before the entry of judgment, and consequently was not appealable as a special order made after final judgment, but was reviewable on appeal from the judgment. The bill of exceptions was not presented at the time the order was made, and therefore it could not be settled under section 649. It was, however, prepared under section 650. The court in bank held that it was not too late, and McKee, J., delivering the opinion, said:

"An order refusing to set aside a default is not an appealable order. Therefore, the only appeal before us is from the judgment, and that presents for consideration the judgment-roll, unless a bill of exceptions contained in the transcript is to be considered."

<sup>1a</sup> Stats. 1907, p. 715. It was also amended in 1901, by the "omnibus" chapter of that year, but was declared unconstitutional in *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. 478, 55 L. R. A. 833.

<sup>2</sup> As to which see sections 186, *ante*.

<sup>3</sup> As to which see section 90 and see, also, section 186, *ante*.

<sup>4</sup> As to which see section 649, *ante*.

<sup>5</sup> 57 Cal. 501.

part of the record of the case. The respondents attack it as too late, because it was not presented for settlement at the time the exception was taken, according to section 649 of the Code of Civil Procedure. But that section only declares that a bill of exceptions to *any* decision *may* be presented to the court or judge for settlement at the time the decision is made; and after having been settled shall be signed by the judge, and filed with the clerk. If the statute absolutely fixes the time within which an act must be done, it is peremptory. The act cannot be done at any other time, unless during the existence of the prescribed time it has been extended by an order made for that purpose under authority of law. Section 1054 of the Code of Civil Procedure authorized such an extension to be made within the limits of thirty days. But no order extending time in this case was applied for or granted; therefore, the time for presentation was such as was prescribed by law, if any. There is no specific time fixed by law for presenting a bill of exceptions for settlement, unless it be found in sections 649 and 650 of the Code of Civil Procedure. Section 649 does not fix any specific time for the performance of such an act. It only declares that the act *may* be done immediately upon the rendering of the decision to which exception is taken, and this decision is one which may be rendered at any time; but it does not require the act to be done at the risk of forfeiture of the right to have it done. If not done immediately upon the rendition of the decision, the right is not taken away. It still exists, and, in our judgment, may be exercised at any time prescribed by section 650 of the Code of Civil Procedure. . . .

“It is contended, however, that section 650 refers only to exceptions taken at the trial of a cause, and not to exceptions taken in the course of proceedings before the trial has commenced; and that as this was an exception taken to a decision rendered on a motion to set aside a default, it was not an exception taken ‘at the trial.’ Such an interpretation is one which seems to us to stick in the bark. A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial. Such an issue was presented on the application to set aside the default

entered against the defendant. Upon that issue the court heard and determined, and to the decision rendered exceptions were taken, which were settled as exceptions taken at the trial, in conformity to the provisions of section 650. The time prescribed by that section is made to relate to the settlement of bills of exceptions taken to any decision made before or after judgment; for it is provided by section 651 that exceptions taken to any decisions made after judgment may be settled or noted as provided in section 649; but a bill of exceptions may be presented and settled afterward, as provided in section 650. The time for the presentation and settlement of all bills of exceptions is therefore fixed by section 650, and as the bill of exceptions in this case was presented and settled within that time, it constitutes a part of the record of the case."

The report of the foregoing case does not show when the proposed bill of exceptions was served. But from a statement in the argument of respondent's counsel, it would seem that it was not served within ten days after the order setting aside the default. Taking that to be the fact the case decides that a bill of exceptions for the review of a nonappealable order on appeal from the judgment need not be presented at the time the order is made, nor within ten days thereafter, but may be proposed within ten days after the entry of final judgment, or within ten days after notice of such entry, if the action were tried without a jury.

This case finally established the principle that a bill of exceptions was proper not only upon the trial of an issue of fact, but upon an issue of law as well,<sup>6</sup> and that sections 649 and 650 were intended to provide for bills of exceptions in all cases whatsoever, except special orders after judgment, and orders on motion for new trial. This principle is fully sustained by later decisions, and is the rule of practice in California.<sup>7</sup>

<sup>6</sup> The word "trial" is defined as a proceeding for the determination of issues of law as well as fact. The case cited in the text, *Tregambo v. Comanche Co.*, so decides the principle, and the point is fully considered in *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091, where most of the cases in point are gathered together. See, also, *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40.

<sup>7</sup> In *Flagg v. Puterbaugh*, 98 Cal. 134, 32 Pac. 863, the rule of *Tre-*

*gambo v. Comanche Mining Co.* was held to apply to orders in themselves appealable, as well as intermediate orders which are not appealable but are reviewable on appeal from the judgment. But see subdivision 2, below, and note 8.

In *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129, it was held that while an appellant might present a bill of exceptions for settlement either at the time of the decision or afterward, either under section 649 or section

The rules which govern the preparation of statements and bills of exceptions on motions for new trial have been fully considered in the chapters on "Statement" and "Bills of Exceptions" in that part of the present treatise devoted to new trial procedure.<sup>7a</sup> A bill of exceptions on motion for new trial, prepared under the provisions of section 659, Code of Civil Procedure, is in no essential respect different from a bill of exceptions prepared subsequent to the decision excepted to, under the provisions of section 650 of the same code; and when so prepared, its scope, its characteristics, its place in the record, and its effect, differ in no essential particular from those various elements of bills of exceptions prepared under the provisions of either section 649, section 650 or section 651.<sup>7b</sup> The same remark is applicable to statements on motion for new trial, whether prepared before or after the hearing, and, presumably, statements such as are authorized by the first portion of section 950, as outlined in *Vinson v. Los Angeles-Pacific R. R. Co.*<sup>7c</sup> For this reason, it is in no wise necessary to consider the principles already fully discussed in the chapters referred to, and the duty of the annotator would seem to be fully performed if a superficial

650, he must present it to the judge who made the decision, and not to another judge before whom subsequent proceedings were conducted. In *Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235, section 650 was held not to apply directly to an order for a family allowance, but it seems the court regarded it as controlling the preparation of a bill of exceptions, since it held that the petitioner for writ of mandate to compel the settlement of such a bill was entitled to the ten days' notice of the decision upon the application for the order. It thus appears that the principle of *Tregambo v. Comanche Co.* applies to probate orders, even those which are the result of special procedure, as section 1715 of the Code of Civil Procedure. See in this connection, *Estate of Young*, 149 Cal. 173, 85 Pac. 145. In *McCarty v. Wilson*, 2 Cal. App. 154, 83 Pac. 170, it was applied to an election contest.

Of the early cases, see *Levee District v. Huber*, 57 Cal. 41, where the ruling in *Tregambo v. Comanche Co.* failed of support; and see *Pfister v.*

*Wade*, 59 Cal. 273, where it received support.

<sup>7a</sup> See chapters 21 and 22, *ante*.

<sup>7b</sup> See *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442, where it was held that the fact that a bill of exceptions used on an appeal from the judgment was entitled "a bill of exceptions on motion for new trial" was immaterial.

<sup>7c</sup> 141 Cal. 151, 74 Pac. 757. And see section 250, *ante*.

Section 1736, Code of Civil Procedure of Montana, identical with section 950, Code of Civil Procedure, has received similar construction, with respect to the use of a bill of exceptions, as therein provided. See *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934. The section in question was re-enacted with slight changes in section 7112, Revised Codes.

The language of the text applies to the various papers, whether bills of exceptions, statements on appeal, statements of facts, or case-mades, which are made use of in the practice in other jurisdictions. No material departure from the rules of practice as here outlined is anywhere noted. See note 6, section 254, *ante*.

view of the papers prescribed in the three sections under consideration, 649, 650 and 651, is set forth, together with an appropriate outline of those attributes which are peculiar to bills of exceptions on appeal from the judgment and special orders after judgment.

2. *Time to Propose a Bill for Use on an Appealable Order Made Before Final Judgment.*—As has been observed, any bill of exceptions may be presented at the time the decision sought to be reviewed is made, and at any time thereafter, provided it be within ten days after entry of judgment, or after notice of entry, according as the trial is with or without a jury. The present state of the law, and the policy of the courts, taken together, have served to practically eliminate any distinction between the application of the two sections which govern the preparation of bills of exceptions on appeals from the judgment, and appealable orders made prior to judgment. As to the latter it was at one time believed that the rule of *Tregambo v. Comanche Mining Co.* could not apply, and that such orders required bills of exceptions prepared under the provisions of section 649, if at all. The reason given was that, inasmuch as an appeal from such an order must be prosecuted within sixty days after its rendition or entry, and the judgment might not be entered until long after this time had expired, a provision for a bill of exceptions prepared after judgment might utterly fail to meet the situation. But in *Flagg v. Puterbaugh*<sup>a</sup> the court thus met this objection:

“In the first place, a distinction is claimed to exist between this case and *Tregambo v. Comanche Co.*, 57 Cal. 501, because the order excepted to here is an appealable order, while in that case it was a ruling which could only be reviewed on appeal from the final judgment, and it is contended that although in the case cited the procedure prescribed by section 650 of the Code of Civil Procedure may have been applicable, this case is wholly governed by section 649. We see no reason arising out of the difference of the cases for applying a different rule. The decision in *Tregambo v. Comanche Co.* was a liberal ruling in favor of justice, and ought to be followed in all cases where it can be applied without violating the express terms of the statute. A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of

<sup>a</sup> 98 Cal. 134, 32 Pac. 863. And *Pac. 368*; and also *Gutierrez v. Heberd*, 106 Cal. 167, 39 Pac. 529, 935.  
*see Smith v. Jordan*, 122 Cal. 68, 54



procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits rather than to convert them into a means of obstruction. Taking this view of the matter, and assuming that the case is governed by section 649, that section is in terms permissive, and the privilege granted the party of presenting his bill of exceptions for settlement at the time of the ruling is not necessarily exclusive. It would frequently be extremely inconvenient to make up a bill of exceptions *instantly*, and there is no reason why a court should hold itself rigidly bound to such a practice in the case of appealable orders made before final judgment, any more than in the case of similar orders made after final judgment, which are provided for in section 651.

"It is only in consequence of our twenty-ninth rule that a bill of exceptions to this order is necessary. . . . We take the occasion, therefore, to say, that in order to comply with that rule parties appealing from orders may follow the same practice prescribed by sections 650 and 651 of the Code of Civil Procedure."

It is true there are some intermediate orders that would require a bill of exceptions irrespective of the requirement of Rule XXIX, but the effect of this decision, aside from bills of exceptions prepared under the rule, was to require bills of exceptions prepared under section 649 to be presented within a "reasonable time" after decision, which was fixed as ten days thereafter. In the cases which sustain this decision, it seems to have been conceded that bills of exceptions upon appeal from intermediate orders must be prepared under section 649, but it is never definitely so stated. The *dictum* of *Flagg v. Puterbaugh*, above quoted, is to the effect that the court could see no reason for applying different principles in the case of an order before judgment and one after judgment, but it goes on to recognize a distinction, and it cannot, therefore, be regarded as fixing a new rule. It is true, as is sometimes noted, that the time for the preparation of a bill of exceptions does not depend upon the time within which appeals may be taken. The appeal from an intermediate order might be perfected without a bill of exceptions, and it is probable that under Rule II the court would hold that the time to file the transcript must be extended to enable the appellant to prepare and have settled a bill of exceptions in accordance with the provisions of the code.

The changes made by the amendments of 1907, however, made this question a mere moot one, and if there is any reason for a distinction, such as is here noted, recent litigation has not developed it.

3. *Time to Propose a Bill for Use on Appeal from an Order Made After Final Judgment.*—The statute upon this subject is clear, and has not undergone material change since adoption of the code. It is as follows:<sup>8a</sup>

"Sec. 651. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, or be settled or noted, as provided in section six hundred and forty-nine, or a bill thereof may be presented and settled afterward, as provided in section six hundred and fifty, and within like period after entry of the order, upon appeal from which such decision is reviewable."

Under the provisions of this section a bill of exceptions upon appeal from an order made after final judgment may be presented "at the time of such decision," "and be settled or noted, as provided in section six hundred and forty-nine," or "may be presented and settled afterward, as provided in section six hundred and fifty," etc. It will be observed that presentation may be made at the time of the decision, while settlement may be made as provided in section 649. Such changes have been made in the section, however, as to raise a question whether this distinction can be preserved or not. However that may be, it is an important detail in practice, and offers merely an opportunity for conjecture. The practical effect of the section is to enable a party to have a bill of exceptions upon an order after judgment, under either of the two preceding sections. Thus in *Estate of Carter*,<sup>8b</sup> as to rulings made after judgment, the court said:

" . . . . Exceptions to such rulings may be presented to the judge and settled at the time the ruling is made, or, as provided in section 649, within a short period afterward, upon notice. Notice is required if the bill is presented at the time the ruling was made, because it is presumed that the adverse party is

<sup>8a</sup> This section was amended in 1874 (Stats. and Amendments 1873-74, p. 314); in 1901 (Stats. 1901, p. 148), declared unconstitutional in *Lewis v. Dunne*, 134 Cal. 291, 86 Am.

St. Rep. 257, 66 Pac. 478, 50 Cal. A. 833, and in 1907 (Stats. 1907, p. 716).

<sup>8b</sup> 127 Cal. 582, 60 Pac. 160.

present; but if not so presented, then and there, the judge is not authorized to settle it save on notice."

The bill of exceptions provided in this section is the bill of exceptions referred to in section 659,<sup>80</sup> and has been held to be the sole mode of authenticating affidavits upon new trial motions,<sup>81</sup> upon any order made after final judgment.<sup>82</sup>

4. *Time to Propose a Bill for Use on Motion for New Trial.*—As has been shown, proceedings to obtain a new trial may be commenced either before or after the entry of judgment.<sup>9</sup> Consequently, where the bill is for use on motion for new trial, the entry of judgment is not a desirable point to mark the commencement of the period allowed. And, therefore, the statute has provided that bills of exceptions for use on motion for new trial must be proposed within ten days after the service of the notice of motion.<sup>10</sup> A bill which has been used on the motion for new trial may be used on appeal from the judgment, although not prepared at the time prescribed by section 650.<sup>11</sup>

5. *Consequences of Failure to Propose a Bill in Time.*—The time limited for the proposal of a bill of exceptions may be extended under section 1054 of the code. If the bill be not proposed within the prescribed time, or some valid extension thereof, and proper objections on that account be reserved, the right to have a bill set aside is lost.<sup>12</sup> The rule in this respect is similar to that which prevailed

The language referred to is, "If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided,"

And see cases cited in next note.

See Skinner v. Horn, 144 Cal. 77, 77 Pac. 904; Wyckoff v. Pajaro Co., 146 Cal. 681, 81 Pac. 17. The affidavits referred to are those provided in subdivision 1 of section 659, Code of Civil Procedure.

See Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Somers v. Somers, 81 Cal. 608, 22 Pac. 967.

See section 16, ante, and also section 2, ante.

This is provided in subdivision 1 of section 659 of the California Code of Civil Procedure, which, as amended in 1874, is as follows:

If the motion is to be made upon a bill of exceptions, and no bill has already been settled, as hereinbefore

provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions, as is provided after the entry of judgment, or after receiving notice of such entry, by section 650, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed when the notice of motion is given, such bill shall be used on the motion."

<sup>11</sup> Section 950, California Code of Civil Procedure, quoted and considered in section 250, ante.

<sup>12</sup> Higgins v. Mahoney, 50 Cal. 444; also Connor v. Southern California M. R. Co., 101 Cal. 429, 35 Pac. 990; In re Clary, 112 Cal. 292, 44 Pac. 569; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Cameron v. Railroad Co., 129 Cal. 279, 61 Pac. 955; Gamache v. Budd, 129 Cal. 554, 62 Pac. 105; and see section 146, ante.

with reference to statements on appeal,<sup>18</sup> and statements on appeal for new trial.<sup>14</sup>

Bills of exceptions such as we are considering, date from 1880 only, and there are not many decisions in regard to them. The procedure prescribed by section 650 is very similar to the procedure in relation to the preparation of statements on motion for new trial, which has been fully considered.<sup>15</sup> And the decisions in reference to extensions of time to propose a statement, the consequences of a failure to propose a statement in time, and the practice in relation thereto<sup>16</sup> will apply to the preparation of bills of exceptions.

6. *Proposal of Amendments to Proposed Bill.*—After the service of the proposed bill, and "within ten days after such service the adverse party may propose amendments thereto, and serve them on the party proposing the same, or a copy thereof upon the other party."<sup>17</sup>

The time for serving such amendments may be extended by the court under section 1054 of the code.<sup>20</sup> The practice is similar to that in relation to amendments to a proposed statement.<sup>21</sup>

The use of the phrase "adverse party" in section 650 suggests a similarity of meaning with the same phrase as used in sections 659, 937, 938 and 940, in connection with the service of statements and notices of appeal, etc., and it was specifically held in *Estes v. Young*<sup>22</sup> that the definition given to it in *Senter v. De Bevoise* and subsequent cases, having application to notices of appeal, is applicable with equal force to the service of bills of exceptions under section 650. Certain limitations suggest themselves, however, in the case of bills of exceptions and, no doubt, statements that are not found in the case of the service of notices of appeal. Thus, it is well settled that the failure of the appellant to serve all adverse parties with the notice of appeal incurs the penalty.

<sup>18</sup> See cases cited in note 6 to section 253, *ante*.

<sup>14</sup> See section 145, *ante*; and see section 146, *ante*.

<sup>15</sup> See chapter 22, herein.

<sup>16</sup> See section 147, *ante*.

<sup>17</sup> See section 145, *ante*.

<sup>18</sup> See section 146, *ante*.

<sup>19</sup> See section 650, California Code of Civil Procedure.

<sup>20</sup> And see *Pink v. Catanich*, 51 Cal. 420.

<sup>21</sup> See section 148, *ante*.

<sup>22</sup> 149 Cal. 173, 85 Pac. 145.

<sup>23</sup> 38 Cal. 637; and see section 146, *ante*.

<sup>24</sup> Also notices of intention to appeal. In re Ryer, 110 Cal. 556, 42 Pac. 1082; *Johnson v. Phenix etc. Co.*, 110 Cal. 571, 80 Pac. 719; also *In re Lard*, 114 Cal. 462, 46 Pac. 297; *Wright v. Menzies*, 115 Cal. 16, 47 Pac. 81; *St. Rep.* 82, 44 Pac. 660, 46 Pac. 35 L. R. A. 318; and see section 148, *post*.

dismissal of an ineffective appeal. In the case of bills of exceptions, however, the result of failure to serve does not incur dismissal, and seldom goes even to the extent of an affirmance of the judgment or order appealed from. The rule is, that if the bill of exceptions be not served upon all adverse parties, it will not be considered, and the case will be decided, if possible, without it. If it cannot be decided without it, it will, at the most, be affirmed, for want of a showing of error on the face of the judgment-roll.<sup>25</sup> Sometimes the points made for the reversal of the judgment or order appear on the face of the judgment-roll, or elsewhere than in the bill of exceptions, in which event the bill of exceptions will be treated as unnecessary. Again, if the bill of exceptions can be considered and the appeal decided thereon without affecting the substantial rights of the party not served, this will be done.<sup>26</sup> In any event, it is not a ground for refusing to entertain the appeal that the bill of exceptions has not been served.

Nor is it a ground for refusing to settle the bill of exceptions that it has not been served on all adverse parties. The appellate court is the sole tribunal having jurisdiction to determine whether an unserved party is *adverse*, and a bill of exceptions is essential to enable that court to determine this question. The bill of exceptions should, therefore, be settled and incorporated in the record for this purpose.<sup>27</sup>

**§ 258. Contents of Bills of Exceptions Settled After the Trial—Exceptions and Matter in Support and Explanation Thereof.**—The matters involved here may conveniently be considered separately.

1. *What the Bill must Contain.*—The amendments of 1907<sup>1</sup> added to this section (650) the following: “. . . . It may also contain a statement of any matters occurring upon the trial, in the presence of the court, showing any of the matters mentioned in subdivisions one and two of section six hundred and fifty-seven of this code.” This amendment should, with greater propriety,

<sup>25</sup> See *Howell v. Howell*, 101 Cal. 115, 35 Pac. 443.

<sup>26</sup> See *Estate of Young*, 149 Cal. 173, 85 Pac. 145.

<sup>27</sup> See *Gutierrez v. Hebbard*, 106 Cal. 167, 39 Pac. 529, 935; also *Howell v. Howell*, 101 Cal. 115, 35

Pac. 443; *Randall v. Duff*, 105 Cal. 271, 38 Pac. 739.

<sup>1</sup> Stats. 1907, p. 715. There are some minor amendments made in 1909 (Stats. 1909, c. 607), which will be hereafter noted.

have been added to section 659. The matter referred to cannot be considered on an appeal from the judgment, and is reviewable only on an appeal from a new trial order. The only other provision in this section relating to the contents of the bill is the following:

"Such draft must contain *all the exceptions and proceedings* taken upon which the party relies. . . . It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions and proceedings may be presented as briefly as possible."

Aside from the requirement of section 648, Code of Civil Procedure, as to specifications, considered in the next section, and the provision as to what an exception is, and how stated, referred to in that section and in section 646 of the same code, there is no other provision as to the contents of bills of exceptions in the code.

2. *What is an Exception, and How It must be Taken.*—The only definition given by the old Practice Act was the following: "An exception is an objection taken at the trial to a decision *upon a matter of law.*"<sup>1a</sup> In *People v. Torres*<sup>2</sup> (a criminal case), the supreme court defined an exception to be "a formal protest against the ruling of the court upon a question of law." Before the code there was no such thing as an exception to a decision upon a matter of fact. In this regard Rhodes, J., delivering the opinion in the *Will of Bowen*,<sup>3</sup> said: "The rule is uniform, and indeed it forms an essential part of the definition of an exception that it must be taken upon a fact or facts not denied. (*Graham v. Cammann*, 2 Caine (N. Y.), 168; *Frier v. Jackson*, 8 Johns. (N. Y.) 495; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Brewer v. Isish*, 12 How. Pr. (N. Y.) 481.) The reason of this is that the question or point of law to the decision of which an exception lies does not arise until the facts are determined." The only kind of ex-

<sup>1a</sup> This definition was contained in section 188, which stood from the time of its adoption in 1851 to the adoption of the Code of Civil Procedure. It was as follows:

"Sec. 188. An exception is an objection taken at a trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made

during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision." *Laws of 1851*, p. 80.

<sup>2</sup> 38 Cal. 141.

<sup>3</sup> 34 Cal. 682.

ception, therefore, which was provided for by the old Practice Act was an exception to a decision *upon a question of law*. And the most apt definition of this kind of exception seems to be that given in *People v. Torres*, viz., that it is "a formal protest against the ruling of the court." This kind of exception is provided for by the Code of Civil Procedure as amended in 1874 and 1876.<sup>4</sup> But in addition to such exceptions the code recognizes exceptions to decisions upon matters of fact. Section 648 contains, among other things, the following clause: "When the exception is to the verdict or decision *upon the ground of the insufficiency of the evidence* to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." This clause clearly recognizes exceptions to the verdict or decision of fact, upon the ground of the insufficiency of the evidence to sustain it.<sup>4</sup> There are, therefore, under the code two kinds of exceptions, viz., exceptions to decisions upon matters of law and exceptions to decisions upon matters of fact.

There are certain proceedings which, under the statute, are deemed to be excepted to.<sup>5</sup> And, as a matter of course, no excep-

<sup>4</sup> The California Code of Civil Procedure as first enacted did not contain the definition. But as amended in 1874 section 646 was as follows:

"Sec. 646. An exception is an objection upon a matter of law to a decision of a court, judge, or referee in an action or proceeding, and may be taken by either party to any decision made either before or after judgment; and except as provided in the following section, it must be taken at the time the decision is made."

In 1876 this section was amended so as to read as follows:

"Sec. 646. An exception is an objection upon a matter of law to a decision made either before or after judgment by a court, tribunal, judge, or other judicial officer in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section 647."

There has been no further change up to the present writing.

<sup>4a</sup> See *Emerson v. Ditch Co.*, 18 Mont. 247, 44 Pac. 969.

<sup>5</sup> After repeated changes, section 647 is as follows:

"Sec. 647. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon an *ex parte* application, giving an instruction, although no objection to such instruction was made, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party, or an order granting or denying a nonsuit, or a motion to strike out evidence or testimony, and a ruling sustaining or overruling an objection to evidence, are deemed to have been excepted to."

The section as amended in 1876 was as follows:

"Sec. 647. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights

tion need be taken by the party to such proceedings.<sup>5a</sup> But, except in such cases, the exception must be taken by the party, and if not taken the proceeding cannot be reviewed.<sup>6</sup> This applies to all adverse rulings of the court not deemed excepted to under the provisions of section 647 of the California Code of Civil Procedure (and corresponding sections), and it has been held that the fact that a trial was conducted by one not skilled in the law, as where a litigant conducts his own case, does not afford the appellate court adequate ground for disregarding the want of exceptions where they are necessary.<sup>5a</sup> Thus, an order refusing to allow the filing of a supplemental complaint, not being an order deemed excepted to, within the provisions of section 647, must be excepted to;<sup>5b</sup> but, on the other hand, an order on a motion

of the parties or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon *ex parte* application, and an order or decision made in the absence of a party, are deemed to have been excepted to."

Prior to 1876, section 647 was as follows:

"Sec. 647. The adverse party is deemed to have excepted to the verdict of the jury or the final decision of the court or referee, to an order granting or refusing a new trial, sustaining or overruling a demurrer, striking out a pleading or any part thereof, granting or refusing a continuance, granting or refusing to change the place of trial; and is also deemed to have excepted to every order, ruling, or proceeding made or had in the action or proceeding, either before or after judgment upon an *ex parte* application."

See, also, section 1457, Revised Statutes of Arizona (section 248, Civil Practice); section 387, Mills' Annotated Code of Colorado; section 4427, Revised Codes of Idaho; section 6784, Revised Codes of Montana (section 1151, Code of Civil Procedure); section 3288, Cutting's Compiled Laws of Nevada; section 7054, Revised Codes of North Dakota; sec-

tion 172, Lord's Oregon Laws; section 293, Code of Civil Procedure of South Dakota; section 3283, Compiled Laws of Utah.

<sup>5a</sup> Upon this point, however, the rule is subject to some slight reservation, and it is sometimes said that while, in certain cases, rulings are deemed excepted to, the necessity for objections is not always done away with. See *Hinsdale etc. Co. v. Ogle*, 45 Colo. 454; 101 Pac. 786; *Denver etc. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 98.

<sup>6</sup> See sections 107, 119, and 127; and see *Brown v. De Lavau*, 63 Cal. 303; *Thiele v. Koster*, 63 Cal. 241; *Austin v. Andrews*, 71 Cal. 98, 16 Pac. 546; *Sierra Union Water & Mining Co. v. Baker*, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *Garoutte v. Williamson*, 108 Cal. 135, 41 Pac. 35, 413; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; and see cases cited below.

Also, *Smith v. Mock*, 33 Colo. 154, 79 Pac. 1011; *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086; *Hinsdale etc. Co. v. Ogle*, 45 Colo. 454, 101 Pac. 786; *In re Estate of Smiley*, 4 Colo. App. 582, 36 Pac. 894; *Ott v. Braun*, 48 Colo. 417, 110 Pac. 73; *Schuch v. Hartshorn*, 48 Colo. 351, 109 Pac. 1110.

<sup>5a</sup> See *Randall v. Freed*, 154 Cal. 299, 97 Pac. 669.

<sup>5b</sup> *Giddings v. The '76 Land etc. Co.*, 109 Cal. 116, 41 Pac. 788.



for a new trial, being an appealable order, is within the operation of that section, and need not be excepted to.<sup>66</sup> Prior to recent amendments, rulings upon evidence required to be excepted to;<sup>67</sup> and prior to other amendments, only slightly less recent, rulings on instructions required to be excepted to.<sup>68</sup> These rulings, by reason of such amendments, no longer require to have exceptions thereto reserved.<sup>69</sup>

The code nowhere specifies how an exception shall be taken.<sup>7</sup> And under the decisions the process differs somewhat in different cases. Thus, in excepting to rulings upon the admissibility of evidence, it is sufficient for the counsel to state that he takes or reserves an exception, or that he excepts, or to use some similar expression;<sup>8</sup> while an exception to the charge of the jury must point out particular portions of the charge which are excepted to.<sup>9</sup> But in no case is it necessary or proper for the counsel to state as part of the exception any of the evidence or other matter

<sup>66</sup> *Southern Pacific Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627. But in *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907, the supreme court, Chief Justice Beatty dissenting, held that in criminal cases the motion, the order, and an exception to the new trial order, must, under Rule II, be incorporated in a bill of exceptions. The chief justice in his dissenting opinion thought that rule applied exclusively to the evidence, papers (files, etc.), upon which the motion was made. See, to same effect, *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Frank*, 2 Cal. App. 283, 83 Pac. 578. It is apparent, however, that this ruling can apply only to cases where the motion was made on the minutes of the court, and the statement or bill of exceptions prepared after the hearing. It is obvious that it could not otherwise be included in the bill. See *Mendocino Co. v. Peters*, 2 Cal. App. 24, 82 Pac. 1122. See section 1259, Penal Code.

<sup>67</sup> See section 107, *ante*.

<sup>68</sup> See section 127, *ante*.

<sup>69</sup> See the following cases for instances where orders, rulings, etc., were deemed excepted to: *Latham v. Blake*, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; *Bedington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Davis v. Honey Lake W. Co.*, 98 Cal. 415, 33 Pac.

270; *Schaake v. Eagle etc. Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; *Rahmel v. Lehnendorff*, 142 Cal. 681, 100 Am. St. Rep. 154, 76 Pac. 659, 65 L. R. A. 88; *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171; *Roberts v. Wilson*, 3 Cal. App. 32, 84 Pac. 216; *People v. O'Brien*, 4 Cal. App. 723, 89 Pac. 438.

The following not deemed excepted to: *Witkowski v. Hern*, 82 Cal. 604, 23 Pac. 132; *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063; *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Story v. Nidifer*, 146 Cal. 549, 80 Pac. 692; *Perry v. Noonan Loan Co.*, 1 Cal. App. 609, 82 Pac. 623; *Cannon v. McKenzie*, 3 Cal. App. 286, 85 Pac. 130.

<sup>7</sup> Section 648 seems to refer to the statement of the exception in the bill, and not to the process of taking it in court. The statement of the text does not, however, apply to all other jurisdictions. An examination of the code provisions of the various states, collected in note 6, section 254, *ante*, will disclose that in several instances specific provision is made as to the manner of taking exceptions.

<sup>8</sup> See section 107, *ante*. Exception must be taken by appellant. *McGarry v. Pedronena*, 58 Cal. 91.

<sup>9</sup> See section 128, *ante*.

in its support. For if it be necessary in taking the exception to state any of the evidence or other matter material to it, it is equally so to state all of such evidence. And this would be to rehearse a whole bill of exceptions every time an exception was taken. The evidence is not a part of the exception. It must be stated in the bill, but so must the ruling excepted to, and no one would contend that the ruling is part of the exception. The taking of the exception, therefore, is distinct from the statement of it in the bill.

3. *How an Exception must be Stated in the Bill.*—There is a manifest difference between the taking of an exception and the statement of it in the bill of exceptions. The bill must show that the exception was properly taken, but it must do more. This is provided by section 648 of the code, which, as amended in 1876,<sup>10</sup> is as follows:

“Sec. 648. No particular form of exception is required; but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated *with so much of the evidence or other matter* as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made.”

Under this section the bill must contain not only the exception taken at the trial, but also the evidence and other matter necessary to explain and support it.<sup>11</sup> Enough must be stated to make the

<sup>10</sup> Prior to 1876 section 648 contained the first two sentences quoted above, but not the last two.

<sup>11</sup> If the finding should be attacked as insufficient, and the particulars wherein the evidence fails to justify it are specified by the appellant, the respondent should set out, by way of amendment, whatever evidence may sustain it; and, it is said that if the appellant, without specifying particulars, alleges, as he may do, that there is no evidence whatever to justify the finding, the duty is imposed upon the respondent to set out enough evidence, at least, as will show that there is a basis for the finding, and that, in the absence of a contrary

showing, it is sustained. This would seem to be the principle of the decisions. *Estate of Page*, 57 Cal. 238; *Nash v. Harris*, 57 Cal. 242; *Coglan v. Beard*, 67 Cal. 303, 7 Pac. 738; *Wilson v. Atkinson*, 68 Cal. 590, 10 Pac. 203; *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *In re Gates*, 90 Cal. 257, 27 Pac. 195; *Walkerly v. Greene*, 104 Cal. 208, 37 Pac. 890; *In re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; *Reclamation District v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075; *Commercial Bank v. Redfield*, 122 Cal. 406, 55 Pac. 160, 772; *Lake Shore etc. Co. v. Modoc etc. Co.*, 127 Cal.

error appear affirmatively, or, in other words, to overcome the presumption in support of the action of the court below.<sup>12</sup> For example, if the alleged error is the rejection of evidence, and ground of such rejection is its irrelevancy, there must be a sufficient showing of relevancy accompanying the statement of the evidence offered. Thus, where the complaint and answer in another action are offered in evidence and refused, the bill of exceptions should contain not only a copy of the papers offered and the order of refusal, but also a sufficient showing to enable the appellate court to understand why the offered evidence is relevant.<sup>12a</sup>

The requirements as to what shall be placed in a bill of exceptions, and as to how it should be set forth, are very similar to the requirements as to what shall be placed in a statement, and as to how that should be set forth, and these subjects have been fully treated elsewhere.<sup>13</sup>

Failure to state an exception in the bill, except in the case of exceptions presumed under section 647, inevitably results in the refusal of the appellate court to review it.<sup>13a</sup> If a bill contains

37, 59 Pac. 206; *Estate of Fath*, 132 Cal. 609, 64 Pac. 995; *Vatcher v. Wilbur*, 144 Cal. 536, 78 Pac. 14; *Estate of Piper*, 147 Cal. 606, 82 Pac. 246. And see *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447, where it was held that exceptions to the admission in evidence of defectively stamped ballots would not be considered in the absence of the ballots themselves, or fac-similes thereof. And see, also, *Jennings v. Brown*, 109 Cal. 290, 41 Pac. 1085.

<sup>12</sup> As to which presumption, see section 285, *post*. This is merely saying, as has been clearly pointed out with respect to statements, that if an appellant attacks a finding for insufficiency of the evidence to justify it, he must point out, or specify, the particulars in which the evidence is insufficient, unless there is no evidence at all, in which case a statement that there is no evidence will be sufficient; and if he fails to so specify the particulars, the exception cannot be reviewed. See *Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292; *San Francisco v. Pacific Bank*, 89 Cal. 23, 26 Pac. 615, 835; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647; *Baird v. Peall*, 92 Cal. 235, 28 Pac. 285; *Gamble v.*

*Tripp*, 99 Cal. 223, 33 Pac. 851; *Hawley v. Harrington*, 152 Cal. 188, 92 Pac. 177. And if there are no such specifications the finding attacked will be presumed to be amply supported. See *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Meade v. Lasar*, 92 Cal. 221, 28 Pac. 935; *Estate of Depaux*, 118 Cal. 290, 50 Pac. 387; *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603; *Matter of Baker*, 153 Cal. 537, 96 Pac. 12. See next section as to specifications.

As to the effect of the Montana section as it existed prior to 1905, see *Emerson v. Ditch Co.*, 18 Mont. 247, 44 Pac. 969.

<sup>12a</sup> See *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; and see *Estate of Piper*, 147 Cal. 606, 82 Pac. 246.

<sup>13</sup> See section 151, *ante*. If the bill be so badly prepared as to be unintelligible, it will be disregarded. *Caldwell v. Parks*, 50 Cal. 502. See *Walkerly v. Greene*, 104 Cal. 208, 37 Pac. 890, for suggestions with respect to an ideal bill of exceptions.

<sup>13a</sup> See *Hanna v. De Garmo*, 140 Cal. 172, 73 Pac. 830, where the supreme court declined to review an exception to a nonsuit because of the failure of the appellant to state his

no exceptions it is not a bill of exceptions, and mere statement of facts accomplish nothing and illustrate nothing. Such a document is wholly without value.<sup>13b</sup>

When the bill is settled the presumption is (unless the content affirmatively appears) that it contains all the evidence and other matter material to the exceptions assigned.<sup>14</sup>

It is proper to note, what must be manifest already; however, that matter whose place is in the judgment-roll, as findings of fact and conclusions of law, supplemental and final decrees, judgments, orders, notices of appeal and proof of service thereof, the clerk's certificate that an undertaking on appeal has been filed, should not be included in a bill of exceptions. Nor should any matter subsequent to the order appealed from, as the notice of appeal, or the undertaking, be properly included in a bill of exceptions.<sup>15</sup>

Under the provisions of Rule XXIX of the supreme court, affidavits, documents, papers, and other matter, requiring identification and authentication before it can be used on appeal, must be incorporated in a bill of exceptions. This is in response to the necessity for identification, and a convenient method of accomplishing that fact, and not because of any rule of law above outlined. This subject will be more fully treated hereafter.<sup>16</sup>

**§ 259. Contents of a Bill of Exceptions Settled After Trial—Specifications.**—Section 648, quoted in the preceding section, provides that "when the exception is to the verdict or decision

exception in the substantive form, and contented himself with transcribing so much of the reporter's notes as indicated that an exception to the ruling had been taken. Other cases illustrative of the point are to be found among those cited above; and see cases cited below.

This rule has been held to apply to a case where the question was upon the constitutionality of a statute. The supreme court held that while it would take judicial notice of the unconstitutionality of the act, there must be a bill of exceptions, showing the facts and the application of the statute in such a way as to bring the error of the lower court and the unconstitutionality of the statute together so as to show injury to the

appellant. *Marean v. Stanley*, Colo. 43, 39 Pac. 1086; also, *Ertson v. People*, 20 Colo. 278, 39 Pac. 326; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *In re Robert*, Colo. 525.

<sup>13b</sup> See *Estate of Carpenter*, Cal. 582, 60 Pac. 162.

<sup>14</sup> And see section 152, *ante*; look at *People v. English*, 52 Cal. 1, and *People v. Coulter*, 145 Cal. 78 Pac. 348.

<sup>15</sup> See *White v. White*, 112 Cal. 577, 44 Pac. 1026. As to what is not a part of the judgment-roll, and what should and what should not be included in bills or statements, see section 230, *ante*, particularly corresponding to note 18.

<sup>16</sup> See section 264, *post*.

upon the ground of the insufficiency of the evidence to justify it, the objection *must specify the particulars in which such evidence is alleged to be insufficient.*" Accordingly, it is settled that a verdict or other decision of fact will not be reviewed on the ground of the insufficiency of the evidence to justify it, unless the bill of exceptions contains specifications of the particulars wherein the evidence is alleged to be insufficient.<sup>1</sup> The language above quoted requiring the bill of exceptions to contain specifications of the insufficiency of the evidence is similar to the language of the section requiring such specifications in a statement on motion for new trial,<sup>2</sup> and the purpose of the two requirements is the same. The specifications of the insufficiency of the evidence, therefore, to be placed in a bill of exceptions prepared under section 650 are the same as those to be placed in a statement. And as the latter have been fully treated of in another place,<sup>3</sup> it is unnecessary to go over the ground here.

Are specifications of *error* necessary in a bill of exceptions settled under section 650? Specifications of error are expressly required in a statement on motion for new trial under the code;<sup>4</sup> and the necessity for placing them in statements under the old Practice Act arose from express provisions of the statute.<sup>5</sup> There is, however, no provision requiring them to be placed in a bill of exceptions under the code, and it is well settled that they are not required. In the case of *Miller v. Wade*<sup>6</sup> a contrary opinion was written into the decision by the justice who delivered the same; but inasmuch as it did not receive the concurrence of a majority of the court it cannot be regarded as a ruling, although it is sometimes so called.<sup>6a</sup> This opinion presents the contrary view:

"The assignment of error is the pleading which points out the particular question raised and passed upon in the court below, and presented to this court for review. The bill of exceptions is in-

<sup>1</sup> *Thorne v. Hammond*, 46 Cal. 530; *Kelly v. Mack*, 49 Cal. 523; *Coveny v. Hale*, 49 Cal. 552; *Jones v. Shav*, 50 Cal. 508; *Watson v. S. F. & H. B. Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Spect v. Gregg*, 51 Cal. 198; *Smith v. Lawrence*, 53 Cal. 34; *Phillips v. Lowery*, 54 Cal. 584; *Rider v. Edgar*, 54 Cal. 27; *Perham v. Kuper*, 61 Cal. 331; and see cases cited in notes 11 and 12 in section 258, *ante*.

<sup>2</sup> Section 659, subdivision 3, California Code of Civil Procedure.

<sup>3</sup> See section 150, *ante*; look at section 149, *ante*.

<sup>4</sup> Section 659, subdivision 3, California Code of Civil Procedure.

<sup>5</sup> See section 149, *ante*.

<sup>6</sup> 87 Cal. 410, 25 Pac. 487.

<sup>6a</sup> See *Martin v. Southern Pacific Co.*, 150 Cal. 124, 88 Pac. 701.

tended to present the facts and the exception which sustains the point made, and thus reserved for our determination. . . . If this were not so, this court would be compelled, instead of looking to the assignment of errors for the questions presented, to search the whole transcript to find them; opposing counsel would have no means of knowing what points would be relied upon, until the briefs were filed in this court, and questions could be urged here that had never been called to the attention of the court below on a motion for a new trial. A different rule was declared in one case, in department, in which a distinction is made between a statement and a bill of exceptions in this respect. (*Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403.) It is true, as stated in that case, that the statute applies, in terms, to statements only, but this court has held, in a number of cases, that a statement and a bill of exceptions are the same; and where a bill of exceptions is used on a motion for a new trial, and is thereby made to take the place of the statement, it must contain everything necessary to present the question by a statement. Undoubtedly a bill of exceptions might be used where a statement would not be proper, and in many cases no specification of error would be necessary. But where a bill of exceptions is used as the basis of a motion for a new trial, it is a statement. The court below has a right under the code to have specifically pointed out all errors relied upon in making the motion, and this court can only be called upon to pass upon such questions as have thus been specified and relied upon in the trial court."

In *Barfield v. Irrigation Co.*,<sup>eb</sup> Garoutte, J., delivering the opinion of the court, said:

"It is insisted upon the part of the respondent that the bill of exceptions cannot be considered, because no specification of errors of law are embodied therein. *Miller v. Wade*, 87 Cal. 410, 25 Pac. 487, is relied upon to support this position. But the doctrine there declared failed to receive the sanction of a majority of the court, and therefore is not authority."

With the exception of the *dictum* of *Miller v. Wade*, above quoted, no departure from the settled rule is to be found.<sup>ec</sup>

<sup>eb</sup> 111 Cal. 118, 43 Pac. 406.

<sup>ec</sup> See *Reay v. Butler*, 69 Cal. 572, 11 Pac. 463; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111;

*Barfield v. Irrigation Co.*, 111 Cal. 118, 43 Pac. 406; *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Harper v. Gordon*, 128 Cal.

Specifications are not required in criminal proceedings, for the simple reason that bills of exceptions in criminal proceedings have been dispensed with.<sup>1</sup>

**§ 260. Presentation for Settlement, Settlement, Engrossment, Authentication, and Filing of Bill of Exceptions.**—When the amendments to the proposed bill have been served, section 650<sup>1</sup> prescribes the following course of procedure:

“The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard the case, upon five days’ notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk he must immediately deliver them to the judge if he is in the county; if he is absent from the county, and either party desires the papers to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immedi-

489, 61 Pac. 84; *Martin v. Southern Pacific Co.*, 150 Cal. 124, 88 Pac. 701.

The early case of *Kelly v. Mack*, 40 Cal. 523, sometimes referred to, does not amount to a decision on the point.

The rule has been followed in other states. *Nord v. Boston etc. Co.*, 30 Mont. 48, 75 Pac. 681.

Notwithstanding the fact that bills of exceptions on motion for new trial are essentially the same as statements for the same purpose, the rule as to specifications of error remains effective with respect to such bills of exceptions. *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566; and see *Gillies v. Clarke etc. Co.*, 32 Mont. 320, 80 Pac. 370.

But see *Ilstad v. Anderson*, 2 N. D. 167, 49 N. W. 659, *Gould v. Elevator Co.*, 2 N. D. 216, 50 N. W. 969, *Pickert v. Rugg*, 1 N. D. 230, 46 N. W. 446, *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687, *Hostetter v. Elevator Co.*, 4 N. D. 357, 61 Pac. 49, *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439, *Schnitz v. Heger*, 5 N. D. 165, 64 N. W. 943, *Nelson v. Jordeth*, 15 S. D. 46, 87 N. W. 140, *Davis v. Cook*, 9 S. D. 319, 69 N. W. 18, *Tootla v. Petrie*, 8 S. D. 19, 65

N. W. 43, in all of which it was held that errors of law must be specified in the bill. These decisions were prior to change of practice dispensing with bill of exceptions in new trial proceedings and on appeal in North Dakota.

<sup>1</sup> See section 1246, California Penal Code. The old practice, as it existed prior to the amendments of 1909, and the cases which illustrate the same, are reviewed in *People v. Coulter*, 145 Cal. 66, 78 Pac. 348. Attention is particularly directed to the dissenting opinion of Chief Justice Beatty in that case.

<sup>1</sup> The portion of section 650, quoted in the text, is the same as was amended in 1874. Prior to that time the only procedure prescribed was that the bill should, “upon one day’s notice to the adverse party, at any time after such ruling is made, and within thirty days after the entry of judgment, be presented to the judge and settled as provided in the preceding section.”

And the provision of “the preceding section” referred to was as follows: “It must be conformable to the truth, or be at the time corrected until it is so, and signed by the judge and filed with the clerk.”

ately after his return to the county. When received from clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of the designation. At the time designated the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it within ten days. If the action was tried before a referee, the proposed bill, with amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee must settle the bill. If no amendments are served, or if served and allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee for settlement without notice to the adverse party.

"It is the duty of the judge or referee in settling the bill to strike out of it all redundant and useless matter, so that the captions may be presented as briefly as possible. When settling the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk."

The presentation of the bill for settlement must be upon notice. If no notice be given the judge may refuse to settle it.<sup>2</sup> The presentation is similar to the presentation of statements for settlement, and the observations in section 153 will apply here. It is the duty of the judge to settle the bill when properly presented, if the party has not lost his right to have a bill, and if he refuses to perform such duty he may be compelled by *mandamus* to settle the bill one way or the other, but not in any particular way. If he refuse to allow any particular exception the party may appeal to the supreme court for leave to prove the exception.<sup>4</sup> The bill is to be settled in the same manner as statements are settled.<sup>5</sup> When being settled the bill must be engrossed;<sup>6</sup> and when engrossed must be authenticated by the signature of the judge. A stipulation by the parties is insufficient.<sup>7</sup> The certificate must be filed in the court below within a reasonable time after presentation.

<sup>2</sup> See cases cited in note 6a, section 153, *ante*, and note 17, section 155, *ante*.

<sup>3</sup> See section 155, *ante*.

<sup>4</sup> See section 155, *ante*.

<sup>5</sup> As to which, see section 154, *ante*.

<sup>6</sup> See section 156, *ante*.

<sup>7</sup> *Gee v. Terrio*, 55 Cal. 38, was otherwise under the code as enacted. *Sarver v. Garcia*, 49 Cal. 218; and see section 157, *ante*.



certificate signed at the time the case is on argument in the supreme court,<sup>8</sup> or written on a fly-leaf of the transcript,<sup>9</sup> is insufficient. It should be before the statement is filed in the court below.<sup>10</sup> The observations in section 158 herein as to the authentication of statements will apply here. After being duly authenticated the bill should be filed with the clerk.<sup>11</sup>

Bills of exceptions may in certain cases be amended after being settled and filed. What has been said in section 160 respecting the amendment of statements is applicable in this connection.

<sup>8</sup> Keller v. Lewis, 56 Cal. 466.

<sup>10</sup> Keller v. Lewis, 56 Cal. 466; but

<sup>9</sup> Look at Wilson v. Dougherty, 45 Cal. 34.

see Marble v. Fay, 49 Cal. 585.

<sup>11</sup> See section 159, *ante*.

## CHAPTER XLVI.

## RECORD ON APPEAL FROM AN ORDER.

- § 261. Record on appeal from an order under the old Practice Act.
- § 262. Record on appeal from an order under the code.
- § 263. Preparation of a bill of exceptions on an appeal from an order.
- § 264. Identification of the papers used on the hearing in the court below.

§ 261. **Record on Appeal from an Order Under the Old Practice Act.**—The record on appeal from an order granting or refusing a new trial has been considered elsewhere.<sup>1</sup> It is here proposed to consider what is the record on appeal from orders other than on motion for new trial. The provisions of the old Practice Act were as follows:

“Sec. 338. When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment *or order* he shall, within twenty days after the entry of such judgment or order, prepare such statement, etc.”<sup>2</sup>

[The statement here provided for was the statement on appeal which has been treated of in chapter 44. When used on appeal from an order it was to be annexed to the order.<sup>3</sup>]

“Sec. 343. The provisions of the last five preceding sections [providing for the statement on appeal above referred to] shall not apply to appeals taken from an order, made at a special term upon affidavits filed; but such affidavits shall be annexed to the order in the place of the statement mentioned in those sections.”<sup>4</sup>

“Sec. 346. On an appeal from a final judgment the appellant shall furnish the court . . . the judgment-roll *and statement annexed*. . . . On an appeal . . . from an order . . . the appellant shall furnish the court with . . . *a copy of the papers used on the hearing of the court below*. . . .”<sup>5</sup>

<sup>1</sup> See section 168, *ante*.

<sup>2</sup> Laws of 1851, p. 105. For amendments of this section, see section 253, *ante*.

<sup>3</sup> See section 342; Laws of 1851, p. 105; Laws of 1863–64, p. 247.

<sup>4</sup> Laws of 1851, p. 105. In 1854 this section was amended so as to omit the words “at a special term.”

Laws of 1854, p. 64. No further change was made until the adoption of the Code of Civil Procedure.

<sup>5</sup> Laws of 1851, p. 106; amended in 1854 (see Laws of 1854, p. 64), and in 1864. See Laws of 1863–64, p. 247. But it is not material to the question in hand to give the changes made by these amendments.

The rules established by these provisions, under the construction given to them by the supreme court, were as follows:

(a) Section 343 applied only to appealable orders.<sup>6</sup> Orders which were not appealable but which necessarily affected the judgment were reviewable on appeal from the judgment.<sup>7</sup> And since there was no provision for annexing affidavits to the judgment-roll, such orders could be reviewed only in a statement on appeal prepared under section 338.<sup>8</sup>

(b) Appealable orders, *if made upon affidavits alone*, could be reviewed on the affidavits properly identified, without a statement.<sup>9</sup>

(c) But appealable orders *not made upon affidavits alone*, but made upon affidavits *and other evidence*, required a statement on appeal at least as to the other evidence.<sup>10</sup> But this did not apply to orders made partly upon the complaint and partly upon affidavits, such orders being reviewable without a statement,<sup>10</sup> under section 343.

(d) The methods above mentioned were the only methods in which orders could be reviewed.<sup>10a</sup> In no case could an order be reviewed on a bill of exceptions.<sup>11</sup> And documents printed in the transcript which were not affidavits properly identified, and were not incorporated in a statement on appeal, could not be considered.<sup>12</sup>

(e) The record on appeal from an order terminated with the order, and could not be made to embrace subsequent proceedings.<sup>13</sup>

**§ 262. Record on Appeal from an Order Under the Code of Civil Procedure.**—As the code was first enacted it contained no provision for statements of any kind.<sup>1</sup> Nor did it contain any

<sup>6</sup> Stone v. Stone, 17 Cal. 513.

<sup>7</sup> As to which see section 196, *ante*.

<sup>8</sup> N. & S. C. Co. v. Kidd, 43 Cal. 180; Stone v. Stone, 17 Cal. 513; Poole v. Caulfield, 45 Cal. 107; McAbee v. Randall, 41 Cal. 136; Dooly v. Norton, 41 Cal. 439; Caulfield v. Doe, 45 Cal. 221; and look at Estate of Arnaz, 45 Cal. 259.

<sup>9</sup> Paine v. Linhill, 10 Cal. 370; Stone v. Stone, 17 Cal. 513; Wetherbee v. Carroll, 33 Cal. 549; Gagliardo v. Crippen, 22 Cal. 362; People v. Doe, 45 Cal. 43; Cross v. Zane, 45 Cal. 89.

<sup>10</sup> Haggin v. Clark, 28 Cal. 162; Leffingwell v. Griffing, 20 Cal. 192;

Wetherbee v. Carroll, 33 Cal. 549; Rogers v. Parish, 35 Cal. 127; People v. Doe, 45 Cal. 43; Cross v. Zane, 45 Cal. 89.

<sup>10</sup> Gagliardo v. Crippen, 22 Cal. 362.

<sup>10a</sup> Wetherbee v. Carroll, 33 Cal. 549.

<sup>11</sup> People v. Doe, 45 Cal. 43; Caulfield v. Doe, 45 Cal. 221; Wetherbee v. Carroll, 33 Cal. 549.

<sup>12</sup> Ritter v. Mason, 11 Cal. 214; Gordon v. Clark, 22 Cal. 533; and see generally section 265.

<sup>13</sup> Coombs v. Hibberd, 45 Cal. 174.

<sup>1</sup> Upon this ground, where a motion for new trial was made after the

provision, like that of section 343 of the old Practice Act, to effect that on an appeal from an order the supreme court should be furnished with copies of the papers used at the hearing in the court below. The sole record on appeal from orders of this kind was a bill of exceptions.<sup>2</sup> The amendments of 1874 introduced some changes. It will be convenient to consider separately the different kinds of orders.

1. *Where the Order is not Itself Appealable, but is Reviewable on Appeal from the Judgment.*—As has been shown, intermediate orders necessarily affecting the judgment, but not themselves the subject of appeal, are reviewable on appeal from the judgment. In such case the appeal must be *from the judgment*, and the record that can be used is the one designated by the statute as the record on appeal from the judgment, viz., the judgment-roll, including a bill of exceptions if one be prepared.<sup>4</sup> There is no provision for annexing affidavits or similar documents to the judgment-roll. And consequently for an appeal of this character the papers and other evidence upon which the order is made must be incorporated in a bill of exceptions,<sup>4a</sup> prepared either at the time the order is made or subsequently, as is pointed out in another place.<sup>5</sup> The provision of the old Practice Act with reference to nonappealable orders was much the same. Under it orders of this character mentioned were to be reviewed upon a statement or bill of exceptions annexed to the judgment-roll.<sup>6</sup>

Where the order is reviewable on an appeal from the judgment, the matter applicable thereto may properly be embodied in the

code took effect, upon a statement of facts and was granted, the order was reversed, the court holding that it ought to have been made upon a bill of exceptions. *Kelly v. Larkin*, 47 Cal. 58. As to the record on appeal from orders on motion for new trial, see section 168, *ante*.

<sup>2</sup> The provision of the California code as first enacted was as follows:

"Sec. 951. On appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and of the bill of exceptions relating thereto."

Under this provision it was held in *Grazidal v. Bastanchure*, 47 Cal. 167,

that an order opening a default on affidavits could be reviewed on a bill of exceptions. So in *v. Buehl*, 47 Cal. 162, it was held that a bill of exceptions was necessary for the review of an order made upon affidavits, denying a motion for continuance. And see note 1 above to continuance in criminal cases. *People v. Weaver*, 47 Cal. 106; *People v. Ashnauer*, 47 Cal. 98.

<sup>3</sup> See section 195, *ante*.

<sup>4</sup> See sections 229, 255, *ante*.

<sup>4a</sup> See, generally, *Welch v. People*, 54 Cal. 211; and following decisions and citations.

<sup>5</sup> As to which see sections 260, *ante*.

<sup>6</sup> See section 261, *ante*.

exceptions prepared on that appeal; but it may be included in separate bill, if desired, and it has been held that the mere fact that the bill was technically presented for settlement and use on an appeal from the order, from which no direct appeal lies, cannot preclude its use for the purpose of reviewing such order on the appeal from the judgment."<sup>6a</sup>

2. *Where the Order is Itself Appealable.*—With reference to appealable orders there was, under the Practice Act, an apparent distinction between orders made on documentary evidence and orders made on evidence, in whole or in part, of a different character. This distinction was based, presumably, upon the fact that documentary evidence, when properly identified, might be used on the appeal without being embodied in a bill of exceptions, while other evidence must necessarily be incorporated in some record, and could not be set out at large in the body of the transcript. This distinction was carried forward and continued under the code, and because of a similarity, existing between the Practice Act and section 951 of the Code of Civil Procedure, the latter was construed to apply to orders made on documentary evidence only. As above stated, this section, as first enacted, required a bill of exceptions in every case.<sup>7</sup> But, as amended in 1874, the section reads as follows:

"Sec. 951. On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, *and of the papers used on the hearing in the court below.*"

Under this provision it was held that the "papers used on the hearing in the court below," on being properly identified, might be used on appeal without being incorporated in a bill of exceptions. This was decided in *Pieper v. Centinella Land Co.*,<sup>8</sup> in which case Thornton, J., delivering the opinion of department two, said:

<sup>6a</sup> See *Foley v. Foley*, 120 Cal. 33, 5 Am. St. Rep. 147, 52 Pac. 122.

An exception to an intermediate order of this description is not "an exception to the verdict or decision," in the sense used in section 939, Code of Civil Procedure. Hence, no specifications of insufficiency are required.

*Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292.

<sup>7</sup> See note 2, *supra*. For reference to corresponding provisions of other codes, see note 3a, section 229, *ante*.

<sup>8</sup> 56 Cal. 173. As to identification, see section 264, *post*.

"An objection is taken by the respondent that the papers claimed to have been used on the motion in the court below cannot be looked at on this appeal, because not embodied in a bill of exceptions. As the statute was at the time the motion was made (in 1879) the bill of exceptions was not necessary to bring up such papers. (Sec. 951, Code Civ. Proc.) In 1874 this section was changed by striking out of the last clause these words, 'and of the bill of exceptions relating thereto,' and inserting in their place the following: 'And of the papers used on the hearing in the court below.' With this change in the statutes we cannot see that a bill of exceptions is necessary under the circumstances."

This section, as quoted above, and as construed in the foregoing decision, no doubt applied to all appealable orders (except orders on motion for new trial) made on *papers*, or, in other words, upon any kind of documentary evidence. In this respect it was deemed to be subject to a similar, but somewhat broader, application than the corresponding provisions of the old Practice Act, which applied to *affidavits* only, and not to other kinds of documentary evidence,<sup>9</sup> while the section under consideration clearly applied to all kinds of documentary evidence, or "*papers*." With reference to such papers, it seems clear, from the language of the code and from that of the case cited, as well as analogous decisions under the Practice Act, that they were a part of the record on appeal on being properly identified;<sup>10</sup> in other words, that they need not be embodied in a bill of exceptions. Evidence of another character, as heretofore stated,<sup>10a</sup> required to be incorporated in a statement; and, for that reason, as above suggested, section 951 was regarded as being applicable to appealable orders made on documentary evidence only.<sup>11</sup> Nevertheless, an appellant might make use of a bill of exceptions if he so desired, and it was suggested that the certificate of such a bill would serve as an identification of the papers used.

The case of *Pieper v. Centinella Land Co.*, above quoted, was first questioned, then distinguished, and finally overruled, as to the principle there enunciated to the effect that a bill of exceptions might be dispensed with after identification,<sup>12</sup> and it was held that

<sup>9</sup> See section 261, subdivision (c), *ante*.

<sup>10</sup> As to identification, see section 264, *post*.

<sup>10a</sup> See section 261, *ante*.

<sup>11</sup> See section 261, *ante*, and see *supra*.

<sup>12</sup> This subject is thoroughly covered in section 264, *post*, as to identification.

there was no statutory authority for identification such as was regarded as a prerequisite in cases of this description, and even if there were, the "papers" were not a part of the judgment-roll, even after identification, unless properly embodied in a bill of exceptions, and could not, therefore, be incorporated in the record on appeal without being so embodied; or, if they were, they could not be considered by the appellate court.<sup>13</sup> Orders upon documentary evidence were, for this reason, placed upon the same footing as orders upon evidence in whole or in part oral. Both required to be embodied in a bill of exceptions. The last vestige of the former distinction between the two classes of orders was thus obliterated, and section 951 has since been regarded as clearly applicable to orders of both classes. The adoption of Rule XXIX cannot be said to restore that distinction. A bill of exceptions is required in every case, whether the order is based upon oral or documentary evidence or both;<sup>14</sup> whether made before or after judgment.<sup>15</sup>

If the matter to be presented on the appeal is already of record, or appears upon the face of the judgment-roll, a bill of exceptions is not necessary. In the case of *Nash v. Harris*,<sup>16</sup> McKee, J., delivering the opinion of the court, said:

"But according to section 647 of the Code of Civil Procedure an appealable order 'is deemed to have been excepted to.' Yet a party who has excepted to a decision of a court, whether he excepted in person at the time the decision was made or is deemed in law to have excepted, must in statutory or reasonable time after his exception avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge."

The case in which this was said was correctly decided, because, as appears from the report, the papers used on the hearing in the court below were neither identified nor embodied in a bill of exceptions. As was said by the court, "none of these documents is in any way authenticated." And the language quoted is true of *some* orders. Thus orders made in the absence of a party are

<sup>13</sup> See section 264, *post*, where this subject is fully discussed under the head of identification.

<sup>14</sup> The cases in support of this axiomatic rule are partially collected in the section on identification (section 264, *post*).

<sup>15</sup> As to the preparation of bills of exceptions on orders, see section 263, *post*.

<sup>16</sup> 57 Cal. 242. See *Granite Mountain Co. v. Weinstein*, 7 Mont. 346, 17 Pac. 108.

deemed to have been excepted to,<sup>17</sup> and many of them require a bill of exceptions. But it is not universally true that orders and decisions which are "deemed" to have been excepted to require a bill of exceptions. For under section 647 of the code the findings of a judge are deemed to have been excepted to; but where the findings are contradictory or uncertain, or against admissions in the pleadings, no bill of exceptions is necessary. So where the question is whether the findings support the judgment no bill of exceptions is necessary.<sup>18</sup> So under the section mentioned an order sustaining or overruling a demurrer is deemed to have been excepted to; but no one would contend that a bill of exceptions is necessary to present a question arising on demurrer to a pleading. The distinction is that in some cases the matter in support of the exception is already of record while in others it is not. In the language of Rhodes, J., in *Smith v. Lawrence*,<sup>19</sup> "neither a bill of exceptions nor a statement is required where the record already presents the question of law and the decision of the court."<sup>20</sup>

As to recitals in an order, see generally section 231.

**§ 263. Preparations of a Bill of Exceptions on Appeal from an Order.**—In the preceding section the cases in which a bill of exceptions is the proper record on appeal from an order have been stated. As shown elsewhere, all bills of exceptions settled after the trial, whatever may be the purpose for which they are intended, are prepared under section 650 of the code, the only difference being as to the time in which the proposed bill must be served.<sup>1</sup> The preparation of such bills has been considered in sections 257, 258, 259, and 260 of this treatise. Bills of exceptions settled at the time of the decision are prepared under section 649 of the code, and are considered in section 256, herein.

**§ 264. Identification of the Papers Used on the Hearing in the Court Below.**

1. *Under the Old Practice Act.*—As has been shown in section 262 of this treatise there are certain cases in which affidavits, or other

<sup>17</sup> Section 647, California Code of Civil Procedure.

<sup>18</sup> *Thompson v. Hancock*, 51 Cal. 110; and see, generally, section 237, *ante*.

<sup>19</sup> 38 Cal. 24, 99 Am. Dec. 344.

<sup>20</sup> See *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461,

28 Pac. 291, 14 L. R. A. 588; *Kleinschmidt v. McDermott*, 12 Mont. 309, 30 Pac. 393, and cases cited, where this subject was disposed of in accordance with the views outlined in the text.

<sup>1</sup> As to which, see section 257, *ante*.



papers used on the hearing in the court below may, on being properly identified, be used as the record on appeal without being incorporated in a bill of exceptions or other record. It remains only to consider what identification is sufficient, and when and by whom it is to be made. It is manifest that some identification is necessary, for otherwise the supreme court could not know what papers were before the court below.<sup>1</sup> The provision of the old Practice Act as to the identification of the affidavits upon motions generally was contained in section 346, which, as enacted in 1851,<sup>2</sup> provided, among other things, that on an appeal from an order "the appellant shall furnish the court with a copy of the notice of appeal, the . . . order appealed from, and a copy of the papers used on the hearing of the court below. *Such copies to be certified by the clerk to be correct.*" In 1854<sup>3</sup> section 346 was amended, but without changing the provision quoted, so far as the identification was concerned. In 1864<sup>4</sup> the section was amended so as to provide that the copies to be furnished the supreme court on an appeal from a judgment or order should be "certified by the attorneys of the parties to the appeal, or by the clerk, to be correct." As so amended the provision stood until the adoption of the Code of Civil Procedure.

The certificate mentioned in the above provision was the certificate to the transcript. But (except as to affidavits on motion for new trial mentioned below) there was no other provision for identification of papers used. And the provision in section 346 was the one under which the identification was made. It did not specify when the certificate was to be made. But the natural course was to make it when the transcript was made up, and this came to be the practice, some memorandum or mark being made by the clerk at the time of the hearing to assist his memory in making up his certificate. Thus in *Paine v. Linhill*,<sup>5</sup> Field, J., delivering the opinion, said: "All that is requisite then, in such cases, is that the certificate of the clerk should specify the affidavits used, and to en-

<sup>1</sup> *Bitter v. Mason*, 11 Cal. 214; *Gordon v. Clark*, 22 Cal. 533; *Johnson v. Muir*, 43 Cal. 542; *Leszinsky v. White*, 45 Cal. 278; *Hancock v. Thom*, 46 Cal. 643; *Stone v. Stone*, 17 Cal. 513.

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<sup>2</sup> Laws of 1851, p. 106.

<sup>3</sup> Laws of 1854, p. 64.

<sup>4</sup> Laws of 1863-64, p. 247.

<sup>5</sup> 10 Cal. 370.

able him to do so, he should at the time mark them as filed on the motion."

As above stated, the provision above given was the only one in relation to the identification of the affidavits upon motions in general. And before 1861 there was no special provision for the identification of affidavits used on a motion for new trial. But in that year section 195, in relation to motions for new trial, was amended<sup>6</sup> so as to provide, among other things, that "to identify the affidavits it shall be sufficient for the judge or clerk to indorse them at the time as having been read or referred to on the hearing. To identify any depositions or minutes of the court it shall be sufficient that the judge designate them in his certificate as having been thus read or referred to." This provision stood until the adoption of the Code of Civil Procedure. It differed from the provision of section 346, above considered, so far as affidavits were concerned, in that the identification was authorized to be made either by the judge or the clerk, and the indorsement was directed to be made "at the time." The question whether an indorsement by the judge or clerk, made not "at the time," but subsequent to the hearing, would be sufficient does not appear to have arisen. Probably it would have been considered sufficient. The provision also made a distinction between affidavits and "depositions or minutes of the court." Why this distinction was made it is difficult to see,<sup>7</sup> and the decisions do not touch upon it.

The purpose of an indorsement or certificate, whether with reference to the papers used on motion for new trial or on other motions, was simply to enable the supreme court to know what papers were in fact used upon the hearing in the court below; and any statement which conveyed this information was sufficient. It is obvious, however, that an indorsement or certificate that the papers were "filed" was insufficient; for the papers could be filed without having been read or produced at the hearing of the motion. And, accordingly, this was held in *Johnson v. Muir*,<sup>8</sup> with reference to

<sup>6</sup> Laws of 1861, p. 590.

<sup>7</sup> The provision in section 195 of the Practice Act was undoubtedly intended to enable the "depositions or minutes" to be brought up without a subsequent statement, as well as affidavits. For under section 343 (which governed the matter before the amendment to section 195, made in 1861) only affidavits were brought up without

a statement. See section 261, subdivision c, and *Haggin v. Clark*, 28 Cal. 162. But why there should have been any difference in the mode of identification is not apparent. The original minutes could not be "indorsed," but copies of the entries could be, and so could depositions.

<sup>8</sup> 43 Cal. 542. See, also, *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454.

affidavits on motion for new trial, the court saying: "It is evident that a mere ordinary indorsement of filing is not sufficient to identify the papers as having been used upon the hearing of the motion. They may have been deposited with the clerk for other and quite different purposes."

2. *Under the Code of Civil Procedure.*—The code has no express provision that the papers used on the hearing of a motion shall be identified. But it provides with reference to orders on motion for new trial that the record on appeal shall consist of "the judgment-roll and *the affidavits* or bill of exceptions, or statement, as the case may be, *used on the hearing*, with a copy of the order made";\* and with reference to other orders that the appellant shall furnish the court "with a copy of the notice of appeal, of the judgment or order appealed from, and of *the papers used on the hearing in the court below.*"<sup>10</sup> And it is manifest that the same necessity for identification exists as under the old Practice Act; for otherwise the supreme court could not possibly know what affidavits or papers were used on the hearing in the court below. Accordingly, it has always been held that unidentified papers appearing in the transcript cannot be considered.<sup>11</sup> But there is nothing in the statute which prescribes what shall be a sufficient identification, and never has been. The cases are numerous, therefore, in which the courts have sought to apply some general principles which would have

\* Sections 661, 952, California Code of Civil Procedure, as amended.

<sup>10</sup> Section 951, California Code of Civil Procedure, as amended in 1874; quoted in section 262, subdivision 2, *ante*.

<sup>11</sup> *Nash v. Harris*, 57 Cal. 242; *Baker v. Snyder*, 58 Cal. 617; *Walsh v. Hutchings*, 60 Cal. 228; *Angell v. Delmas*, 60 Cal. 254; *White v. Longmire*, 63 Cal. 232; *Peltret v. Frank*, 66 Cal. 34, 4 Pac. 885; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. 396; *Pardy v. Montgomery*, 77 Cal. 326, 19 Pac. 530; *McAulay v. Truckee Ice Co.*, 79 Cal. 50, 21 Pac. 434; *Boyd v. Desmond*, 79 Cal. 250, 21 Pac. 755; *Gilman v. Bootz*, 80 Cal. 564, 22 Pac. 255; *Von Glahn v. Grennan*, 81 Cal. 261, 22 Pac. 596; *Fitzpatrick v. Fitch*, 83 Cal. 490, 23 Pac. 531; and see cases cited in section 265, *post*; and see *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; and compare

*Hefflon v. Bowers*, 72 Cal. 270, 13 Pac. 690. The following cases are in point, although decided after the rule: *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *Whipple v. Hopkins*, 116 Cal. 349, 51 Pac. 535; *Barclay v. Blackinton*, 127 Cal. 189, 59 Pac. 834; *Warren & Malley v. Russell*, 129 Cal. 381, 62 Pac. 75; *O'Leary v. Castle*, 133 Cal. 508, 65 Pac. 950.

The effect of Rule XXIX of the California supreme court, and similar rules of other jurisdictions, upon the practice is considered later in this section.

Identification was required in criminal cases. See *People v. Price*, 17 Cal. 310; *People v. Padillia*, 42 Cal. 535; *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73; *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453; and see *People v. McMahon*, 124 Cal. 435, 57 Pac. 224, 138 Cal. 530, 71 Pac. 650.

the effect of doing substantial justice. In this way certain general rules sprang up, or were constructed for the purpose in view, from time to time. Thus it was settled at an early date that the identification could not be accomplished by the clerk. In the case of *Baker v. Snyder*,<sup>12</sup> the clerk first gave a certificate as to what papers were used on the hearing of a motion to set aside a judgment of dismissal, but subsequently canceled it on the ground that it was inadvertently made. The supreme court said, in the course of its opinion, that the law did not impose upon the clerk the duty of certifying as to what papers were used on the hearing. But the decision is only to the effect that a *canceled* certificate of the clerk is not sufficient to identify the papers. The subsequent case of *Walsh v. Hutchings*,<sup>13</sup> however, directly decides that a certificate by the clerk is insufficient. The appeal was from an order setting aside a judgment by default. Myrick, J., delivering the opinion of court in bank, said:

"Papers appear in the transcript as printed, purporting to be an affidavit of the defendant and a counter-affidavit of the plaintiff; but there is no bill of exceptions, and the judge of the court below does not certify or identify these papers as having been used on the motion. It is true the clerk of the court below certifies that the transcript 'contains full, true, and correct copies of all papers used on the hearing in said district court, on the motion of said defendant Hutchings, to set aside said default and judgment'; but it is not for the clerk to determine what papers or evidence the court acted upon. Disregarding these papers, it does not appear that the court was not justified, under section 474, Code of Civil Procedure, in making the order."

So it was held that the only person who could identify the papers was the judge. In *Pieper v. Centinela Land Co.*,<sup>14</sup> an identification by the judge was accepted as sufficient, and Thornton, J., delivering the opinion of department two, said:

"There is in the transcript a certificate of the judge of the court below stating what papers were used on the hearing of the motion, and these papers are inserted in the transcript. The statute pre-

<sup>12</sup> 58 Cal. 617; and see *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Fitzpatrick v. Fitch*, 83 Cal. 490, 23 Pac. 531.

<sup>13</sup> 60 Cal. 228. Ross, J., took no part in this decision; Morrison, C. J.,

and McKinstry, J., concurred in the judgment.

<sup>14</sup> 56 Cal. 173; and see *Nash v. Harris*, 57 Cal. 242; and other cases cited in notes 11 and 12, *supra*.

scribes no mode by which it shall be made to appear to this court on appeal what papers were used on the hearing of such a motion as the one before us. Under such circumstances the court has the power to prescribe by a rule how such papers can be brought before it on appeal. This it can do in order to make effectual the appeal given by law. As it has the right to make such a rule in advance, it has a like power to ratify and adopt the mode followed in this case. We shall consider the papers named in the judge's certificate as properly before us."

This ruling was followed and the practice which it approved treated as correctly settled in several subsequent decisions of the supreme court,<sup>15</sup> but in *Herrlich v. McDonald*<sup>16</sup> and *Somers v. Somers*<sup>17</sup> such a diversity of views as to the propriety of the practice was developed among the members of the court as resulted in the adoption of Rule XXIX (originally Rule XXXII), which provides that "in all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."<sup>18</sup>

<sup>15</sup> See *Nash v. Harris*, 57 Cal. 242; *Schammel v. Schammel*, 70 Cal. 72, 11 Pac. 497; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454.

<sup>16</sup> 80 Cal. 472, 22 Pac. 299.

<sup>17</sup> 81 Cal. 608, 22 Pac. 967.

<sup>18</sup> The first case decided under Rule XXIX appears to have been *White v. White*, 88 Cal. 429, 26 Pac. 236; but this was followed by an unbroken line down to the present. See *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Cohen v. Alameda*, 124 Cal. 504, 57 Pac. 377; *Pereira v. City Savings Bank*, 128 Cal. 45, 60 Pac. 524; *Ramsbottom v. Fitzgerald*, 128 Cal. 75, 60 Pac. 522; *People v. Terrill*, 131 Cal. 112, 63 Pac. 141; *Esert v. Glock*, 137 Cal. 533, 70 Pac. 479; *San Diego Savings Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299; *Cahill v. Baird*, 138 Cal. 691, 72 Pac. 342; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *Guardianship of Wells*, 140 Cal. 349, 73 Pac. 1065; *People v. Gay*, 141 Cal. 41, 74 Pac. 443; *People v. Wrin*, 143

Cal. 11, 76 Pac. 646; *Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904; *People v. Ward*, 145 Cal. 736, 79 Pac. 448; *Estate of Dean*, 149 Cal. 487, 87 Pac. 13; *Bentley v. Hurlburt*, 153 Cal. 796, 96 Pac. 890; *Muzzy v. McEwen Lumber Co.*, 154 Cal. 685, 98 Pac. 1062.

See the following cases with reference to the principle of the decision in *Pieper v. Centinela Co.*: *Nash v. Harris*, 57 Cal. 242; *Clark v. Crane*, 57 Cal. 629; *Walsh v. Hutchings*, 60 Cal. 228; *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *Cummings v. Conlon*, 66 Cal. 403, 5 Pac. 796, 903; *In re Tanner*, 70 Cal. 22, 11 Pac. 326; *Schammel v. Schammel*, 70 Cal. 72, 11 Pac. 497; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. 396; *Hyde v. Thornton*, 83 Cal. 83, 23 Pac. 126; *Fitzpatrick v. Fitch*, 83 Cal. 490; *Adams v. Andross*, 85 Cal. 609, 24 Pac. 842.

The point as to identification by the clerk was decided adversely to the California decisions in *Simmons etc. Co. v. Alturas etc. Co.*, 4 Idaho, 386, 39 Pac. 553, where the court

The authentication contemplated by Rule XXIX includes a showing of some kind that the papers presented are all the papers that were used at the hearing of the motion.<sup>19</sup> The necessity for this is apparent. Unless it appears that the papers presented are all the papers that were used, it cannot be said that there were no other papers, such as counter-affidavits, for example, used in the trial court; and, therefore, under the presumption in favor of the action of the court, other papers will be presumed to have been

seemed to think that these decisions marked a pathway "too devious" to follow, and concluded that a certificate by the clerk was a substantial compliance with the provisions of section 4821, which is identical with California section 953.

The case of *State v. Millis*, 19 Mont. 444, 48 Pac. 773, is a leading case upon the point in that state, following the California decisions, but holding to the necessity for a bill of exceptions without a rule to that effect. See, also, *Rumney etc. Co. v. Detroit etc. Co.*, 19 Mont. 557, 49 Pac. 395; *Cornish v. Floyd-Jones Co.*, 26 Mont. 153, 66 Pac. 838; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

Rule XXIX has not, of course, influenced the practice in other states, and in the absence of a statutory provision or a rule of court of similar import, the practice is governed by the principles which controlled that of California before the adoption of the rule. See *Goose River Bank v. Gilmore*, 3 N. D. 188, 54 Pac. 1032. Also *Daley v. Forsythe*, 9 S. D. 34, 67 N. W. 948.

Rule XXIX made no change in the necessity for identification, which was regarded as being accomplished by the certificate of the bill of exceptions in which the matter to be identified is incorporated. The cases under the rule are cited below.

See, also, *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121; *Rose v. Northern Pacific Co.*, 35 Mont. 70, 119 Am. St. Rep. 936, 88 Pac. 767; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609; *Conklin v. Cullen*, 25 Mont. 214, 64 Pac. 502; *Manuel v. Scott*, 37 Mont. 29, 94 Pac. 487.

As to identification of the evidence in equity cases in the Oregon practice

(see section 827, B. & C. Comp.; section 838, Lord's Oregon Laws), see *Sanborn v. Fitzpatrick*, 51 Or. 457, 91 Pac. 450, and cases cited. And see note 1, section 265, *post*.

In the earlier decisions, however, it was held that the statute allowed authentication by the clerk. *Granite Mountain Co. v. Weinstein*, 7 Mont. 346, 17 Pac. 108; *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589; *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124; *Bookwalter v. Conrad*, 14 Mont. 62, 35 Pac. 226; *Parrott v. McDevitt*, 14 Mont. 203, 36 Pac. 193.

<sup>19</sup> See *Shain v. Eikerenkotter*, 88 Cal. 13, 25 Pac. 966; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Pereira v. Savings Bank*, 128 Cal. 45, 60 Pac. 524; *Muzzy v. McEwen Lumber Co.*, 154 Cal. 685, 98 Pac. 1062.

Also *Walling v. Bown*, 9 Idaho, 740, 76 Pac. 318, 2 Ann. Cas. 720.

A certificate that "the said record constitutes a full, true and correct record of the above-entitled action, with indorsements thereon as the same are now of record and on file in my office," has been held to be sufficient. *Kootenai Co. v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

On an appeal from an order dissolving an injunction the appellate court will not consider affidavits found in the transcript where the trial judge certifies that certain papers (which do not include these affidavits), and none other, were considered by him, and there is no showing that the affidavits were presented or called to the attention of the trial judge at the hearing of the motion. *Dougal v. Eby*, 11 Idaho, 789, 85 Pac. 102.

used, and that they sufficiently support the order.<sup>20</sup> The papers must be fully and sufficiently identified,<sup>21</sup> otherwise they will be disregarded.<sup>22</sup>

The rule applies only to papers which are not otherwise, or of themselves, a part of the judgment-roll, where there is a judgment-roll,<sup>23</sup> or are not of themselves entitled to be incorporated in the transcript.<sup>24</sup> Thus, in the case of an appeal from an order settling the accounts of an administrator, it was held that, inasmuch as the accounts themselves, the accompanying reports, the objections to the same, the findings and the judgment or order appealed from, constitute the judgment-roll, they need not be incorporated in a bill of exceptions for the purpose of authentication, and that it would not be proper to do so.<sup>25</sup>

In the case of *Pereira v. City Savings Bank*,<sup>26</sup> it was intimated that papers used at the hearing of a motion for a new trial might be made a part of the record on appeal by stipulation, and without being incorporated in a bill of exceptions. But in *San Diego Savings Bank v. Goodsell*,<sup>27</sup> where the effect of certain stipulations was under consideration, the court effectually repudiated the doctrine, and there is now no question, if indeed there ever was any, that stipulations cannot relieve parties of the necessity of compliance with the rule. In that case the court said: Rule XXIX "was intended to remove all doubt as to what papers were used on the hearing of the motion by requiring their incorporation in the bill." <sup>27a</sup>

<sup>20</sup> See *Pereira v. Savings Bank*, 128 Cal. 45, 60 Pac. 524; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Gay*, 141 Cal. 41, 74 Pac. 443.

<sup>21</sup> See *Adams v. Andross*, 85 Cal. 609, 24 Pac. 842.

As a matter of course, the papers must be identified as copies of those used in the trial court. A certificate that they are true copies of the originals is not enough. *Sand Point v. Doyle*, 9 Idaho, 236, 74 Pac. 861; *Dougal v. Eby*, 11 Idaho, 789, 85 Pac. 102.

<sup>22</sup> See *Whipple v. Hopkins*, 119 Cal. 349, 51 Pac. 535; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *People v. Gay*, 141 Cal. 41, 74 Pac. 443; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646.

<sup>23</sup> Under section 951 it is apparent that there may be an appeal from an

order, other than an order on motion for a new trial, without a judgment-roll. If so, all necessary facts which might have appeared in the judgment-roll must be incorporated in the bill of exceptions. See *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113.

<sup>24</sup> See section 265 et seq., post.

<sup>25</sup> See *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586.

<sup>26</sup> 128 Cal. 45, 60 Pac. 524.

<sup>27</sup> 137 Cal. 420, 70 Pac. 299.

<sup>27a</sup> As to the force or scope of stipulations in this connection, see section 230, ante, notes 17, 17a, 17b, 17c, and 17d.

It has been held by the Washington supreme court that where "the affidavit was an integral and inseparable part of the motion, attached

Failure to properly identify papers used at the hearing of the motion is not a ground for dismissing the appeal,<sup>28</sup> unless the motion is made on the papers alone.<sup>29</sup> As has been said in the case of invalid bills of exceptions and statements in general, and as to their service on all the adverse parties, the penalty falling upon the party whose duty it is to identify or authenticate such papers is the refusal of the court to consider them, the presumption in such cases being that the order appealed from was sufficiently supported.<sup>30</sup>

The effect of Rule XXIX is such that there is no provision of law which permits the bringing up of errors in the making or refusing of special orders, otherwise than by bill of exceptions, as therein provided. The error certainly cannot be presented on appeal by an affidavit of appellant's attorney.<sup>31</sup>

The rule applies to criminal as well as civil causes.<sup>32</sup>

thereto, constituting a part thereof, and setting forth, in verified form, the grounds of the motion, and the order of the court expressly recites that the court 'had read the same in support of the motion,' . . . it is not necessary that such affidavits be certified in a bill of exceptions or statement of facts." *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; and see, also, *Clay v. Selah etc. Co.*, 14 Wash. 543, 45 Pac. 141; *Winsor v. McLachlan*, 12 Wash. 154, 40 Pac. 727; *State v. Howard*, 15 Wash. 425, 46 Pac. 650; *State v. Anderson*, 20 Wash. 193, 55 Pac. 39; *Armstrong v. Van de Vanter*, 21 Wash. 682, 59 Pac. 510.

<sup>28</sup> See *Herrlich v. McDonald*, 72 Cal. 579, 14 Pac. 357. This case was decided prior to the adoption of Rule XXIX as identification, but the principle is no doubt the same.

<sup>29</sup> See *White v. White*, 88 Cal. 429, 26 Pac. 236.

<sup>30</sup> See section 257, *ante*.

<sup>31</sup> *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113; and see, as necessity for a bill of exceptions, generally, *La Fetra v. Gleason*, 101 Cal. 246, 35 Pac. 765.

<sup>32</sup> See *People v. Terrill*, 131 Cal. 112, 63 Pac. 141; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Gay*, 141 Cal. 41, 74 Pac. 443; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646.



## CHAPTER XLVII.

## TRANSCRIPT ON APPEAL.

- § 265. What the transcript is and what it must contain.
- § 266. Each transcript must be complete in itself—Using transcript on another appeal.
- § 267. Printing and arrangement of transcript.
- § 268. Authentication of transcript—Curing defects by stipulation.
- § 269. Filing and service of transcript—Duty of appellant to file a correct and complete transcript and copies.
- § 270. Time for respondent to object to transcript.
- § 271. Diminution of record.
- § 271a. The transcript under the new and alternative method of appeal.

**§ 265. What the Transcript is and What It must Contain.<sup>1</sup>—**  
 The papers which constitute the record on appeal from a judgment

<sup>1</sup> For convenience, the various statutory provisions relating to the transcript, and pointing to the rules of practice set forth in this chapter (aside from those contained in note 3a, section 229, and in section 168, *ante*), are collected here in a synoptical form, by states.

*Arizona:* The transcript, consisting of "the original record of the case, together with a copy of all minute entries made in the case, the same to be certified by the clerk of the district court, with the seal of the court affixed, that it contains a copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case," must be filed in the supreme court by the appellant "within thirty days next after the record of the case in the district court shall have been completed and the appeal shall have been perfected"; or, in the case of a writ of error, the transcript must be so filed by the plaintiff in error within thirty days after the "summons shall have been served." Section 1582, Revised Statutes; section 373, Civil Practice. "On demand therefor by either party to the case, or his attorney, the clerk shall cause such copy to be made and be certified to by him, shall affix thereto the record of the

case and shall transmit them to the clerk of the supreme court, who shall, on their receipt, docket the case and file the papers therein as one paper." *Id.*

If the appellant or plaintiff in error shall fail to file the transcript as directed, the appellee or defendant in error may file with the clerk of the supreme court a certificate of the clerk of the district court, attested by the seal of his court, stating the time when the appeal was perfected or the summons served, "whereupon it shall be the duty of the supreme court to affirm the judgment of the court below, unless good cause be shown why such record was not filed. . . . " If a bond has been filed, and a copy thereof accompanies the certificate above referred to, judgment shall be affirmed against the sureties thereon also (section 1583, Revised Statutes; section 374, Civil Practice). If the appellant makes a showing of cause, the court may allow the transcript to be filed afterward, "at any time during the term at which any such judgment was so affirmed" (section 1584, Revised Statutes; section 375, Civil Practice).

Section 1518 (section 308, Civil Practice) provides that upon the perfecting of the appeal or writ of error, the clerk shall, upon the application

of either party, make out a transcript, which shall "contain a copy of all the minute entries, judgments and decrees of court, and the original files of the case, and the same shall be transmitted to the supreme court as the record, and it shall not be necessary to file in the supreme court copies on file in the district court." The record or transcript here referred to is assumed to be the "original record" mentioned in section 1582. No express provision is made for including in this record the judgment-roll defined in section 1443, Revised Statutes. See note 3b, section 230, *ante*. But section 1520 dispenses with the necessity of bringing up the summons and returns in cases where there is an appearance shown by the pleadings. Section 1521 permits the parties, by agreement in writing, with the approval of the judge, to direct the clerk to omit any designated portion of the record deemed immaterial to the disposition of the controverted points in the appellate court; and section 1522 authorizes them to agree upon a brief statement of the case and of the facts, which, with whatever portions of the record may be deemed essential, shall constitute the record on appeal. Section 1523, however, provides that the transcript shall in all cases contain "a copy of the final judgment, notice of appeal, petition for writ of error and summons in error, with return of service thereon, bond on appeal, or such of them as there may be, and a statement of the costs that have accrued in the cause."

Under Rule I, Arizona supreme court, the appellant or plaintiff in error is required to file with his transcript of the record six copies of an abstract of the same, which must contain, (a) the pleadings, original or amended; (b) the findings of fact and conclusions of law, or the verdict; (c) the judgment; (d) the motion for a new trial; (e) the minute entries of the trial court; (f) the bill of exceptions and statement of facts; and (g) such other portions of the record as may be necessary to inform the court of the errors relied upon without an investigation of the record itself. This abstract must be chronologically arranged, be prefaced

with an alphabetical index of its contents, specifying the folio of each separate paper, order, testimony of each witness; and have a cover. The merely formal parts of the record, such as the pleadings, motions, depositions, exhibits, or other papers filed in the trial court, may be omitted from this abstract, unless some question for review is predicated thereon. The substance of depositions only need be given, reduced to narrative form; and notices, interrogatories, certificates of officers, signatures of witnesses, etc., may be omitted. Only the material portions of deeds, mortgages, contracts, and other instruments presented in the form of exhibits need be given. Certificates of acknowledgment and indorsements thereon may be omitted, except when material. Indorsements of the clerk of the trial court giving the date of filing may be disposed of by simply noting, "Filed \_\_\_\_\_," giving the date. Exhibits incapable of being readily incorporated into the abstract may be omitted, but they must be referred to in such fashion as to readily identify them from other parts of the record.

The appellee may supplement this abstract by one of his own if he deems it necessary to a proper presentation of the issues.

These abstracts are treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error; but they may be stricken from the record for failure to comply with the rule, on motion of the party affected by such noncompliance.

A transcript of the reporter's notes is not such an abstract as will be deemed a compliance with the rule, and an appeal will be dismissed. *Meade v. Demund* (Ariz.), 108 Pac. 479.

The court will not resort to the transcript to ascertain the form of an objection made to the testimony. *Phoenix Ry. Co. v. Landis* (Ariz.), 108 Pac. 247.

*Colorado*: Section 389, Mills' Annotated Code, requires the appellant to lodge in the office of the clerk of the supreme court "an authenticated copy of the record of the judgment

or decree appealed from, by or before the third day of the next term of said supreme court." Provided, that if thirty days do not lie until the sitting of the supreme court at its next term, then the "record shall be lodged as aforesaid at or before the third day of the next succeeding term of the supreme court." Otherwise, the appeal shall be dismissed, unless further time be granted by the supreme court, for good cause shown, to file the record.

Section 391 empowers the supreme court to dismiss the appeal and enter judgment against appellant for failure to prosecute the same, for not less than five nor more than twenty per cent damages for consequences of the delay occasioned by the appeal.

Section 394 authorizes the supreme court to make uniform rules of practice and procedure not inconsistent with the Civil Practice Act.

*Idaho:* The practice in this state does not differ in any appreciable degree from that of California, as outlined in this chapter. See sections 4818, 4819, 4820, 4821 and 4822, Revised Codes, and sections 229 and 230, *ante*.

*Montana:* In the place of section 953, California Code of Civil Procedure, as to authentication of copies by the certificate of the clerk or attorneys, section 7115 of the Revised Codes of Montana (Act approved February 26, 1907, section 3) provides:

"The copies provided for in the last three sections (see note 3a, section 229, and section 168, *ante*) must be certified to be correct by the clerk or attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or that a deposit has been made as provided for in section 7108 (1732), or the stipulation of the party waiving an undertaking or deposit. The appellant may present to the supreme court or any justice thereof a copy of the record from which are omitted those parts thereof which appellant believes to be immaterial to any question arising on the appeal, and thereupon, if it shall appear, *prima facie*, that the parts omitted are so immaterial, the court

or justice shall make an order allowing such abbreviated record to be served and filed as the transcript on appeal, and directing the clerk of the district court to certify to such transcript, which order shall save to the respondent the right to suggest a diminution of the record in case he can show that without the parts omitted the appeal cannot fairly and fully be heard and determined. The certificate of the clerk of the district court shall refer to such order of the supreme court or justice."

See also note 3a, section 229, as to the record on appeal; and see section 3b, note 230, *ante*, as to the judgment-roll. Also note 6, section 254, as to the bill of exceptions.

*Nevada:* Section 3435, Cutting's Compiled Laws (section 340, Civil Practice), provides that "on an appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, and the statement, if there be one, certified by the respective attorneys of the parties to the appeal, or by the clerk of the court. On an appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering judgment or making the order in the court below, a copy shall be furnished, certified in like manner. If the appellant fails to furnish the requisite papers, the appeal may be dismissed."

Section 3862, Cutting's Compiled Laws, section 1 of an act approved March 13, 1895, page 58 (an act regulating appeals to the supreme court), is as follows: "In all cases of appeal to the supreme court from final judgments or from orders overruling motions for new trial, and in all other cases when ordered by the supreme court or a judge thereof or by the district judge or stipulated by the parties or their attorneys, it shall be in the discretion of the appellant to furnish the court with a transcript on appeal in accordance with the present provisions of the

statute, or to have the original papers in the district court, including documentary evidence, maps and exhibits certified to the supreme court, or the appellant may furnish the court with a transcript of a portion of the record on appeal, and have the remaining portion certified to the supreme court. In case he shall elect to have the original papers certified they shall be attached together and the pages numbered and indexed the same as transcript on appeal, and shall be certified by the clerk of the district court or by the respective parties or their attorneys to be such originals, and to constitute in whole or part the record on appeal, and the clerk shall then transmit them to the clerk of the supreme court; provided, that where it would not be convenient to attach maps or exhibits to the other papers, they may be sent separately, properly identified and certified." Section 3863 (section 2): "Where such original papers have been so certified, the clerk of the supreme court, at the time he transmits the *remittitur*, shall return them to the clerk of the district court. Any of the papers or documents so certified to the supreme court may be returned to the court below upon application of either party and order of one of the judges and leaving a certified copy. Where it is necessary to present upon the appeal the minutes of the court or records containing entries affecting other cases, they shall be copied in the transcript the same as heretofore."

*New Mexico:* See note 3a, section 229. Section 894, Compiled Laws, provides: "Whenever it shall be intended to review on appeal or writ of error any judgment or decree of any district court, it shall not be necessary that any record of the pleadings or proceedings in the cause in the district court shall be or shall have been prepared by the appellant or plaintiff in error, or a copy served on the opposite party or his attorney. But the party taking or having taken such appeal or writ of error, may file, or cause to be filed in the supreme court, the whole of the record in the cause, or such part thereof as such party may deem necessary for a review of the judgment or decree, and the opposite party, if the whole record

be not filed in the supreme court, may file such other part of the record in the supreme court as may be deemed by such opposite party necessary to properly review the judgment or decree in the cause; and it shall not be necessary that the judge shall determine or shall have determined, what portion of the record and proceedings in the cause shall be transmitted to the supreme court; but when only a part of the record is filed, the supreme court shall determine whether there is sufficient in the part so filed to enable it to properly review the cause, and may require the production of the entire record, or such additional parts thereof as said supreme court may deem necessary for a proper review of the cause; provided, that where more or a greater part of the record is filed in the supreme court, than is necessary to properly review the cause, the supreme court may, in its discretion, tax the cost of such greater part against the person filing the same."

Section 895: "In all causes where appeals or writs of error have been taken to review in the supreme court any judgment or decree of a district court, and the judge has not determined what portions of the record and pleadings in the cause shall be transmitted to the supreme court, and the time has passed for docketing said cause and filing the record in said supreme court, the party taking said writ of error or appeal may, within twenty days after the approval of this act, file in the supreme court, the record in said cause in accordance with the provisions of section eight hundred and ninety-four, without it being necessary to have determined by the judge what portion of the record and proceedings in the cause shall be transmitted to the supreme court, and such cause shall thereafter be docketed, heard and determined in the same manner as if it had been filed and docketed in the proper time, and the appellant or plaintiff in error shall have leave to assign errors, and file briefs as in other causes, and the opposite party shall also have leave to join in the assignment of errors and file briefs."

Section 3140, Compiled Laws, provides that "all appeals taken thirty

days before the first day of the next term of the supreme court shall be tried at that term, and appeals, taken in less than thirty days before the first day of the term, shall be returnable to the next term thereafter; the appellant shall file in the office of the clerk of the supreme court, at least ten days before the first day of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the case. If he fail to do so, the appellee may produce in court such transcript, and if it appear thereby that an appeal has been allowed in the cause, the court shall affirm the judgment, unless good cause can be shown to the contrary. . . . ."

*North Dakota:* Section 7206, Revised Codes, is as follows: "Upon an appeal being perfected the clerk of the court from which the appeal is taken shall at the expense of the appellant forthwith transmit to the supreme court, if the appeal is from a judgment, the judgment-roll; if the appeal is from an order, he shall transmit the order appealed from and the original papers used by each party on the application for such order. The court may, however, in case of either judgment or order upon motion of either party after notice to the adverse party for good cause shown, direct copies to be transmitted instead of the originals. The clerk shall also in all cases transmit to the supreme court the original notice of appeal and the undertaking given thereon; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies as the case may be and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary; provided, that if the appellant does not within thirty days after his appeal is perfected cause a proper record in the case to be transmitted to the supreme court by the clerk of the district court, the respondent may cause such record to be transmitted by the clerk of the district court to the clerk of the supreme court; and in such case the respondent may recover

the expense thereof as costs on such appeal in case the judgment or order appealed from is in whole or in part affirmed."

Under the provisions of this section the originals must be transmitted in the absence of an order for copies. *Jasper v. Hazen*, 1 N. D. 210, 46 N. W. 173; *Hedlun v. Mining Co.*, 14 S. D. 369, 85 N. W. 861; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479; *Goose River Bank v. Gilmore*, 3 N. D. 188, 54 N. W. 1032; *Bailey v. Scott*, 1 S. D. 337, 47 N. W. 286.

So, on an appeal from a new trial order, the papers and documents used at the hearing of the motion, when properly identified as having been so used, may be used on the appeal without being incorporated in a statement or bill of exceptions; but the stenographer's transcript must be brought up by bill or statement. *Goose River etc. Co. v. Gilmore*, 3 N. D. 188, 54 N. W. 1032.

The clerk should certify to the judgment-roll. *Hardy v. Purington*, 6 S. D. 382, 61 N. W. 158. And the transcript cannot be amended in the supreme court, but must be remanded for that purpose, if necessary. *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607.

*Oklahoma:* As already noted (note 3b, section 250, *ante*), the record on appeal may comprise the complete transcript of the record in the trial court, or the case-made heretofore considered. Section 6072, Compiled Laws, provides: "That in all actions hereinafter instituted by petition in error in the supreme court, the plaintiff in error shall attach to and file with the petition in error the original case-made, filed in the court below, or a certified transcript of the record of said court; and in no such action hereafter instituted in the supreme court shall any charge, fees or costs be taxed or allowed for making any copy of any case-made, or transcript when such copy shall be ordered by the court for its use, and the same has not been furnished by the plaintiff in error thirty days before the first day of the term at which the case shall stand for hearing, and no costs or fees shall be taxed for making a complete record in such case, except when the same

shall be made by request of a party to the suit and at his own costs."

Under the provisions of the above section, and those quoted in note 3b, section 250, *ante*, the appellant is at liberty to present his appeal upon a complete transcript of the record of the court below, or he may dispense with the complete record, and present his case upon a case-made, attached to the judgment or order appealed from, "containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court." See *Wade v. Mitchell*, 14 Okl. 168, 79 Pac. 95; *Williamson v. Williamson*, 15 Okl. 680, 83 Pac. 718. If he takes the course first outlined, there is no choice in the matter, and his transcript must be a complete record, and must so appear. *Wade v. Mitchell*, *supra*. If, however, he adopts the latter course, there is always a question as to what should and what should not be included in the case-made, as there always is, in other jurisdictions, in the preparation of a statement or bill of exceptions. His task in preparing the record must be carried on under the supervision of the trial judge, for the latter is called upon to allow, or settle, and sign the paper; and under the critical eye of his adversary, who may be expected to insist upon the incorporation therein of everything which will tend to sustain the judgment or order appealed from, or nullify the charge of error. In this respect the parallel between a case-made and a statement of facts, or on appeal, is therefore clearly apparent. The rules which govern the practice with regard to statements apply with the same force to the practice under case-made; and an appeal by case-made differs only slightly from an appeal by statement, such as, for example, appeals under the new and alternative method in California. It is to be noted, however, that a case-made falls short of its purpose if it fails to include everything essential to the presentation of the error complained of. The record on appeal

may contain matters relating to the service, signing and settling of the case-made, *dehors* the latter, but matter relating to the subject for review must be incorporated in the case-made. See *Burnett v. Davis*, 27 Okl. 124, 111 Pac. 191. In general, however, a case-made, when it takes the place of the transcript on appeal, is a transcript, and should be so treated.

*Oregon*: Section 554, Lord's Oregon Laws, is as follows, in part:

"Upon the appeal being perfected, the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the rules of the appellate court may require, of so much of the record as may be necessary to intelligibly present the questions to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal or proof of service thereof, and of the undertaking on appeal. . . .

"1. If the appeal is from a decree and the cause is to be tried anew on the testimony, the clerk shall attach together the testimony, depositions and other papers on file in his office containing the evidence heard or offered on trial in the court below, and deliver the same to the appellant. . . . Such evidence shall be deemed a part of the transcript or abstract, and shall be filed therewith."

Since the amendment of 1899 (Laws 1899, p. 229) the transcript is not the judgment-roll, "but rather a fair synopsis of the proceedings in the trial court relative to the questions reserved by appellant for further consideration." See *Backhouse v. Buells*, 43 Or. 558, 72 Pac. 976, 73 Pac. 342. This would seem necessarily to include the bill of exceptions, and the supreme court, by Rule II, setting out synoptically the proposed transcript, includes that paper among the rest. Rule I provides that "transcripts on appeal in civil cases shall consist of a copy or printed abstract, as in these rules provided, of so much of the record as may be necessary to intelligibly present the questions to be deter-

mined," etc., almost in the language of the statute, above quoted.

Rule II contains the following synopsis: Complaint, summons, return thereof, demurrer or other motion, order thereon, answer, reply, verdict, judgment, bill of exceptions, notice and undertaking on appeal. See Rules Supreme Court of Oregon (50 Or.), 91 Pac. vii.

Subdivision 2 of section 554 provides that, "If the transcript or abstract is not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned, and the effect thereof terminated, but the trial court or the judge thereof, or the supreme court or a justice thereof, may, upon such terms as may be just, by order enlarge the time for filing the same; but such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal."

Only the papers which constitute the judgment-roll should be included in the transcript. Farrell v. Oregon etc. Co., 31 Or. 463, 49 Pac. 876; Mitchell v. Powers, 16 Or. 487, 19 Pac. 647. Formerly it was not necessary to set out the undertaking in the transcript. Bilyeu v. Smith, 18 Or. 335, 22 Pac. 1073; but this was changed by the amendment of 1899. Burchell v. Averill etc. Co., 55 Or. 113, 105 Pac. 403. So much of the evidence, exhibits and other documents on file in the trial court as is desired to be brought up would seem to require the consent of the trial judge if there is any doubt or confusion as to what should properly be included in the record. Hume v. Rogue River etc. Co., 51 Or. 237, 137 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865. This is certainly the rule in cases tried before a referee. Sanborn v. Fitzpatrick, 51 Or. 457, 91 Pac. 540. But if the parties are agreed, the certificate of the stenographer is sufficient. *Id.*

The transcript or abstract must be filed within the time prescribed by statute, or some extension thereof duly authorized. The requirement as to this point is jurisdictional.

Kelley v. Pike, 17 Or. 330, 20 Pac. 685; McCarty v. Wintler, 17 Or. 391, 21 Pac. 195; Nestucca Road Co. v. Landingham, 24 Or. 439, 33 Pac. 983; Connor v. Clark, 30 Or. 382, 48 Pac. 364; Judkin v. Taffe, 21 Or. 89, 27 Pac. 221; Harrington v. Snyder, 53 Or. 573, 101 Pac. 392; Hanley v. Stewart, 54 Or. 38, 102 Pac. 2; and this requirement cannot be dispensed with by stipulation. Davidson v. Columbia etc. Co., 49 Or. 577, 91 Pac. 441.

The extension of time above referred to must be secured before the expiration of the statutory time or of any previous extension thereof. Tallmadge v. Hooper, 37 Or. 503, 61 Pac. 349, 1127. The sole requirement is that the transcript or abstract must be filed before the expiration of the time, and it matters not that the order enlarging the time is made prior to the filing of the undertaking. Wolf v. City Ry. Co., 50 Or. 67, 85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181.

When the statutory time to file the transcript has expired, an extension cannot be made and entered *nunc pro tunc*. Davidson v. Columbia etc. Co., 49 Or. 577, 91 Pac. 441. But if the order was made within the time, it may be entered after its expiration, *nunc pro tunc*. Quartz etc. Co. v. Patterson, 53 Or. 85, 96 Pac. 551.

The order cannot be made *ex parte*, without notice. Bush v. Geisey, 16 Or. 267, 19 Pac. 122; and see Whalley v. Gould, 27 Or. 74, 40 Pac. 4; Kelley v. Pike, *supra*; McCarty v. Wintler, *supra*; Nestucca etc. Co. v. Landingham, *supra*; but see Johnson v. Iankovetz (Or.), 102 Pac. 799.

If the appellant has lost his right to an appeal by failure to file his transcript in time, he cannot thereafter take a second appeal. Nestucca etc. Co. v. Landingham, *supra*. But a party may abandon an imperfectly attempted appeal and initiate another one. Fisher v. Tomlinson, 40 Or. 112, 60 Pac. 390, 66 Pac. 696.

South Dakota: Section 443, Code of Civil Procedure, provides: "Upon an appeal being perfected, the clerk of the court from which the appeal is taken shall, at the expense of the appellant, forthwith transmit to the su-

preme court, if the appeal is from a judgment, the judgment-roll; if the appeal is from an order, he shall transmit the order appealed from, and the original papers used by each party on the application for the order appealed from. The court may, however, in each case, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal and undertaking given thereon; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies, as the case may be, and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary."

*Utah:* Section 3316, Compiled Laws, provides: "Upon an appeal being perfected the clerk of the court from which the appeal is taken shall, at the expense of the appellant, forthwith transmit to the supreme court the papers constituting the record on appeal. The court may, however, for good cause shown, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal, together with a certificate of the clerk that an undertaking on appeal in due form, or a stipulation of the parties waiving an undertaking, has been properly filed; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies as the case may be, and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary."

*Washington:* Section 1729, Rem. & Bal. Code (section 6313, Bal. Code), provides, in part, as follows: "Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, . . . a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the

appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months . . . the clerk of the superior court shall at the expense of the appellant, send up to the supreme court said transcript together with the opening briefs on appeal filed in his office. The papers and copies so sent up together with any thereafter sent up as hereinbelow provided shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the superior court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much thereof as the appellant deems material, or a copy thereof may be prepared, certified and sent up at any time prior to the hearing on appeal. . . ." Then follows provisions as to supplementary records. Section 395 is partly as follows: "All reports of referees or commissioners, with the testimony and other evidence returned into court therewith, all findings of fact and conclusions of law made in writing by a judge, referee or commissioner and signed by him, all charges to a jury made wholly in writing, all instructions requested in writing to be given as part of a charge, all verdicts, general or special, and all rulings and decisions embodied in a written judgment, order or journal entry in the cause, together with all exceptions, if any, taken to any part thereof, as well as all papers and matters hitherto deemed a part of the record, shall be deemed and are hereby declared to become, upon being filed in the cause, or, as the case may be, embodied in a journal entry, a part of the record in the cause, for all the purposes thereof and of any appeal therein; and it shall not be necessary or proper, for any purpose,



or order have already been stated. The originals of such papers remain in the court below; only copies are furnished to the supreme court. Such copies properly authenticated, arranged and printed constitute the transcript on appeal. The transcript must not contain any papers which are not a part of the record on appeal.<sup>1a</sup> It must, however, contain *all* the papers which constitute the record; but they may often be abbreviated and condensed with advantage, and all needless repetition should be avoided. These propositions will be considered separately.

1. *The Transcript must not Contain Any Paper Which is not a Part of the Record on Appeal.*—As has been stated, the record on

to embody the same in any bill of exceptions or statement of facts."

*Wyoming*: Section 5114, Compiled Statutes, is partly as follows: Provision is made for an order "directing the clerk of the district court or other tribunal from which the appeal is taken to transmit to the supreme court all such original papers in the case in which the appeal is taken, and a duly authenticated transcript of all such journal entries, or other entries of record as he may desire and as may be necessary to exhibit the error complained of; and upon the filing of such application it shall be the duty of the clerk of the supreme court to forthwith issue such order, under the seal of said supreme court, and the said order shall be served upon the clerk of the district court or other tribunal from which said appeal is taken in the same manner as all other process is served out of said supreme court, and it shall be the duty of the clerk of said district court or other tribunal upon the receipt of such order to forthwith deliver such original papers and authenticated transcript as may be called for by said order to the clerk of the supreme court, taking his receipt for the same; and such original papers and authenticated transcript shall be and become a part of the record in said case in the supreme court, and upon the conclusion of said case in the supreme court said papers shall be returned with the mandate of the supreme court to the court or tribunal from which the appeal was taken." This requirement is complied with by the filing of a petition reciting that

a transcript of the record and proceedings, duly certified, "are hereto annexed and made a part of this petition." *Underwood v. David*, 9 Wyo. 178, 61 Pac. 1012.

The transcript contemplated "contains the pleadings, the orders, and judgment . . . and also the various executions, and the officer's returns thereon, as recorded in the execution docket. These are all matters of record, and require no bill of exceptions to entitle them to consideration. . . . If such matters of record as are embraced in the transcript are sufficient to present any question raised upon the petition in error, no bill of exceptions would be required for the determination of such question. . . . They must be regarded as sufficient in case the order, which is here assigned as error, was made and entered solely upon such record, and without the consideration of any extraneous matter. Whether or not they constitute all that is essential to a review of the order must be disclosed by the authenticated record itself." *Underwood v. David*, 9 Wyo. 178, 61 Pac. 1012. To the same effect, see *Board of Commissioners v. Shaffner*, 10 Wyo. 181, 68 Pac. 14.

<sup>1a</sup> With reference to unnecessary matter in the transcript, the supreme court of Montana, in *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99, said: "Such unnecessary matter imposes useless expense, sheds no light upon any question presented by the appeal, and tends to impede the court in its investigation of the case. The judgment and order appealed from are reversed."

appeal consists of the papers designated by the statute. Papers not so designated have no place in the transcript, and if printed therein will be disregarded. This has been held with respect to the notice and affidavit on motion to retax costs,<sup>1b</sup> and with respect to the affidavit and notice of motion to strike out a pleading,<sup>2</sup> and with respect to the notice of motion to dismiss an action,<sup>3</sup> and the order made thereon,<sup>4</sup> and with respect to a notice of motion for judgment on the pleadings,<sup>5</sup> and the order made thereon.<sup>6</sup> So with respect to orders striking out a pleading,<sup>7</sup> or a portion thereof,<sup>8</sup> and an order denying a motion to strike out,<sup>9a</sup> and the motion itself,<sup>9b</sup> and with respect to stipulations,<sup>9</sup> and with reference to the notice of the overruling of a demurrer,<sup>10</sup> and with respect to the testimony reported by a referee,<sup>11</sup> and with respect to a memorandum of costs,<sup>12</sup> and with respect to affidavits where the appeal was from the judgment,<sup>13</sup> and with respect to unidentified affidavits on appeal from an order.<sup>14</sup> So with reference to instructions to a jury not incorporated in a proper record;<sup>15</sup> so with respect to the minutes of the court in certain cases;<sup>16</sup> so with reference to the judgment-roll in another action used as evidence on a motion to dissolve an in-

<sup>1b</sup> *Gates v. Buckingham*, 4 Cal. 286.

<sup>2</sup> *Dimick v. Campbell*, 31 Cal. 238; *Morris v. Angle*, 42 Cal. 236; *Douglas v. Dakin*, 46 Cal. 49.

<sup>3</sup> *Morris v. Angle*, 42 Cal. 236; *Bacon v. Robson*, 53 Cal. 399.

<sup>4</sup> *Stoddart v. Burge*, 53 Cal. 394.

<sup>5</sup> *Douglas v. Dakin*, 46 Cal. 49.

<sup>6</sup> *McAbee v. Randall*, 41 Cal. 136;

*Douglas v. Dakin*, 46 Cal. 49.

<sup>7</sup> *Abbott v. Douglass*, 28 Cal. 295; *Dimick v. Campbell*, 31 Cal. 238.

<sup>8</sup> *Sutter v. San Francisco*, 36 Cal. 112; *Morris v. Angle*, 42 Cal. 236; *N. S. C. Co. v. Kidd*, 43 Cal. 180; *Feely v. Shirley*, 43 Cal. 369, 12 *Morr. Min. Rep.* 132; *Douglas v. Dakin*, 46 Cal. 49; *Sutton v. Stephen*, 101 Cal. 545, 36 *Pac.* 106; *Barber v. Mulford*, 117 Cal. 356, 49 *Pac.* 206; *Hawley v. Kocher*, 123 Cal. 77, 55 *Pac.* 696; and *Spence v. Scott*, 97 Cal. 181, 31 *Pac.* 52, 939.

<sup>9a</sup> *Strathern v. Dakin*, 63 Cal. 478; *Mock v. Santa Rosa*, 126 Cal. 330, 58 *Pac.* 826.

<sup>9b</sup> *Barber v. Mulford*, 117 Cal. 356, 49 *Pac.* 206; *Mock v. Santa Rosa*, 126 Cal. 330, 58 *Pac.* 826.

<sup>9</sup> *Ritter v. Mason*, 11 Cal. 214; *People v. Hawes*, 41 Cal. 632; *Hayden v. Hayden*, 46 Cal. 332; *Spinetti v. Brignardello*, 53 Cal. 281; *Moore v. Semple*, 11 Cal. 360. But see section 230, *ante*, and notes 17 to 17d, inclusive, therein, for a more extended consideration of the point.

<sup>10</sup> *Catanich v. Hayes*, 52 Cal. 338; *Jacks v. Baldez*, 97 Cal. 91, 31 *Pac.* 899.

<sup>11</sup> *Harper v. Minor*, 27 Cal. 107; and see section 230, *ante*, and notes 17e and 18, therein.

<sup>12</sup> *Kelly v. McKibben*, 54 Cal. 192.

<sup>13</sup> *Welch v. Allen*, 54 Cal. 211.

<sup>14</sup> See section 264, *ante*, and particularly cases cited in note 11 therein.

<sup>15</sup> See section 230, *ante*, as to this subject, particularly notes 19k and 19l, therein.

<sup>16</sup> *Dawley v. Hovious*, 23 Cal. 103; *Mendocino County v. Morris*, 32 Cal. 145; *People v. Empire G. & S. M. Co.*, 33 Cal. 171; *Abbott v. Douglass*, 28 Cal. 295.

junction;<sup>17</sup> and so as to proof of service of amended pleadings.<sup>17a</sup> So with respect to the affidavit of the foreman of the jury;<sup>17b</sup> and so as to the notice of intention,<sup>17c</sup> unless it appears in the statement or a bill of exceptions;<sup>17d</sup> and so with reference to various other documents.<sup>17e</sup>

If documents which do not belong in the record on appeal are nevertheless erroneously incorporated therein, they will, as heretofore stated, be merely disregarded. It is not the proper practice to strike them out, and motions to that effect will be denied.<sup>18</sup>

2. *The Transcript must Contain All the Papers Which Constitute the Record on Appeal.*—It is apparent from the cases cited in the preceding subdivision that it is useless to print in the transcript any document which is not designated by the statute as part of the record on appeal. On the other hand, the transcript must contain everything which is necessary to show that a valid appeal has been taken, and copies of those documents which are declared by

<sup>17</sup> *Sanchez v. Carriaga*, 31 Cal. 170; *Morris v. Angle*, 42 Cal. 236.

<sup>17a</sup> *Riverside Co. v. Stockman*, 124 Cal. 222, 56 Pac. 1027; *Canadian etc. Co. v. Clarite etc. Co.*, 140 Cal. 672, 74 Pac. 301; and see *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40.

<sup>17b</sup> *Clanton v. Coward*, 67 Cal. 373, 7 Pac. 787.

<sup>17c</sup> See section 151, *ante*, note 4, and section 168, *ante*, and cases and references there cited.

A notice of intention printed in the transcript will not be permitted to contradict the recitals of the statement or a bill of exceptions. *Mendocino Co. v. Peters*, 2 Cal. App. 24, 82 Pac. 1122, and *Monterey v. Cushing*, 83 Cal. 507, 23 Pac. 700; *Southern Pacific Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627. Also *Carr v. Closser*, 25 Mont. 149, 63 Pac. 1043; *S. C.*, 27 Mont. 94, 69 Pac. 560.

<sup>17d</sup> See references in note 17c, above; and see *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708, which sustains the decision in *Hook v. Hall*, 68 Cal. 22, 8 Pac. 596.

<sup>17e</sup> *Gordon v. Clark*, 22 Cal. 533; *Magee v. Mokelumne Hill Co.*, 5 Cal. 258; *Partridge v. San Francisco*, 27 Cal. 415; *Calderwood v. Brooks*, 28 Cal. 151; *Brooks v. Calderwood*, 34 Cal. 563; *Rogers v. Parish*, 35 Cal. 127; *Coleman v. Gilmore*, 49 Cal. 340; *Sanchez v. McMahon*, 35 Cal. 218; *Wormouth v. Gardner*, 35 Cal.

227; *City of Los Angeles v. Mellus*, 58 Cal. 16; and see sections 229 and 230, *ante*.

Amendments to a bill of exceptions allowed, but not incorporated therein, cannot be considered on appeal, although printed in the transcript. *Yellowstone Bank v. Gagnon*, 25 Mont. 268, 64 Pac. 664.

<sup>18</sup> *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588. But see note 25g, section 230, *ante*. And see *Carr v. Closser*, 25 Mont. 149, 63 Pac. 1043, where it was held that a notice of intention would be stricken from the transcript when improperly incorporated therein without being embodied in a statement or bill of exceptions.

And see *Streeter v. Johnson*, 23 Nev. 194, 44 Pac. 819; and *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231. Also *Greeley v. Holland*, 14 Nev. 320; *Reinhart v. Company D*, 23 Nev. 369, 47 Pac. 979; *Hoppin v. First Nat. Bank*, 24 Nev. 222, 52 Pac. 12; and *Beck v. Thompson*, 22 Nev. 109, 36 Pac. 562.

On appeal from a judgment of dismissal, where the transcript contains the original papers and an "affidavit on motion for a new trial and on appeal," a motion to strike out all except the complaint, demurrer, summons and judgment will be granted. *Hart v. Spencer*, 29 Nev. 286, 89 Pac. 289.

the statute to constitute the record on such appeal.<sup>18a</sup> Perhaps the most important essential is the judgment itself, or the order which is the subject of the review sought. Without such judgment or order all else is mere chaos, without use, object, or purpose.<sup>18b</sup>

Aside from the judgment or order, one of the most important features of the record is a showing of jurisdiction, and the fundamental rule is recognized that there must be an affirmative showing in the transcript that the case is within the jurisdiction of the appellate court.<sup>19</sup> Thus it must appear that the notice of appeal has been filed,<sup>20</sup> and that it has been served,<sup>21</sup> and that a proper

<sup>18a</sup> The provisions of the section declaring what shall constitute the record on appeal is mandatory. *Stanton v. Lewis*, 28 Mont. 267, 72 Pac. 658. The presence of the judgment-roll in the transcript is jurisdictional and cannot be dispensed with. *Featherman v. Granite Co.*, 28 Mont. 462, 72 Pac. 972; *Kinman v. Scheuer*, 30 Mont. 73, 75 Pac. 690.

<sup>18b</sup> *Granger v. Richards*, 126 Cal. 635, 59 Pac. 118. And see *Kinman v. Scheuer*, 30 Mont. 73, 75 Pac. 690.

There is nothing for the appellate court to review if the record does not contain the ruling complained of. *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70. And see *State v. Vanella*, 40 Mont. 326, 106 Pac. 364. See note 19w, section 230, *ante*. So an assignment of error that the trial court overruled a demurrer to the complaint cannot be reviewed where the record contains no such demurrer. *Pease v. Clayton (Wash.)*, 112 Pac. 943. And see *Gilliland v. Bank*, 59 Wash. 292, 109 Pac. 1020; *Ford v. McIntosh*, 22 Okl. 423, 98 Pac. 341; *Olentine v. Powell*, 23 Okl. 363, 100 Pac. 556.

The rule is the same where the appeal is by original papers and bill of exceptions (*Sproat v. Durland*, 7 Okl. 230, 54 Pac. 458), or case-made. *Board of Commissioners v. Moon*, 8 Okl. 205, 57 Pac. 161; *Denny v. Wright*, 13 Okl. 256, 74 Pac. 104. This omission cannot be cured by a mere statement in the certificate of the judge to the case-made that a judgment was rendered. *Id.* Or a like statement in the bill of exceptions. *Ford v. McIntosh*, 22 Okl. 423, 98 Pac. 341.

Where an appeal purports to be from a new trial order denying the

motion, but the record fails to show that the motion was really denied, or otherwise disposed of, it will be treated as premature, and dismissed. *Kalmes v. Gerrish*, 7 Nev. 31.

<sup>19</sup> *Hoyt v. Stearns*, 39 Cal. 92.

This rule was well exemplified in *Beck v. Holland*, 28 Mont. 460, 72 Pac. 972, where the supreme court held that it had no jurisdiction to consider the appeal on its merits, inasmuch as a number of changes of parties had taken place which were not shown in the transcript. And see *Featherman v. Granite Co.*, 28 Mont. 462, 72 Pac. 972.

<sup>20</sup> *Bonds v. Hickman*, 29 Cal. 460.

<sup>21</sup> *Franklin v. Reiner*, 8 Cal. 340; *Whipley v. Mills*, 9 Cal. 641; *Hildreth v. Guindon*, 10 Cal. 490. It is not to be understood that proof of service of notice of appeal is a part of the judgment-roll, for such is not the fact. See section 230, *ante*, note 19s. Such proof may appear anywhere in or out of the record. It may be supplied. Thus in *Perri v. Beaumont*, 88 Cal. 108, 25 Pac. 1109, the appellant was permitted to file a second proof of service. The court said:

"The affidavit is uncertain as to the notice referred to; and as it was made on the 10th of February, 1890, it fails to show the places of residence of the respective attorneys on February 8th, and, strictly construed, is insufficient (*Doerfler v. Schmidt*, 64 Cal. 265, 30 Pac. 816); but as the defect is one arising, doubtless, out of a careless use of language, and the objection being rather technical, we deem it a proper exercise of our discretion to grant the appellant's request to file another affidavit of ser-

undertaking on appeal has been given in due time.<sup>22</sup> So where the transcript on appeal from a final judgment contained no copy of

vice. The court should be liberal in granting amendments which can cause the respondent no injustice, and which will secure to the appellant a hearing on the merits."

Jurisdiction does not depend upon proof of service, but upon service itself (In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Sichler v. Look, 93 Cal. 600, 29 Pac. 220), "and a motion to dismiss an appeal upon the ground that the record does not show a sufficient service of the notice will be denied if the appellant can show by other proof that the notice was properly served, even though the transcript be defective in that regard." Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8. The better practice is to have proof of service of notice of appeal made part of the record in the trial court, and the record, properly authenticated, would then be conclusive evidence of proof of service. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986. But if it is not in the transcript, it may be supplied, or an affidavit of service filed separately. See Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552; Peck v. Agnew, 126 Cal. 607, 59 Pac. 125; Sutter Co. v. Tisdale, 128 Cal. 180, 60 Pac. 757; Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440.

The rule would seem to be the same in criminal cases, or, if there be a distinction, the rule would seem to be more liberal than in civil appeals; yet, in the earlier cases it is otherwise. See People v. Phillips, 45 Cal. 44, People v. Clark, 49 Cal. 455, People v. Bell, 70 Cal. 33, 11 Pac. 327, People v. Colon, 119 Cal. 668, 51 Pac. 1082, in all of which the appeal was dismissed for failure of the transcript to show service of notice of appeal. In the more recent case of People v. Brown, 148 Cal. 743, 84 Pac. 204, however, where the appeal was dismissed, the court said:

" . . . . As this omission and error was called to the appellant's attention by respondent's brief, and as no

effort has been made to cure the omission or to show that service was in fact made, it must be concluded that no service was made, and that the court is without jurisdiction to consider this appeal."

This language is plainly an intimation that it was within the power of the appellant to cure the defect in the same way that is practiced in civil cases, and indicates that the same rules apply. The matter is no longer of importance in view of recent changes in section 1240 of the California Penal Code, which dispenses with service of notice of appeal in criminal cases, substituting therefor oral notice in open court.

Showing of service of notice of appeal not necessary. McIntyre v. MacGinniss, 41 Mont. 87, 137 Am. St. Rep. 701, 108 Pac. 353. Aside from the necessity of filing and service, the notice itself is an essential part of every transcript. Stevens v. Hall, 6 Idaho, 233, 73 Pac. 527; Caldwell v. Ruddy, 1 Idaho, 760.

"Unless the record shows proper service of the notice of appeal, the appeal will be dismissed on motion. Anderson v. Knott, 1 Idaho, 626; Tootle v. French, 3 Idaho, 1, 25 Pac. 1091; Adams v. McPherson, 3 Idaho, 718, 34 Pac. 1095; Moe v. Harger, 10 Idaho, 194, 77 Pac. 645; Doust v. Telephone Co., 14 Idaho, 677, 95 Pac. 209.

The appellant must furnish the supreme court with a "notice of appeal" and "undertaking on appeal" as required by the statute, or the appeal will be dismissed. Gaudette v. Glisan, 11 Nev. 184; Spafford v. White River etc. Co., 24 Nev. 184, 51 Pac. 115; Marx v. Lewis, 24 Nev. 306, 53 Pac. 600.

<sup>22</sup> Bryan v. Berry, 8 Cal. 130; Franklin v. Reiner, 8 Cal. 340; Wakenman v. Coleman, 28 Cal. 58. But the undertaking need not be copied out in the transcript. Section 953 of the code provides that the transcript must contain "a certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed, or a stipulation of the parties

the pleadings the appeal was dismissed.<sup>23</sup> So where the transcript on appeal from an order on motion for new trial contained no copy of the pleadings the court declined to consider the questions argued and affirmed the order.<sup>24</sup> In brief, every paper which the statute declares shall constitute the record on appeal must appear in the transcript; <sup>25</sup> and each paper must be complete. The supreme court

waiving an undertaking." In *Watson v. Cornell*, 52 Cal. 644, a certificate by the clerk that "a good and sufficient undertaking on appeal in due form of law has been executed and is now on file in said action in my office" was held to be insufficient. So a certificate that does not state that the undertaking is *in due form* is insufficient. *Winder v. Hendrick*, 54 Cal. 275. An affidavit cannot be substituted for the certificate. *Winder v. Hendrick*, 54 Cal. 275. If the clerk entertains doubt whether it is in due form he should certify up the whole undertaking. *Winder v. Hendrick*, 54 Cal. 275. So a certificate of the clerk, after setting out the undertaking on appeal in the transcript, that he had "compared the foregoing transcript with the original papers," was held to be an insufficient compliance with the statutory requirement of a certificate "that an undertaking on appeal, in due form, has been properly filed." *San Francisco etc. Co. v. Anderson*, 77 Cal. 297, 19 Pac. 517. Nor is such requirement sufficiently met by the insertion of a copy of the undertaking, with its indorsements verified by the clerk as a true copy, in the transcript. *Swasey v. Adair*, 83 Cal. 136, 23 Pac. 284. But the omission of the certificate is not ground for dismissing the appeal, if the appellant offers to supply, and does supply, the same, by filing a proper certificate in accordance with Rule XV (formerly Rule XIII). See *Swasey v. Adair*, *supra*, and *Pacific Mut. L. Ins. Co. v. Edgar*, 132 Cal. 197, 64 Pac. 260. A certificate that "an undertaking in due form of law is on file in my office" was held insufficient, and the appeal was dismissed, there being no showing otherwise that an undertaking on appeal had really been filed, and no effort made to supply the want of a proper certificate by suggestion of diminution of record. The court said:

"While we would not, in all cases, require the exact language of the code to be followed in the certificate, yet it must appear that an undertaking on appeal has been properly filed. If the certificate does not so state, it might show the date of filing the undertaking, or a copy of the undertaking. It must appear, however, that such an undertaking has been filed, either 'properly' or of a date that shows it was in due time."

The rule is the same in other states. *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99; *Rich v. Franch*, 3 Idaho, 727, 35 Pac. 173.

A stipulation that the transcript contains true and correct copies, *inter alia*, of the "undertaking on appeal" is a sufficient certificate of the filing of the undertaking. *Idaho etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975.

<sup>23</sup> *Hart v. Plum*, 14 Cal. 148; *Buckman v. Whitney*, 28 Cal. 555.

<sup>24</sup> *Todd v. Winants*, 36 Cal. 129; and look at *McQuade v. Whaley*, 29 Cal. 612; *Bowering v. Adams*, 126 Cal. 653, 59 Pac. 134.

<sup>25</sup> The subject of what constitutes the record on appeal from a judgment or order has been considered in a previous portion of this treatise.

The statute requires that all the records and papers considered by the trial judge in passing upon the motion for a new trial should appear in the transcript, and this fact must be affirmatively shown by the record. Hence, it has been held that "Under the provisions of sections 4443, 4820 and 4821 of the Revised Statutes of 1887 (same as at present), it is essential that one who appeals from an order granting or denying a motion for a new trial should furnish the appellate court with a proper certificate identifying the papers, records, files, and other matter presented to and used by the trial judge upon the hearing and consideration of such

cannot review a cause upon a mutilated record.<sup>26</sup> If the appellant fails to furnish the papers declared by the statute to constitute the record, it does not help him that the court below has made an order that certain papers shall constitute the record on appeal. For the court below has no power to determine what shall constitute the record on appeal.<sup>27</sup>

What is here said as to the necessity for a complete record on appeal applies to whatever is important or essential to a consideration of such appeal. Section 950 of the Code of Civil Procedure provides that "if the appellant fails to furnish the requisite papers, the appeal *may* be dismissed." In *Paige v. Roeding* <sup>28</sup> the supreme court said:

"This power to dismiss might be properly exercised in extreme cases; but it frequently happens that the whole of a judgment-roll is not 'requisite' to the full determination of an appeal. And it would be unjust to dismiss an appeal merely because some part of the roll had been, inadvertently, perhaps, omitted from the transcript. If the omission be deemed material by the respondent, he can easily remedy the supposed defect by suggestion of a diminution of record."

The transcript must show that the documents contained in it were filed in the court below,<sup>29</sup> and also that they were served upon the opposite party where service is necessary; and must contain everything necessary to a proper understanding of the points presented. Thus where a question as to the statute of limitations is involved, the transcript must show when the action was com-

motion, and, upon failure on the part of the appellant to furnish such certificate, his appeal from the order granting or refusing the motion will be dismissed." *Steve v. Bonners etc. Co.*, 13 Idaho, 384, 92 Pac. 363. Also, *Doust v. Telephone Co.*, 14 Idaho, 677, 95 Pac. 209.

<sup>26</sup> *Buckman v. Whitney*, 28 Cal. 555; *Kimball v. Semple*, 31 Cal. 657; *Miller v. Thomas*, 78 Cal. 509, 21 Pac. 11.

The judgment-roll must be certified to the appellate court as an entirety. *Butte etc. Co. v. Kenyon*, 30 Mont. 314, 76 Pac. 696, 77 Pac. 319; and see *Featherman v. Granite Co.*, 28 Mont. 462, 72 Pac. 972.

<sup>27</sup> *Buckman v. Whitney*, 28 Cal. 555; *People v. Center*, 54 Cal. 236. If, however, an essential part of the record in the lower court has been lost or mislaid, and steps have been taken to have the same replaced by properly authenticated copies, it would appear that such copies, or, perhaps, copies of such copies, will be accepted by the appellate court if accompanied with appropriate data showing the facts. See *Knowlton v. MacKenzie*, 110 Cal. 183, 42 Pac. 580, where the notice of appeal was lost, and afterward replaced with its indorsements of service by a properly authenticated copy. The replaced record was accepted.

<sup>28</sup> *Mahlstadt v. Blanc*, 34 Cal. 577.

menced;<sup>29</sup> the date of the filing of the amended complaint does not show when the action was commenced.<sup>30</sup> So where the portions of a complaint demurred to were described by a reference to the pages and lines of the document in the court below which did not appear in the transcript, it was held the points made on the demurrer could not be considered.<sup>31</sup> So where the transcript contained a demurrer by one defendant to the complaint, and a demurrer by another defendant to the replication, and an "order sustaining defendant's demurrer," the supreme court said that it could not tell which demurrer was sustained, and therefore could not consider the matter.<sup>32</sup>

3. *Abbreviation and Condensation.*—But although the transcript should present all the papers which constitute the record on appeal, there are many things which can be presented in an abbreviated form. Thus, where the parties consent, the substance of the pleadings may be stated instead of copying them out in full;<sup>33</sup> and the same is true of other documents. So the parties may stipulate that a notice of appeal has been filed, instead of setting it out.<sup>34</sup> And all matter which is manifestly useless and mere repetition should be omitted. In this regard Sawyer, J., delivering the opinion in the *Estate of Boyd*,<sup>35</sup> said:

"We are gratified to find that transcripts are much less voluminous than formerly, but many records still contain much that might be advantageously omitted; for all matter that does not tend in some degree to illustrate the points litigated is an encumbrance and positively injurious. Many pages are often taken up with verifications of papers, acknowledgments of deeds, titles of the cause, repeated in every paper of the record, etc., where no point is made on them; in which case, where the record is certified by the attorneys, it would answer all the purposes if in the place of the verification, acknowledgment, title, etc., the words 'duly verified,' 'duly acknowledged,' 'title of the cause,' etc., and the date of the document or filing were substituted."

<sup>29</sup> *Reamer v. Nesmith*, 34 Cal. 624, 5 Morr. Min. Rep. 610; *Hoffman v. Fett*, 39 Cal. 109; *Fratt v. Toomes*, 48 Cal. 28.

<sup>30</sup> *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.

<sup>31</sup> *Packard v. Bird*, 40 Cal. 378.

<sup>32</sup> *Bostwick v. McCorkle*, 22 Cal. 669; and look at *Hill v. Weisler*, 49 Cal. 146.

<sup>33</sup> *McQuade v. Whalley*, 29 Cal. 612; *Todd v. Winants*, 36 Cal. 129.

<sup>34</sup> *Bonds v. Hickman*, 29 Cal. 460; look at *Hill v. Weisler*, 49 Cal. 146.

<sup>35</sup> 25 Cal. 511.



And the same learned justice, delivering the opinion in *Marriner v. Smith*,<sup>56</sup> said:

"In this case the original pleadings and summons might have been omitted, as no question arises on them. The amended complaint and answer thereto formed the issues tried. The entire first half of the transcript, therefore, is utterly useless here, and no inconsiderable portion of the remainder is taken up with titles of the cause in the several papers, indorsements upon each paper filed and verifications in full. Each time the style of the court and title of the cause is repeated one-half of a printed page is taken up, and the indorsement of title, names, etc., on each paper takes another half page. Where papers are short and numerous such repetitions are frequent and constitute a very large portion of a transcript. All this is unnecessary, especially where the transcript is made up and certified under the rules of court by the attorneys of the respective parties, as is now usually done, and as was done in this case; and when the transcript is certified by the clerk, the certificate can easily be adapted to such omissions of irrelevant and useless matter. It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterward give the name of the document, and at the head say 'title of cause.' And where a paper is verified or acknowledged, and no point is made on the verification or acknowledgment, to say 'duly verified,' or 'duly acknowledged.' The date of the paper, date of filing, date of service, etc., and every indorsement that may be important should of course appear. The rest may with advantage be omitted. Attorneys in making up their transcripts, by observing these suggestions, will still further greatly diminish the expense of making up and printing records, and thereby also facilitate the examination of the record on the part of the court."

It is to be observed, however, that no abbreviation of the contents of a document, except merely formal ones, such as verifications, acknowledgments, etc., should be made without the consent of all the parties.<sup>56a</sup> The clerk cannot certify to an abstract of a pleading or a judgment or the like. But as suggested in *Marriner v. Smith*, above quoted, he may and should adapt his certificate to the omission of merely formal portions of the record.

<sup>56</sup> 27 Cal. 649.

<sup>56a</sup> See *McQuade v. Whalley*, 29 Cal. 612; *Kimball v. Semple*, 31 Cal. 657.

In making up the statement or bill of exceptions the parties should, as already explained, avoid all needless repetition and prolixity.<sup>37</sup> In such case those documents may be copied into the transcript *verbatim*. But if they are not made up as they should be in the respects mentioned, the parties have an opportunity in making up the transcript to eliminate the useless matter.

There are times when statements and bills of exceptions may be advantageously incorporated in one paper, and the supreme court has said that when such is the case, these very necessary parts of the transcript may be as well considered when presented together as when separately presented.<sup>38</sup>

**§ 266. Each Transcript must be Complete in Itself—Using Transcript on Another Appeal.**—A party will not be allowed to eke out his transcript by reference to other transcripts on file in the supreme court. Such a practice would impose too much labor upon the justices of the court; for it would render it necessary to hunt up the document referred to every time they wished to examine it; and the respondent, instead of having a complete copy, would have to make a journey to the clerk's office whenever he had occasion to consult the transcript, which in cases where the attorney lived at a distance would involve great inconvenience. Accordingly, the practice is not permissible even where the transcript referred to was filed by the appellant upon the same appeal. In *Kimball v. Semple*<sup>1</sup> the first transcript filed was defective, and the party brought up a second, which was incomplete, and sought to supply the defects in the second by reference to the first. But the court said: "If sufficient could be gathered by combining portions taken here and there from the first transcript with the last, such a practice would be inadmissible. It would impose upon the court the labor of carefully comparing the two documents, and selecting out fragments here and there in one and inserting them in their proper places in another, while it is the duty of the appellant himself to furnish the court with a complete, clean, properly arranged and properly authenticated transcript." And as a party will not be allowed to refer to a transcript filed by himself on the same appeal, much less will he be allowed to refer to one filed by

<sup>37</sup> See section 151, *ante*, subdivision 3.

<sup>38</sup> *Spottiswood v. Weir*, 66 Cal. 525,

6 Pac. 381; *Martin v. Southern Pac. Co.*, 150 Cal. 124, 88 Pac. 701.

<sup>1</sup> 31 Cal. 657.

other parties on a different appeal. Thus in *Gates v. Walker*,<sup>2</sup> a partition suit, where appellant omitted material portions of the record from his transcript, the supreme court affirmed the judgment, and Sawyer, C. J., delivering the opinion, said:

“Appellant refers to the record of an appeal taken by other parties in the same case, but wholly independent of this appeal, and asks that it may be consulted. There is no stipulation that the record in the other appeal may be used as the record in this appeal, and respondent’s counsel well says: ‘Those other transcripts are made without reference to any errors that these appellants might assign. If, when one party appeals and files his transcript, another party can assign errors on that transcript, it is evident that the second party could almost always obtain a reversal of the judgment. One of two defendants could appeal and file his transcript, and another defendant could assign errors affecting himself, and obtain a reversal upon a transcript prepared without reference to his errors.’ The statute provides for preparing records on appeals which shall omit all matter not in some way having a relation to the errors specified by appellant, when the record is being prepared. Such a record is, of course, not a record of all that transpires in the case, and if other parties, after it is made up with a special reference to the points specified, could take an independent appeal and show errors in it, which were not contemplated by the parties in proposing it, there would be no safety to them. Each party taking an appeal must present his own record prepared in pursuance of the provisions of the Practice Act, with especial reference to the errors of which he complains. The respondent can only be called upon to respond to the record which the appellant serves upon him and files in the case. If that record does not present all of the record in the court below favorable to his side of the question, he has an opportunity to have the defect supplied by suggesting a diminution of the record, and requiring the omitted matter to be certified up. But how is he to protect himself, when, after the cause is submitted on briefs to be filed, as was done in this case, and the appellant serves his briefs, he finds the cause argued, not on the transcript served on him and filed in the case, but upon the record in some other appeal prepared with reference to other errors, and which may in no way affect him, and

<sup>2</sup> 35 Cal. 289; and see, also, *Fair v. Stevenot*, 29 Cal. 486, 11 Morr. Min. Rep. 11.

which he may, in fact, know nothing about? Such a practice is unauthorized, and cannot be tolerated. We have held so before. (*Fair v. Stevenot*, 29 Cal. 486, 11 Morr. Min. Rep. 11.)”

In the cases above objection seems to have been raised by the respondents to the use of transcripts in other cases. No doubt is entertained that such objections are well founded, and will always be sustained by the courts. But occasionally it happens that stipulations are entered into between the parties, and in such cases the question arises as to what may be the attitude of the court. It is probable that in proper cases the proposal would be looked upon with favor, but it is a practice the higher courts have never encouraged. In the case of *Spangler v. San Francisco*,<sup>2a</sup> where there was a stipulation to the effect that all the evidence and findings appearing in the statement of the case in *Cook v. San Francisco*, at that time pending on appeal in the supreme court, “that may be pertinent herein” should be considered in the case at bar, the court said:

“Under this mode of bringing a case here on appeal, the work of counsel is imposed on this court. This court is called upon to read two transcripts in different cases, to decide and determine what evidence is pertinent in one case and not in the other, and what is not. This labor should be performed by the counsel and not by the court. Counsel should not turn over their work to be performed by the court. The transcript in every case should contain in it all the matter on which it is to be determined, and the court ought not to be called upon to read two transcripts to determine one case, and find out and cull from one transcript what would be pertinent in the case under consideration. Certainly counsel should recollect the amount of labor imposed on this court, and do everything incumbent upon them to lighten it. This court might well have refused to consider this cause and have affirmed the judgment and order without consideration, by reason of the facts just set forth. In its consideration more time has been consumed on account of the unusual mode of presenting the case in the record. Though this case has been determined, another may not be treated in the same way.”

The case referred to is not in all respects a fair illustration, since only a part of the transcript in the second case, and that an indefinite or indeterminate part, was proposed to be used. No

<sup>2a</sup> 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091.

additional labor would have been imposed upon the court if the entire statement had been applicable to both cases, or the portion to be used had been more readily pointed out.

But where an appeal has been dismissed without prejudice, the court will sometimes allow the appellant to make use of the transcript on file in support of the appeal retaken in a proper manner.<sup>3</sup> And in the case of *Hill v. Finnigan*,<sup>4</sup> where the appellant, erroneously supposing that his appeal was invalidated by the failure of the sureties on the appeal bond to justify, took a second appeal and filed his transcript on such second appeal, the supreme court dismissed the second appeal, but allowed the transcript to be used as a transcript on the first. And there is no objection to including in one transcript several appeals by the same party in the same cause, provided such transcript contains a complete record for each appeal, and there is no confusion in its arrangement. And in practice it is very common for the appellant to have in the same transcript an appeal from the judgment and an appeal from the order denying a motion for new trial. In such case the appeals are as distinct as if they were in separate transcripts.<sup>5</sup> And if the parties can agree, they may include in the same transcript cross-appeals in the same case. But as a matter of course, the party who prints a transcript has control over it, and need not allow his adversary's appeal therein unless he chooses to do so. And in any case where several appeals are in the same transcript it must contain a complete record for each appeal, and there must be no confusion in the arrangement.<sup>6</sup>

**§ 267. Printing and Arrangement of Transcript.**<sup>1</sup>—In the earlier history of the court, transcripts were written instead of

<sup>3</sup> *Dooling v. Moore*, 19 Cal. 81; *Gordon v. Wansey*, 19 Cal. 82.

<sup>4</sup> 54 Cal. 311.

<sup>5</sup> *McDonald v. McConkey*, 57 Cal. 325.

Under supreme court Rule II, it has been held that appeals from a judgment and new trial order may be heard on the same transcript, though taken at widely different times. *Rauth v. Southwest etc. Co.*, 158 Cal. 54, 109 Pac. 839.

<sup>6</sup> *People v. Center*, 61 Cal. 191; and see section 211, *ante*, as to the rule requiring separate undertakings for each appeal. There sometimes

arises exceptional cases in which the supreme court will examine an improperly arranged transcript. See, for example, *Gridley v. Boggs*, 62 Cal. 190.

<sup>1</sup> No attempt is made, either here or elsewhere, to consider the rules of other than the California appellate courts in detail. Such rules fairly illustrate the general practice; but even if this were not true, the task of setting out the appellate court rules of the thirteen other states, which, including the two Dakotas, constitute the so-called Pacific Coast states, and define the scope of this

printed.<sup>1a</sup> Ever since 1864 the requirements as to printing have been regulated by Rule VII. This rule has not been changed in any material particular since 1864.<sup>2</sup> In the published rules which took effect March 22, 1880, this rule appears as follows:\*

“Rule VII. *Printing of Transcript*.—All transcripts of record shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin on the outer edge of not less than two inches wide. The printed pages, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica, solid, is the smallest letter and the most compact mode of composition allowed.”

The arrangement of the transcript is regulated by Rule VIII, which as published in March, 1880, is as follows:

“Rule VIII. *Index and Arrangement of Transcript*.—The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule will be exacted of the appellant or party filing the record here in all cases, by the court, whether objection by the opposite

work, would not only be a serious task, in itself, but would give to the work an encyclopedic character which does not properly belong to a text-book. See Rules Supreme Court of Arizona, 71 Pac. vi; Colorado, 66 Pac. vii; Idaho, 96 Pac. vii; Montana, 103 Pac. vii; Nevada, 100 Pac. vii; New Mexico, 107 Pac. vii; North Dakota, 61 N. W. vii; Oklahoma, 101 Pac. vii; Oregon, 91 Pac. vii; South Dakota, 124 N. W. vii; Utah, 97 Pac. vii; Washington, 69 Pac. vii; Wyoming, 53 Pac. v.

<sup>1a</sup> In Estate of Boyd, 25 Cal. 511, the reasons for the change from writing to printing were stated by Sawyer, J., delivering the opinion, as follows: “It was thought that the print-

ing of transcripts would greatly facilitate the examination and hasten the decisions of causes, as well as lessen the liability of the judges to overlook or misapprehend important facts in the case, and in other respects promote the administration of justice. As each attorney would have a copy it would enable the counsel to more thoroughly prepare their cases for argument, and facilitate their references to the record.”

<sup>2</sup> See rules published in 52 Cal. 680; 41 Cal. 698; 37 Cal. 707; 28 Cal. 704; 26 Cal. 694; 25 Cal. 658; 144 Cal. xlv. There have been other changes in the rules but they do not affect this question.

\* See 9 Pac. C. L. J. 843.

party be made or not, and for any failure or neglect in these respects which is found to obstruct the examination of the record, the appeal may be dismissed.”<sup>2a</sup>

The first sentence of this rule has not been changed since 1864.<sup>4</sup> The last sentence, beginning with the words “the chronological arrangement,” has stood since January 28, 1870.<sup>5</sup> In some cases the rule has been enforced,<sup>6</sup> while in others the court has contented itself with admonishing the counsel.<sup>7</sup>

Rule X, formerly Rule VIII, provides that “no transcript or other paper or document which fails to conform to the requirements of these rules shall be filed with the clerk.”<sup>8</sup>

Both the record and the briefs should bear the original title of the cause, with the simple addition of the words “appellant” and “respondent” appropriately placed. It is the well-settled practice of the court not to transpose the names of the parties in cases of appeal by the defendant.<sup>9</sup>

It is the duty of counsel to have their transcripts printed in accordance with the rules of the court.<sup>10</sup>

As to the practice with reference to interlineations, erasures, etc., see section 272, *post*.

<sup>2a</sup> For disregarding this rule in the preparation of the transcript in *Martin v. Hudson*, 79 Cal. 612, 21 Pac. 1135, although no objection was raised by respondent, the court ordered that the submission of the case be set aside, the transcript be stricken out and a new transcript printed within thirty days at appellant's cost, under penalty of dismissal of the appeal upon failure.

<sup>4</sup> See 25 Cal. 658; 26 Cal. 694; 28 Cal. 704; 37 Cal. 707; 41 Cal. 698; 52 Cal. 680; 144 Cal. xlv.

<sup>5</sup> 52 Cal. 680; 41 Cal. 698.

<sup>6</sup> *Kellogg v. Mayer*, 54 Cal. 583; *Douglass v. Fulda*, 45 Cal. 592.

<sup>7</sup> *Thompson v. Lynch*, 43 Cal. 482; *Gridley v. Boggs*, 62 Cal. 190.

<sup>8</sup> 9 Pac. C. L. J. 844; and see 144 Cal. xlv.

<sup>9</sup> *Perego v. Sellick*, 79 Cal. 568, 21 Pac. 966.

<sup>10</sup> *Richardson v. Bohney*, 18 Idaho, 328, 109 Pac. 727.

The necessity of compliance with rules of court is always recognized and failure or neglect in this respect is ground for dismissal of the appeal. In *Hannan v. Waltenspiel*, 29 Utah, 466, 82 Pac. 859, the appellant failed to comply with Rule II (see 97 Pac. vii) as to the chronological arrangement of the papers and proceedings in the cause, and there was no statement of the contents of each paper embodied in the cause, and no reference in the assignments of error to the page of the abstract containing the exceptions. There were other grounds which were sufficient to invalidate the appeal, but the court was clearly of the opinion that these were ample to sustain a dismissal. “These rules were adopted for the purpose of having cases presented to this court in a proper and intelligent manner, and must be obeyed.”

**§ 268. Authentication of Transcript—Curing Defects by Stipulation.**—The propositions involved here may conveniently be considered separately.

1. *Necessity for Authentication.*—The transcript must be authenticated. This is expressly required by the statute. Before 1864, section 346 of the Practice Act required the copies of the papers constituting the record to be “certified by the clerk to be a correct copy.”<sup>1</sup> In 1864 the section was amended so as to provide that the copies should be “certified by the attorneys of the parties to the appeal, or by the clerk, to be correct.”<sup>2</sup> The corresponding section of the California Code of Civil Procedure is section 953, which, as amended in 1874,<sup>3</sup> provides that “the copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed, or a stipulation of the parties waiving an undertaking.”

In addition to the statute there is a rule of court in regard to the matter. The former rule required the transcript to be certified by the clerk “where the parties do not agree”; but this did not make it incumbent upon the appellant to endeavor to get a stipulation from the respondent before resorting to the clerk.<sup>4</sup> The present rule requires that the transcript must be “duly certified to be correct by the attorneys of the respective parties or by the clerk of the court from which the appeal is taken.”<sup>5</sup> Unless there

<sup>1</sup> Laws of 1851, p. 106; Laws of 1854, p. 64.

<sup>2</sup> Laws of 1863–64, p. 247.

<sup>3</sup> The provisions of the code as first enacted was that “the copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk that an undertaking on appeal, in due form, has been properly filed.” This did not provide that the certificate concerning the undertaking could be given by the attorneys.

Authentication, or identification, where the original papers are incorporated in the transcript on appeal, is required in nearly all instances, by express provision of statute, or rule of court, where there is no statutory provision. See section 1582, Revised

Statutes of Arizona (section 373, Civil Practice); section 4821, Revised Codes of Idaho; section 7115, Revised Codes of Montana; section 3435, Cutting’s Compiled Laws of Nevada (section 340, Civil Practice); section 3140, Compiled Laws of New Mexico; also sections 894, 895, 896, and 2685, subsection 172; section 7206, Revised Codes of North Dakota; section 443, Code of Civil Procedure of South Dakota; section 3316, Compiled Laws of Utah; section 1729, Rem. & Bal. Code of Washington.

<sup>4</sup> Estate of Boyd, 25 Cal. 511.

<sup>5</sup> See Rule II; Rules of Sup. Ct. in 9 Pac. C. L. J. 841. This provision has been in Rule II since 1872. 41 Cal. 696; see 49 Cal. (front of volume); 52 Cal. 672; 144 Cal. xl. Before that the provision was in Rule



be a certificate by the clerk or a stipulation by all the parties to the appeal, the authentication is not sufficient; if one necessary party does not join and there is no certificate by the clerk, the appeal will be dismissed.\*

2. *Certificate by the Clerk.*—Aside from the undertaking, the essence of the certificate required is that the copies contained in the transcript are true copies of the originals on file in the clerk's office.<sup>6a</sup> It is not necessary or proper for the clerk to certify that the transcript contains all of the papers which constitute the record on appeal.<sup>6b</sup> Neither the clerk nor the court below has power to pass upon that question.<sup>7</sup> It is no concern of theirs that the appellant has omitted documents which he ought to have inserted. That is a question for the respondent to raise in the supreme court upon suggestion of diminution of record.<sup>8</sup> The clerk cannot be compelled to certify to incorrect or incomplete copies.<sup>9</sup> But if the copies presented to him are correct and complete, it is his duty to so certify upon payment of his lawful fees. And if he refuse to perform this duty, its performance will be directed by the supreme court on motion of the appellant. For with respect to all purposes connected with its appellate jurisdiction the

IX, and was that the transcript should be "duly certified to be correct by the attorneys of the parties plaintiff and defendant, or by the clerk of the court from which the appeal is taken." See 37 Cal. 708; 28 Cal. 705; 26 Cal. 695; 25 Cal. 660.

<sup>6</sup> Estate of Medbury, 48 Cal. 83.

<sup>6a</sup> As will be seen (note 3a, section 229, ante), the transcript may be sometimes made up of the original papers. When such is the case they must be certified to be such originals, and to constitute, in whole or in part, the record on appeal. In the absence of a certificate to this effect, the appeal will, on motion, be dismissed. Holmes v. Iowa etc. Co., 23 Nev. 23, 41 Pac. 762; Peers v. Reed, 23 Nev. 404, 48 Pac. 897.

<sup>6b</sup> The transcript, as certified by the clerk, merely purports "to be a true, complete, and perfect transcript of certain pleadings, motions, etc., and orders directed by the court below." It cannot take the place of a bill of exceptions, so as to bring up for review matters requiring to be incorporated in such a paper, without

being so incorporated. Ott v. Braun, 48 Colo. 417, 110 Pac. 73.

The certificate of the clerk does not add anything to the record. He can go no further than to certify that the copies furnished by him are correct copies. If he does so, his certificate is of no efficacy to make any matter a part of the record which is not in fact such. See section 229, ante. Also Cornish v. Floyd-Jones, 26 Mont. 153, 66 Pac. 838; Conklin v. Cullen, 25 Mont. 214, 64 Pac. 502; Emerson v. McNair, 28 Mont. 578, 73 Pac. 121; Manuel v. Scott, 37 Mont. 29, 94 Pac. 487.

<sup>7</sup> People v. Center, 54 Cal. 236; Buckman v. Whitney, 28 Cal. 555; O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

<sup>8</sup> As to which, see section 271, post.

<sup>9</sup> People v. Bartlett, 40 Cal. 142. Nor can the clerk be compelled to certify to a document composed of papers merely referred to. In other words, it is not the duty of the clerk to engross the statement. People v. Bartlett, 40 Cal. 142.

supreme court has the same power over the clerk of the court below as it has over its own clerk.<sup>10</sup> In certifying to the correctness of copies, repetitions of headings and other merely formal portions may be omitted, as stated in *Marriner v. Smith*,<sup>11</sup> an equivalent phrase being substituted. The undertaking need not be included in the transcript. With respect to it the clerk is empowered by the statute to certify that "an undertaking on appeal, *in due form*, has been *properly filed*, or a stipulation of the parties waiving an undertaking."<sup>12</sup> It is essential to this portion of the certificate that it be stated that the undertaking was "*in due form*,"<sup>13</sup> and that it was "*properly filed*."<sup>14</sup> If the clerk has doubts about the propriety of the form of the undertaking, he should certify up a copy of it.<sup>15</sup>

Provisos in the clerk's certificates suggesting the absence of portions of documents will be disregarded.<sup>15a</sup> So will statements of counsel for respondents that errors exist therein. Nor will such a statement warrant a dismissal of the appeal.<sup>15b</sup>

3. *Authentication by the Parties.—Curing Defects in the Transcript.*—The appellant has the option to apply either to the clerk

<sup>10</sup> *People v. Center*, 54 Cal. 236; *Winder v. Hendrick*, 54 Cal. 275; *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147. In the latter case the court say:

" . . . . We do not claim any authority over him while performing his customary duties as clerk of the lower court, but duties connected with our appellate jurisdiction we can require him to perform."

In the case of *In re Wierbitszky & Co.*, 88 Cal. 333, 26 Pac. 174, it appears that the clerk did not obey an order directing him to attach his certificate to the transcript. The motion for the order was made upon a suggestion by the appellant of a diminution of the record. This was on November 28, 1890. On March 19, 1891, the appeal was dismissed on respondent's motion because such certificate had not been filed and the appellant had taken no further steps.

<sup>11</sup> 27 Cal. 649; quoted in section 265.

<sup>12</sup> Section 953, California Code of Civil Procedure; and see note 22 to section 265, *ante*.

<sup>13</sup> *Winder v. Hendrick*, 54 Cal. 275.

<sup>14</sup> *Watson v. Cornell*, 52 Cal. 644. These words probably refer to the time of filing. Any language showing that the undertaking was filed in time would probably be accepted as their equivalent.

<sup>15</sup> *Winder v. Hendrick*, 54 Cal. 275. The affidavit of the parties themselves, or of their attorneys, cannot take the place of the certificate required. *Hailey v. Riley*, 13 Idaho, 749, 92 Pac. 756.

<sup>15a</sup> In *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709, this point seems to have been conceded without deciding. The supreme court is not bound by the clerk's certificate, but may at any time compel him to correct it. *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147. And the same may be said as to attorneys' certificates. *Id.*; and see *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411.

<sup>15b</sup> See *Herrlich v. McDonald*, 72 Cal. 579, 14 Pac. 357.

or to the attorney of the respondent to have the transcript certified. The attorney of the respondent may refuse to give a certificate if he does not wish to give it. But it is provided by rule IX that,<sup>16</sup>—

“ . . . . If a party shall present to the attorney of the adverse party a transcript on appeal in a civil cause, and request his certificate that the same is correct, and said attorney upon such request shall, for a period of five days, neglect or refuse to join in such certificate, or if deemed incorrect, shall neglect or refuse for the same time to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate the costs of procuring the certificate to such transcript, from the clerk of the proper court, shall be taxed against the party whose attorney so neglects or refuses.”

This rule does not limit the duty of the appellant, as prescribed by the code, of bringing into the appellate court a full and complete transcript of the record on appeal, containing true and correct copies of all papers on file in the court below, and required by law to be incorporated in the record on appeal; nor does the supreme court undertake, by Rule XI (formerly Rule IX), to penalize the refusal of the respondent to certify to the correctness of the transcript. He is at liberty to do so or not, as he chooses. If he comply with the rule, well and good; but, on the other hand, if he refuse to certify the correctness of the transcript, and the appellant is thus driven to secure the certificate of the clerk, it will be ultimately at the cost of the losing party; and the sole penalty attached to such refusal on the part of the respondent is the payment, in the event he is the losing party on the appeal, of the costs of such certification, added to the usual bill of costs. The supreme court will not attempt in advance to collect such excess from him.<sup>16a</sup> If the judgment should be affirmed, the respondent would not then, of course, be required to pay the cost of the clerk's certificate, any

<sup>16</sup> See Rule IX, 9 Pac. C. L. J., 844. This rule was afterward numbered Rule XI, 144 Cal. xlv. The same rule has been in force since 1864. See 52 Cal. 681; 41 Cal. 699; 37 Cal. 708; 28 Cal. 705; 26 Cal. 696; 25 Cal. 658.

<sup>16a</sup> *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328. But see *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459, where a rule of this kind was declared void. Also *Potter v. Talkington*, 5 Idaho, 317, 49 Pac. 14.

more than he would be called upon to pay any other costs appertaining to the appeal.<sup>16b</sup>

If the attorney for respondent chooses to certify the transcript, he may confine himself to certifying that the transcript contains correct copies of the originals on file. In such case the stipulation has the same effect as the clerk's certificate. In *Todd v. Winants*<sup>16a</sup> the stipulation was that "the foregoing transcript is correct." This was held not to excuse the omission of the pleadings, the court saying: "It merely takes the place of the clerk's certificate that the papers to which it is annexed are true copies." So in *Wetherbee v. Carroll*,<sup>17</sup> where the appellant attempted to have the order appealed from reviewed on a bill of exceptions, instead of a statement as required by the old Practice Act, it was held that the matter was not cured by the following stipulation: "We hereby certify that the foregoing twenty-one pages constitute the transcript on appeal from the orders appealed from, and contain true and full and correct copies of the affidavits referred to in the bill of exceptions on page 20, of the judgment entered in this cause, of the order to show cause also referred to in said bill of exceptions, and an order discharging the same, from which the appeal is taken, and the notice of appeal therefrom, and of the bill of exceptions filed in said cause in this matter." And the court said: "It is claimed that the stipulation . . . precludes the respondent from denying the correctness or sufficiency of the bill of exceptions, etc. We think not. The stipulation is but a substitute for the clerk's certificate to the correctness of the transcript. It simply shows that this is a transcript of such record of the proceedings as has been in fact made in the court below. The stipulation in this case shows what the record in fact is, nothing more. It might undoubtedly have gone further, but it has not done so, and manifestly was not designed to do more than authenticate the transcript as a true copy of the record below. And that is the extent to which such stipulations usually go. When attorneys design to stipulate for anything further, they will doubtless do so in terms not to be misunderstood."

<sup>16b</sup> *Loftus v. Fischer*, 114 Cal. 131, 45 Pac. 1058; S. C., 117 Cal. 128, 48 Pac. 1030.

<sup>16c</sup> 36 Cal. 129. See, also, *Leonard v. Shaw*, 114 Cal. 69, 45 Pac. 1012, where it was held that a stipulation in

like terms simply obviated the necessity of a certificate of the clerk, and did not preclude respondents from denying the sufficiency of the statement.

<sup>17</sup> 33 Cal. 549.

So in *Siebe v. Hendy Machine Works*,<sup>17a</sup> where the stipulation was merely to the effect that certain papers contained in the transcript were "correct" copies, the court, in declining to consider the question as to whether the evidence supported the findings of fact, there being no bill of exceptions and no statement, or other reference to the matter except an admission in the stipulation that certain documents had been introduced in evidence, said:

"The mere statement that certain copies are 'correct' is of no more force than the usual certificate of the clerk. . . ."

But there are many defects in a record on appeal which can be cured by stipulation.<sup>18</sup> And such stipulation may be made in the certificate to the transcript as well as in any other place. In *Bonds v. Hickman*<sup>19</sup> the stipulation appended to the transcript was as follows: "It is hereby agreed that the foregoing is a true copy of the pleadings, the patent of the United States referred to therein, the minutes of the court, and judgment in said case, and that the case be argued thereon. Notice of appeal admitted as duly filed and served, also the filing of appeal bond, insertion of copies waived." This was held to preclude the respondent from objecting that no notice of appeal had been given. So in *Solomon v. Reese*<sup>20</sup> it was said that if the transcript had been defective in not containing the judgment, the defect would have been cured by the following stipulation: "The foregoing transcript is correct, and contains all that is necessary for the purposes of this appeal."

And it has been held that a stipulation appended to the transcript by the attorneys, as attorneys for the respective parties, to the effect that "the foregoing transcript embraces a full, true, and correct copy of the judgment-roll, notice of motion for new trial, notice of motion to dismiss motion for new trial, order dismissing the same, notice of appeal, and that an undertaking on appeal in due form has been duly filed," waived the want of authority in the attorney to give the notice of appeal.<sup>21</sup>

So it has been held that where the parties stipulated to the correctness of a transcript which showed that the judgment appealed

<sup>17a</sup> 86 Cal. 390, 25 Pac. 14. The clerk's certificate to the like effect would be equally ineffective. *Sand Point v. Doyle*, 9 Idaho, 236, 74 Pac. 861.

<sup>18</sup> In *Godechaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178, a stipulation appended to a statement on motion

for new trial was held to waive the absence of the notice of intention.

<sup>19</sup> 29 Cal. 460.

<sup>20</sup> 34 Cal. 28.

<sup>21</sup> *McDonald v. McConkey*, 54 Cal. 143. See, also, *State v. Squires*, 15 Idaho, 327, 97 Pac. 411.

from had been entered before the appeal was taken, they would not be permitted to impeach the correctness of such showing.<sup>22</sup> It would be different, however, if the record made no showing whatever upon the point. In such a case the appeal would be dismissed, for the reason that to hold otherwise would be to hold that the parties could stipulate as to a jurisdictional fact—the date of entry of the judgment appealed from.<sup>23</sup> The distinction is that the record, in the first instance, and the stipulation in the second, not the record, which shows nothing, fixes the date of such entry.<sup>24</sup> Such a stipulation can never be said to estop the respondent from moving to dismiss the appeal on the ground that it was not taken in time.<sup>25</sup>

As heretofore intimated, it is to be noted in this connection that the appellate court is not bound by the papers found in the transcript, claimed by counsel as constituting the judgment-roll, and record on appeal; nor is it foreclosed by the certificate of the clerk that certain papers enumerated therein constitute such record.<sup>25a</sup> If the completeness of the record as presented is attacked, the defects will be considered, and if they exist, notwithstanding such certificate, the court will so hold, and will permit the omission to be supplied by suggestion of diminution of record.<sup>26</sup> When the missing parts appear, it is the duty of the court to determine whether they are material or not, if this point has not already been determined. The certificate of the clerk goes no further than the performance of his statutory duty, and refers solely to the correctness of the copies incorporated in the transcript.<sup>27</sup>

<sup>22</sup> *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888; and see to same effect, *Estate of Mackay*, 107 Cal. 303, 40 Pac. 558; *Estate of Pichoir*, 139 Cal. 694, 70 Pac. 214, 73 Pac. 604; *Estate of More*, 143 Cal. 493, 77 Pac. 407.

See *California etc. Assn. v. Commercial etc. Ins. Co. (Cal.)*, 112 Pac. 858.

<sup>23</sup> See *Estate of Scott*, 124 Cal. 671, 57 Pac. 654.

<sup>24</sup> This distinction was made in *Estate of Pichoir*, 139 Cal. 694, 70 Pac. 214, 73 Pac. 604, which is an interesting decision because of the various dissenting and concurring opinions and the wide divergence of the views expressed.

<sup>25</sup> *Palmdale Irr. Dist. v. Rathke*, 91 Cal. 538, 27 Pac. 783.

<sup>25a</sup> See *supra*, notes 15a and 15b.

<sup>26</sup> See section 271, *post*.

<sup>27</sup> See *Paige v. Roeding*, 96 Cal. 388, 31 Pac. 264; *Colton etc. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878. But see *First Nat. Bank of Lewiston v. Sampson*, 7 Idaho, 564, 64 Pac. 890, where a supplement from the record not included in the clerk's certificate was stricken out, the court, in effect, holding that it would not travel outside the record covered by the certificate of the clerk or attorneys; but it is manifest that the court was induced to grant the motion to strike out for other reasons than the mere fact of a want of a

**§ 269. Filing and Service of Transcript—Duty of the Appellant to File a Correct and Complete Transcript and Copies.**—The present rules of the supreme court concerning the filing and service of transcripts are as follows: <sup>1</sup>

“Rule II. 1. The appellant in a civil action shall within forty days after the appeal is perfected serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken; *provided*, that where there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed; and, provided further, that when a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time for filing and serving the printed transcript shall not begin to run until the motion for a new trial has been decided or the proceeding dismissed for want of prosecution; and the appeal from the judgment and from any order denying a new trial of the issue may be presented upon the same transcript.

“2. Written evidence of the service upon the adverse party of the transcript shall be filed therewith.

“3. The time above limited may be extended by stipulation, or by the court upon good cause shown by affidavit.” . . . .

certificate of the clerk or attorneys to the “supplement” offered for its consideration; and there is ground for this view in the fact that in *Coe v. Cleghorn*, 10 Idaho, 162, 77 Pac. 331, it was held that where the certificate covered a manifestly defective record, a motion suggesting a diminution of record would have a better standing in the upper court than a motion to dismiss for want of a complete record.

<sup>1</sup> 144 Cal. xl. For previous forms of this rule, see 9 Pac. C. L. J. 841; 52 Cal. 678, 681; 49 Cal. (front of volume); 41 Cal. 696; 37 Cal. 704–708; 28 Cal. 686; 25 Cal. 658; 11 Cal. 408; 130 Cal. (front of volume).

The time to file the transcript is not always fixed by a rule of court. It is sometimes fixed by statute. See note 1, section 265, *ante*.

<sup>2</sup> The original form of this provision was as follows: “The time above limited may be extended by stipulation, but shall not be extended by the court more than twenty days; and such extension of time shall be granted only upon good cause shown by affidavit. . . .” Under this rule it has been held that four justices may sign an extension. *Meeker v. Hoffer*, 57 Cal. 140. As to what is an extension, see *Page v. Latham*, 60 Cal. 601.

The appeal will be dismissed for failure to file the transcript in time (*Collins v. Goodwin* (Nev.), 108 Pac. 4), although filed within the time as extended, where the order of extension is invalid as having been made after the expiration of the time within which such an extension could be made. *Harrington v. Phipps* (Or.), 108 Pac. 185.

"6. The party wishing to file any printed paper shall prepare the original and twenty copies thereof. If such paper is to be filed in the district court of appeal, the original and three copies shall be filed therein, and the remaining seventeen copies shall be simultaneously delivered to the clerk of the supreme court. If it is to be filed in the supreme court, the original must be accompanied by the twenty copies, unless it is an application to the supreme court for the rehearing of a cause decided by the district court of appeals, in which case the party shall deliver to the clerk of said district court one copy for each justice of said court, and file the original and seventeen copies in the supreme court. Papers not required to be printed are subject to these provisions if they are, in fact, printed. If not printed, they must be in typewriting and three copies must be filed with the original. A carbon copy must not be used for the original."<sup>2a</sup>

"Rule IX. Whenever a map or survey forms part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, and reference thereto shall be made in the other copies."

"Rule XI. 1. Before the printed transcript is filed, a copy thereto shall be served upon the adverse party, and if there be more than one adverse party, appearing by different attorneys, on the attorney of each party so appearing. . . ."

The duty of filing the transcript is cast by the law upon the appellant. The language of the statute is that "the *appellant* must furnish the court,"<sup>3</sup> etc. And the rules above quoted are in accordance with the statute. And it is his duty to see that the copies correspond with the original. In *Franklin v. Goodman*,<sup>4</sup> the copies of the transcript did not show that an undertaking had been filed, and the appeal was dismissed for failure to file an undertaking. Upon it being brought to the attention of the court that the original transcript showed that an undertaking had been filed a rehearing was granted, but costs were imposed on the appellant, and Rhodes, J., delivering the opinion, said:

<sup>2a</sup> The rule was originally in the following form: "7. Besides the original there shall be filed fourteen copies of the transcript, and points and authorities, and statement of facts, which copies shall be distrib-

uted by the clerk in the manner prescribed by law."

<sup>3</sup> Sections 950-952, California Code of Civil Procedure.

<sup>4</sup> 31 Cal. 458.



"Counsel must be aware that the rules require the appellant to see that all the transcripts are correct copies of the one filed as the original, except in respect to maps and surveys, which, according to Rule IX, may be appended to the original, and should be referred to in the copies. It is the duty of the appellant to attend to clerical and typographical errors, and see to it that each transcript is a true copy of the original, in all respects, other than the maps and surveys. This labor does not devolve upon the members of the court, for they never take from the clerk's office, or examine the original, unless it contains the only copy of a map or survey used on the trial; but when a copy is taken up for investigation, it is presumed that the appellant has performed his duty, and that the transcript is what it purports to be, a true copy of the original."

So in *Rousset v. Boyle*,<sup>a</sup> a stipulation accounting for the absence of a statement was in the original transcript, but not in the copies. The judgment was affirmed for want of a statement. But on rehearing the court examined into the merits, saying:

"We take this occasion to say that it is the duty of counsel to see that the copies of the transcript intended for the members of the court *literally conform* to the transcript filed in the office of the clerk. In the great majority of cases we never see the transcript filed in the clerk's office, but depend entirely upon the copies sent to the consultation-room for the use of members of the court. The latter are expected to be accurate in every respect, and unless their accuracy be assured, serious mistakes are liable to ensue."

The time for filing the transcript begins to run from the perfecting of the appeal, in the case of an appeal from the judgment alone or a new trial order alone; but if the appeal is from both, the time for filing the transcript begins to run from the entry of the new trial order.<sup>5a</sup> No provision is made for notice of entry of a new trial order, and the filing of the transcript does not, therefore, depend upon any such notice,<sup>5b</sup> and the rule that the time for doing an act or taking a step begins to run from the notice of

<sup>a</sup> 45 Cal. 64; and see *Vassault v. Edwards*, 43 Cal. 458.

<sup>5a</sup> *Bell v. Staaeke*, 148 Cal. 405, 83 Pac. 245. The filing of the undertaking marks the perfecting of the appeal.

<sup>5b</sup> *Bell v. Staaeke*, 148 Cal. 405, 83 Pac. 245; and see also *Vinson v. Los Angeles-Pacific Co.*, 147 Cal. 479, 82 Pac. 53; and see *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831.

the act rather than the doing of the act which marks the commencement of the time within which the act must be done or the step taken has no application here.<sup>5c</sup> The time a judge holds a bill of exceptions before settlement, and the time during which respondent's attorney retains the transcript must be excluded, under Rule XXV, from the sixty days in which the transcript is to be filed.<sup>5d</sup>

The jurisdiction of the appellate court does not depend upon the filing of the transcript. It attaches immediately upon the filing of the notice of appeal, and cannot be devested, either by a failure to file the transcript or by its subsequent loss.<sup>5e</sup>

The clerk cannot be required to file a transcript, unless his fees are prepaid.<sup>6</sup>

The rule as to service is equally important, and a failure to serve the transcript upon the adverse party or his attorney will be ground for striking it from the files.<sup>7</sup>

**§ 270. Time for Respondent to Object to Transcript.**—This matter is regulated by rule of court. The rule which went into effect on March 22, 1880, and which is at present in force, is as follows:<sup>1</sup>

“Rule XV. Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant, in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail.”<sup>2</sup>

<sup>5c</sup> Bell v. Staacke, 148 Cal. 405, 83 Pac. 245.

<sup>5d</sup> Featherstone v. Keane, 18 Idaho, 24, 108 Pac. 337.

<sup>5e</sup> Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711.

<sup>6</sup> See Bolander v. Gentry, 36 Cal. 127.

<sup>7</sup> State v. Miles, 11 Idaho, 784, 83 Pac. 697; State v. Squires, 15 Idaho, 327, 97 Pac. 411.

<sup>1</sup> 144 Cal. xlvii. This was formerly Rule XIII. See 9 Pac. C. L. J. 845.

<sup>2</sup> The rule in force between March, 1880, and July, 1878, required the objection to be “taken and noted in the printed points of the respondent required to be filed and served under Rule II, or otherwise notified to the appellant in writing at least five days before the hearing.” See Rule XIII, 52 Cal. 682. The rule in force be-

A substantially similar rule has been in force at least since 1858. Under the rule an objection that the transcript does not show when the proposed statement was filed is waived if not taken as required.<sup>3</sup> So an objection that the affidavits appearing in the transcript are not identified as having been used on the motion is waived if not taken as required by the rule.<sup>4</sup> So an objection that a paper has been omitted from the transcript must be taken as required by the rule.<sup>5</sup> The purpose of the rule is to afford the appellant an opportunity to correct the defects which admit of correction. But it does not apply where the transcript does not show that a valid appeal has been taken,<sup>6</sup> or does not contain a sufficient record upon such appeal. The court cannot review a case upon an insufficient record even if the respondent does not take the objection. Thus in *Todd v. Winants*,<sup>7</sup> the transcript did not contain the pleadings, and the court held that it could not look into the merits, and Rhodes, J., delivering the opinion, said:

"The respondents' objections are not waived by their failing to take an exception to the transcript according to rule 13 of this court. The question is not whether the appellant may be heard on the points of error assigned, but it is whether the record as now presented discloses any error. The respondents moving under that rule say, in effect, that the transcript is not in such condition as to entitle the appellant to be heard on the errors assigned, because it does not appear that the notice of appeal was served, or that the documents are properly authenticated as true copies, or that the statement was settled by the judge, or agreed to by the parties, or because of some other technical objection to the transcript; but when the transcript contains only a part of the record or proceeding necessary to present or explain the points relied on, the respondents' position is that the appellants do not show any error.

tween July, 1878, and January, 1870, required the objection to be "taken and noted in the printed points of the respondent required to be filed and served under 2." See Rule XIII, 41 Cal. 700, 37 Cal. 700. Between January, 1870, and 1859 the rule required the objections to be "taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument or they will not be regarded. In such case the objection must be presented to the court before the argu-

ment on the merits." See Rule XIII, 28 Cal. 705; 26 Cal. 696; 25 Cal. 658; 11 Cal. 410.

<sup>3</sup> *Ross v. Roadhouse*, 36 Cal. 580.

<sup>4</sup> *Rogers v. Parish*, 35 Cal. 127.

<sup>5</sup> *Solomon v. Reese*, 34 Cal. 28; and look at *Bennett v. His Creditors*, 22 Cal. 38; *St. John v. Kidd*, 26 Cal. 263, 4 *Morr. Min. Rep.* 454.

<sup>6</sup> As to taking and perfecting appeals, see chapters 33 to 36.

<sup>7</sup> 36 Cal. 129. And see, to same effect, *Leonard v. Shaw*, 114 Cal. 69, 45 *Pac.* 1012.

If, for instance, the point is that the evidence is insufficient to justify the verdict, and it does not appear by the transcript that the statement was settled or agreed to, the respondents may take advantage of the omission under the thirteenth rule, and the appellants cannot be heard upon that point unless the omission is supplied; but if the statement is omitted from the transcript, no error in the respect complained of is shown, for it does not appear upon what evidence the court below acted. In the supposed case the issues are as essential as the evidence to explain or present the points relied on."

As to motions to dismiss under Rule XV, see section 274.

**§ 271. Diminution of Record.**—Diminution of record is the process of correcting the errors and defects which may exist in a transcript. The transcript, as has been stated, is a duly authenticated copy of the record in the court below.<sup>1</sup> The supreme court has no power to amend the record of the court below,<sup>2</sup> but it has the power to make the transcript a correct and complete copy of such record. The exercise of this power is regulated by rule of court. And the present rule is as follows:<sup>3</sup>

<sup>1</sup> See section 265, *ante*.

<sup>2</sup> See latter part of this section.

<sup>3</sup> 144 Cal. xlv. The most recent change was that suggested by the necessity of providing for appeals to the district courts of appeal. As to the form of the rule prior to this last amendment, see 130 Cal. xlii, and 9 Pac. C. L. J. 845. The rule above quoted has been in force since July, 1878. 52 Cal. 682. The rule in force between July, 1878, and January, 1870, was in the same language, except that it omitted the words "except when a certified copy of the omitted record is produced at the hearing." See 41 Cal. 700; 37 Cal. 709. Prior to 1870 and since 1859, at least, the rule omitted all provision for producing a certified copy of the omitted portion "without such order," but in other respects was the same as the rule quoted in the text. See 28 Cal. 706; 26 Cal. 696; 25 Cal. 658; 1 Cal. 410.

The rule of practice as to suggestion of diminution of record is of almost universal application. In *Baker City etc. Co. v. Baker City (Or.)*, 110 Pac. 392, the court said:

"The appellant is required to send up a transcript on appeal, containing copies of the judgment or decree appealed from, of the notice of appeal and proof of service thereof, and of the undertaking on appeal, whereupon jurisdiction of the cause is secured. Section 553, B. & C. Comp. When, however, it satisfactorily appears by affidavit that the transcript is incomplete in any particular, the supreme court is authorized to make a rule on the clerk of the trial court, requiring him to certify as to such alleged omission, and, if true, to transmit a copy of the paper so left out. Section 554, Id. It has been the constant practice of this court for many years to construe these clauses of the statute with reference to each other, and when it has been made satisfactorily to appear that an appeal was perfected and a transcript filed in due time, from which some paper, order, judgment, or decree was inadvertently omitted, to supply the defect by rule on the clerk of the lower court."

In this case a copy of the decree appealed from was unintentionally omitted, and was supplied in accord-

"Rule XIV. For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper clerk certify to the court in which the case is pending, the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestions, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged."

As stated in the above rule, the suggestion of diminution may be made by either party; and, as a matter of course, it is to be made by the party to whose case the omitted portion is necessary. The transcript cannot be contradicted by affidavits.<sup>4</sup> And if it be not corrected on suggestion of diminution of record, all statements in the briefs or arguments of counsel as to matters not appearing in the transcript will be disregarded.<sup>5</sup> As it is manifestly in furtherance of justice that the supreme court should have before it everything that is material to a proper determination of the appeal, a diminution of record will be ordered as a matter of course whenever suggestion therefor is made in the proper manner and in due season.<sup>6a</sup> Any error or defect in the transcript may be

ances with the doctrine thus expressed. In *Byers v. Ferguson*, 41 Or. 77, 65 Pac. 1067, 68 Pac. 5, a copy of the judgment lien docket was inserted in the transcript, instead of the judgment, and the defect was remedied in the same way.

The case-made cannot, however, when it takes the place of the transcript on appeal, be amended in the same way. This has been frequently decided. See *Gardenhire v. Burdick*, 7 Okl. 212, 54 Pac. 483; *Sproat v. Durland*, 7 Okl. 230, 54 Pac. 458.

The Washington statute (section 1729, Rem. & Bal. Code. See note 1, section 265, *ante*) contains an express provision for the filing of a supplemental transcript, "embracing such omitted files or records, or copies thereof," as the respondent may deem material to the review. This provision was construed in the following cases: *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773; *Washington Liquor Co. v. Alladio Café Co.*, 28 Wash. 176, 68 Pac. 444; *Johnston v. Gerry*, 34

Wash. 524, 76 Pac. 258, 77 Pac. 503; *Spring Hill Co. v. Lake Irr. Co.*, 42 Wash. 379, 85 Pac. 6; *State v. Washington etc. Co.*, 39 Wash. 11, 80 Pac. 803; *Ogden v. Chehalis Co.*, 41 Wash. 45, 82 Pac. 1095; *Ames v. Kinnear*, 40 Wash. 646, 82 Pac. 994; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Hopkins v. Crane*, 50 Wash. 636, 97 Pac. 772.

<sup>4</sup> *Bonds v. Hickman*, 29 Cal. 460; *Carey v. Brown*, 58 Cal. 180; *Boston v. Haynes*, 31 Cal. 107; *Ward v. Springfield Fire etc. Ins. Co.*, 12 Wash. 631, 42 Pac. 119; and see section 283.

<sup>5</sup> *Smith v. Athern*, 34 Cal. 506.

<sup>6a</sup> Look at *Ketchum v. Crippen*, 31 Cal. 365. The record cannot be amended after argument and submission (*Moore v. Booker*, 4 N. D. 543, 62 N. W. 607); or a supplemental transcript filed for the purpose of showing want of jurisdiction where the supreme court has already acted upon the original record. *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.

corrected in this manner.<sup>5b</sup> And a diminution is frequently resorted to in answer to a motion to dismiss the appeal.<sup>6</sup>

But as above stated, the process is confined to the amendment of the transcript. The supreme court has no power over the records of the court below. This is well settled. Thus in *Buckman v. Whitney*<sup>7</sup> it was held that application to supply the place of a lost record must be made to the court below, and not to the supreme court. So in *Bonds v. Hickman*<sup>8</sup> it was held that a stipulation that notice of appeal had been given was conclusive, unless relieved against by the court below, and the court said: "This court is powerless in the premises, and cannot amend the documents constituting the transcript, nor indirectly accomplish the same result by accepting as true a statement not found in the transcript, but which necessarily displaces a fact stated therein." So in *Boston v. Haynes*<sup>9</sup> the court refused to permit the appellant to show that the notice of appeal was not served before it was filed, as stated in the transcript, saying: "This court has no authority to correct the records of the district court. If there is any error in the records of those courts, the application to correct it must be made to the court in the record of which the error exists." So in *Satterlee v. Bliss*,<sup>10</sup> Sawyer, C. J., delivering the opinion, said:

<sup>5b</sup> See *Coey v. Cleghorn*, 10 Idaho, 162, 77 Pac. 331.

<sup>6</sup> For instances see *Wakeman v. Coleman*, 28 Cal. 58; *McQuade v. Whaly*, 29 Cal. 612; *Hill v. Finnigan*, 54 Cal. 311. In *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131, where certain exhibits, referred to in the body of the statement on motion for new trial by the words, "here insert, etc.," were collected in an appendix, properly numbered and preceded by the recital, "The following are the exhibits offered and read in evidence on behalf of the plaintiff, and mentioned in the foregoing statement," the court held that, as to certain other exhibits, referred to in the same way in the statement, but not contained in the appendix or otherwise in the transcript, their absence was not ground for striking out the entire statement, but that the proper remedy was to suggest a diminution of the record and have the missing documents brought up for consideration. This view was not concurred in by Mr. Justice Thornton. Nor does it seem to be in accord or entirely consistent

with the weight of the decisions. In *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625, the objection that the record did not show the substitution of certain executors was obviated by suggestion of diminution, and the missing record brought up.

<sup>7</sup> 24 Cal. 267; S. C., 28 Cal. 555.

<sup>8</sup> 29 Cal. 460; and see *In re Fifteenth Ave. Extension*, 54 Cal. 179. In *California etc. Assn. v. Commercial etc. Ins. Co. (Cal.)*, 112 Pac. 858, where there was a similar stipulation, and the respondent contended that the transcript could not be amended by adding thereto a special verdict omitted by order of court, the supreme court held otherwise. Such a stipulation might prevent an amendment by suggestion of diminution of record under different conditions, but not where appellant had sought to complete the record and had been prevented by the court, and had excepted to the ruling thereon.

<sup>9</sup> 31 Cal. 107. See, also, *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73, 4 Pac. 773.

<sup>10</sup> 36 Cal. 489.

"Respondent presents certain instructions having an important bearing on the rights of the parties which are shown by affidavit to have been given to the jury at the request of appellant's counsel, but which were never introduced into the statement on motion for new trial, and moves for an order directing the said instructions to be added to the statement. We have often held that it is no part of the province of this court to amend the records of the court below. The record in this court is a transcript of the record of the court below, and we decide the case upon the same record considered by the court below. The court below decided the motion for new trial upon the statement as it is now presented. If we should amend the statement by adding these instructions, we should decide it upon a different record, and we should not be reviewing the action of the court below, but act upon another and a different case. If we could amend the statement in this particular we could in any other. But we have no means of correcting the records of other courts. We have no authority to say what their records are or shall be. We can only act upon a transcript of the record as it exists in the lower court duly authenticated in the mode prescribed by law." <sup>11</sup>

So in *Fagan v. Carty*,<sup>12</sup> where the appellant, realizing the inadequacy of his statement to present the merits of the case on appeal, caused to be printed in the transcript a copy of the evidence and proceedings, taken from the reporter's notes, and certified by that official, and thereafter asked the supreme court to consider the same upon a suggestion of diminution of record. Patterson, J., for the court, said:

" . . . Manifestly, we have no right upon such a suggestion to add to the statement any of the evidence proposed. The code provides a plain and simple method of securing a statement of the evidence and proceedings, and Rule XII of this court is not intended to relieve those who, through ignorance, negligence or mistake, have failed to procure from the trial judge a full and correct statement of the case."

So, in *Mendocino Co. v. Peters*,<sup>13</sup> it was sought to correct a bill of exceptions as to the date of service of notice of intention, so as to correspond with the date as it appeared on the notice itself, by a suggestion of diminution of record, but the district court of

<sup>11</sup> And see, also, *Thompson v. Patterson*, 54 Cal. 542; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240.

<sup>12</sup> 77 Cal. 352, 19 Pac. 584.

<sup>13</sup> 2 Cal. App. 34, 82 Pac. 1124.

appeal calling attention to the well-settled rule that a record authenticated by the trial court could not be corrected by the appellate court, denied the motion.

**§ 271a. The Transcript Under the New and Alternative Method of Appeal.**—The legislature of 1907, by two separate acts,<sup>1</sup> added six new sections to the Code of Civil Procedure, constituting what it described as “a new and alternative method of appeal,” the immediate effect of which was to provide a method of taking an appeal, and a method of preparing a record for that purpose, much more simple in detail than that which theretofore prevailed. The first three sections, at least numerically speaking, have been considered in their proper connection.<sup>2</sup> Sections 953a, 953b, and 953c prescribe the method of preparing the record on the new procedure.

1. *The Bill of Exceptions.*—A bill of exceptions is dispensed with under the new and alternative method of appeal. Section 953a provides as follows:

“Sec. 953a. Any person desiring to appeal from any judgment, order or decree of the superior court to the supreme court or any of the district courts of appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section six hundred and fifty of this code, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree.

<sup>1</sup> The first act (Stats. 1907, p. 753), entitled: “An act to add three new sections to the Code of Civil Procedure, to be known as sections numbered 941a, 941b, and 941c, of said code, respectively, providing a new and alternative method by which appeals may be taken from judgments, orders or decrees of the superior court of the state of California, to the supreme court or district courts of appeal thereof”; and the second (Stats. 1907, p. 750), entitled, “An act to add three new sections to the Code of

Civil Procedure of the state of California to be known as numbers 953a, 953b, and 953c, relating to a new and alternative method for the preparation of records to be used on appeals from judgments, orders or decrees of the superior court to the supreme court and district courts of appeal.”

<sup>2</sup> The sections referred to, 941a, 941b, and 941c, and their various provisions are considered in the various chapters on the taking and perfecting of appeals, and the rules which govern the same.



"Upon receiving said notice, it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial. The stenographic reporter shall, within twenty days after said notice has been filed with the clerk, prepare a transcript of the phonographic report of the trial, including therein copies of all writings offered or received in evidence and all other matters and things required by the notice above referred to to be therein contained, and shall file the same with the clerk of said court. Upon the same being filed, it shall be the duty of the clerk forthwith to give the attorneys appearing in said cause notice that said transcript has been filed, and that within five days after the receipt of said notice the same will be presented to the judge for approval. At the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate. The judge shall thereupon certify to the truth and correctness of said transcript, and the same shall, when so settled and allowed, be and become a portion of the judgment-roll and may be considered on appeal in lieu of the bill of exceptions now provided by law."

It thus appears that no apparent change is made in the record prescribed by sections 950 and 951, except to dispense with the bill of exceptions which, under that method, was designed to present matters for review that did not appear on the face of the judgment-roll, and to prepare a transcript of the proceedings as outlined in the phonographic record, and copies of documents not included in the judgment-roll. As though for the purpose of carrying out the similitude between the new paper, thus provided, and the old bill of exceptions, it is required to be presented to the judge of the trial court within a specified time after notice, for approval and certification, and "for settlement and allowance," and the respondent may at that time require the insertion of other papers, files, documents, records and proceedings, that he may desire. It is presumed, of course, though it must be admitted upon very slight

ground, in view of the specific and positive language of the section,<sup>3</sup> that the trial judge has ample discretion as to permitting either party to incorporate papers or documents in such a transcript that have no business there.

The effect of this provision, as stated in the case of *Lane v. Tanner*,<sup>4</sup> is not to permit the appellant to bring up the evidence in the transcript merely certified by the court reporter. He must give the notice and the undertaking required,<sup>5</sup> and the paper which is thus officially prepared constitutes the sole method for bringing up the evidence, or other matter not properly a part of the judgment-roll, under the new and alternative method,<sup>6</sup> as the bill of exceptions constituted the only method, in addition to the statement, which is practically the same thing, under the old method.<sup>7</sup>

Such paper takes the place of the bill of exceptions prepared under section 650, but not the bill prepared under sections 649 or 651.<sup>8</sup> Nor can it be said to take the place of the bill of exceptions prepared under section 659 on a new trial motion.<sup>9</sup>

The duty of preparing the chief portion of every transcript is thus imposed upon the reporter, who not only cannot avoid such duty, but is liable to the process of the court if he fails to both prepare and file the transcript thus provided for within the time prescribed.<sup>10</sup>

<sup>3</sup> The language referred to is as follows: "The respondents on said appeal may at the time said transcript is presented for *settlement and allowance*, require the insertion therein of such other papers, files, documents, records and proceedings of said cause as they then desire to have incorporated therein. . . ."

<sup>4</sup> 156 Cal. 135, 103 Pac. 846. And see *Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 105 Pac. 940, where it was held that the transcript thus prepared is a part of the judgment-roll in no other sense than that the bill of exceptions was so.

<sup>5</sup> See section 953b, California Code of Civil Procedure, as to the undertaking required. The notice referred to here is not the notice of appeal, which is provided for in section 941b, of the same code. The notice here is rather a notice of intention to appeal. See *Modoc Co-operative Assn. v. Porter*, 11 Cal. App. 270, 104 Pac. 710, where this notice is referred to as a notice of intention.

<sup>6</sup> See *Lane v. Tanner*, 156 Cal. 135, 103 Pac. 846.

<sup>7</sup> See *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588.

<sup>8</sup> See section 953a, *supra*.

<sup>9</sup> In *Ford & Sanborn Co. v. Braslan etc. Co.*, 10 Cal. App. 762, 103 Pac. 946, the district court of appeal of the third district seemed to have been of the opinion that the new and alternative method has not the remotest effect upon proceedings for new trial, and that the record upon a new trial order must be prepared in the old way.

<sup>10</sup> Section 953a, California Code of Civil Procedure; *Gjurich v. Fieg* (Cal.), 117 Pac. 000. Here the reporter refused to file the transcript, after preparing same, on the ground his fees had not been paid. The court held that he was liable to mandate; that the bond prescribed by section 953b of the code was intended to secure his fee until such time as the

Under the new and alternative method of appeal, affidavits used at the hearing may no doubt be included in the transcript by the clerk, without being subject to Rule XXIX.<sup>9b</sup>

2. *Printing of Transcript.*—A transcript so prepared, settled and certified becomes, as stated, a part of the record on appeal, just as the bill of exceptions, under the old method, does. The record on appeal is not otherwise changed. But, unlike the provisions of the old method, such record, or transcript on appeal, as it is more properly called, need not be printed. The requirement is,<sup>10</sup> "Said record shall be filed with the clerk of the court to which the appeal is taken, and no transcript thereof need be printed."

But it is also provided that "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court,"<sup>11</sup> otherwise it is well settled that the appellate court will decline to grope through the record to find the testimony and documents relied upon by the parties. Nor will the reviewing court deem it a sufficient compliance with the requirement above quoted that the parties indicate in their briefs the page or the particular portion of the record so relied upon.<sup>12</sup>

3. *Miscellaneous.*—The alternative method of appeal requires the parties to print in a supplement appended to their briefs such portions of the record as they desire to call to the attention of the reviewing court, and it will therefore be presumed that matters omitted from the transcript, or from the supplement referred to, would not affect the soundness or correctness of the decision at-

amount thereof could be ascertained, not merely until the preparation of the transcript; and that he could no more refuse to file the transcript until payment of the cost thereof than he could refuse to prepare it in the first place without such payment.

<sup>9b</sup> See section 140, *ante*.

<sup>10</sup> See section 953c, California Code of Civil Procedure.

<sup>11</sup> See section 953c, California Code of Civil Procedure.

<sup>12</sup> In *Roussin v. Kirkpatrick*, 8 Cal. App. 7, 95 Pac. 1123, the court of appeals of the third district said: "Whatever motive of utility or economy suggested these new sections to the codes, it is quite clear to our

minds that the legislature did not intend to require the reviewing court to grope through an unprinted transcription of the phonographic report of the trial to find the testimony and documents relied upon by the parties, or that it would be sufficient compliance with the statute for the parties to indicate in their briefs the portions of the record relied on by simply citing the page of this transcription where such portion may be found. If the legislature had intended to substitute such a record for the printed, hitherto required, no such provision as we have quoted would have been placed in the section." And see *Estate of McPhee*, 156 Cal. 335, 104 Pac. 455, as to this same requirement.

tacked.<sup>13</sup> "The amplified opportunity afforded by the complete detailed statement of the evidence and proceedings at the trial which is furnished by the record under the 'alternative method of appeal,' affords no sufficient reason 'why the change of method should affect a rule so well grounded as the one which places with the trial court or jury the determination of the credibility of the witnesses and the weight to be given their testimony, including the selection of one of several reasonable inferences that may be drawn from the evidence.' " <sup>14</sup>

<sup>13</sup> Estate of McPhee, 156 Cal. 335, 104 Pac. 455.

<sup>14</sup> United Inv. Co. v. Los Angeles etc. Co., 10 Cal. App. 175, 101 Pac. 543.

## CHAPTER XLVIII.

## DISMISSAL OF APPEAL.

§ 272. Grounds for dismissal.

§ 273. Dismissal for failure to file transcript—Clerk's certificate.

§ 274. Motion to dismiss.

§ 275. Dismissal upon stipulation.

§ 276. Reinstatement, after dismissal.

§ 277. When dismissal is a bar to a subsequent appeal.

§ 272. **Grounds for Dismissal.**—An appeal is a matter of right, and is remedial. In doubtful cases, therefore, where the substantial interests of the parties are affected, the doubt should be resolved in favor of the right, and the appeal should be entertained.<sup>1</sup> And an appeal, once entertained, should not be dismissed for purely technical reasons, where there has been no violation or disregard of any express rule of procedure.<sup>1a</sup> Nor should an appeal be dismissed, in advance of the hearing on the merits, upon the ground that the appellant is merely a formal party, and has no real interest in the controversy; or that the appeal was taken for delay, or that the matter has been decided on a previous appeal.<sup>1b</sup> These questions cannot be determined in advance of a hearing on the merits, and the court will never consider the merits on a mere motion to dismiss. In this regard, Wallace, C. J., delivering the opinion in *Foscalina v. Doyle*,<sup>2</sup> said:

"The appeal was perfected only on the 21st of March last, and the time allowed to the appellant to file the printed transcript of the record, under the second rule of practice, has not elapsed. The respondent produces a copy of the record, and thereupon moves that the appeal be dismissed, because it is frivolous, and taken with intent to delay the execution of the judgment. We cannot, however, look into the copy of the record produced by the respondent, for the purpose of determining in advance what, if any, merit, the appeal may have. The rule of the court already referred to is intended to operate uniformly upon all appeals taken to this court,

<sup>1</sup> See *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481.

<sup>1a</sup> See *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772.

<sup>1b</sup> *Ricketson v. Compton*, 23 Cal. 636.

<sup>2</sup> 48 Cal. 151.

and a motion of this character made intermediate the taking of the appeal and the filing of the transcript will not be entertained. But even if we could look into the record to determine the merits of the appeal, and should ascertain that it had been taken merely for the purpose of vexation and delay, still we ought not to dismiss the appeal, if well taken in point of procedure. The remedy would be found only in an affirmance of the order, and the imposition of damages in a proper case. To depart from these rules would produce great confusion in practice, and consequent delay in the orderly disposition of causes."

The same rule has been applied to the disposition of motions to dismiss upon the ground that all adverse parties have not been served with notice of appeal.<sup>2a</sup> This is a question that cannot be determined by a showing *dehors* the record,<sup>2b</sup> and its determination necessarily rests upon a review of the merits. If, when the merits have been reviewed, the courts should conclude that the remedial process has been curtailed by such failure, conceding that there has been a failure to serve some party to the record, and that the relief sought by the appellant cannot be accorded without affecting the interests of the party who was not served with the notice of appeal, the proper judgment may then be rendered, but the merits will not be reviewed upon a motion to dismiss.<sup>2c</sup> So as to other grounds.<sup>2d</sup>

Nor is the fact that there is no statement or bill of exceptions on appeal from the judgment a ground for dismissing the appeal,<sup>3</sup> for

<sup>2a</sup> See *Hibernia etc. Soc. v. Behnke*, 118 Cal. 498, 50 Pac. 666; *Kenney v. Parks*, 120 Cal. 22, 52 Pac. 40; *Quist v. Michael*, 153 Cal. 365, 95 Pac. 658; and see, also, *Latham v. Los Angeles*, 83 Cal. 564, 23 Pac. 1116; and *Estate of Bullard*, 114 Cal. 462, 46 Pac. 297.

<sup>2b</sup> See *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *In re Ryer*, 110 Cal. 556, 42 Pac. 1082.

<sup>2c</sup> See *People v. McNulty*, 95 Cal. 594, 30 Pac. 963; *Swasey v. Adair*, 83 Cal. 136, 23 Pac. 284; *Howell v. Howell*, 101 Cal. 115, 35 Pac. 443; *Randall v. Duff*, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803; *S. C.*, 105 Cal. 271, 38 Pac. 739; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Jarman v. Rea*, 129 Cal. 157, 61 Pac. 790; *Nevills v. Shortridge*, 129 Cal. 575, 62 Pac. 120; *Estate of Kasson*, 135 Cal. 1, 66 Pac. 871; *Steen v.*

*Santa Clara etc. Co.*, 145 Cal. 564, 79 Pac. 171; *Quist v. Michael*, 153 Cal. 365, 95 Pac. 658.

<sup>2d</sup> It is sometimes said that the question of the appealability of an order will not be considered on a motion to dismiss, unless the point can be determined from an inspection of the judgment-roll, or the face of the record, and without going into the merits. See *Hale etc. Co. v. Fox*, 122 Cal. 56, 54 Pac. 270; *Estate of Heaton*, 139 Cal. 237, 73 Pac. 186; *Grey v. Brennan*, 147 Cal. 355, 81 Pac. 1014; and see *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211, and *Centerville etc. Co. v. Bach-told*, 109 Cal. 111, 41 Pac. 813. And see note 8, below.

<sup>3</sup> *Abrams v. Howard*, 23 Cal. 388; *Flynn v. Cottle*, 47 Cal. 526; *Howell v. Howell*, 101 Cal. 115, 35 Pac. 443; but see *Fowler v. Harbin*, 23 Cal. 630.

it may be heard on other parts of the judgment-roll. But it is otherwise, of course, if the transcript does not contain the judgment-roll or show who the parties are.<sup>5a</sup> Nor would it seem to be technically correct to dismiss an appeal from an order denying a motion for a new trial on the ground that there was no record in support of the motion;<sup>4</sup> but that course has sometimes been taken.<sup>5</sup> Nor is the fact that the notice of intention was not given, or the bill of exceptions or statement not filed, in time, ground for dismissing the appeal.<sup>5a</sup> Such fact may constitute a reason for affirming an order denying the motion, or reversing an order granting the same, if made to appear properly in the record, but it is no ground for dismissing the appeal.<sup>5b</sup> Nor is a defective statement or bill of ex-

The absence of a bill of exceptions is at most ground for affirming the judgment; but not without an examination and consideration of the merits. *Randall v. Duff*, 105 Cal. 271, 38 Pac. 739.

<sup>5a</sup> *Miller v. Thomas*, 78 Cal. 509, 21 Pac. 11.

In *First Nat. Bank v. Daniels*, 26 Okl. 383, 108 Pac. 748, a writ of error (more accurately, a statutory petition in error), brought up on a case-made, was dismissed on the ground that the case-made was a nullity, having been signed and settled in the absence of the defendant in error, and without notice to him of the time and place of settlement. But it is not to be forgotten that a case-made is something more than a mere statement on appeal. It is a record on appeal, a transcript, and having been declared invalid, there is nothing upon which the appeal can be considered.

<sup>4</sup> If a motion for a new trial should be granted without a record in its support, an appeal from the order would not be dismissed, but the order would have to be reversed. See section 134, *ante*. This shows the anomaly of the practice. It would seem that an appeal from a new trial order would be dismissed when the record does not show the grounds on which the motion was made, or whether it was made at all. *People v. Lenon*, 77 Cal. 308, 19 Pac. 521.

<sup>5</sup> *Cosgrove v. Johnson*, 30 Cal. 509; *Waggenheim v. Hook*, 35 Cal. 216.

<sup>5a</sup> See *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Dore v. Dougherty*, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621; *Watson v. Sutro*, 77 Cal. 609, 20

Pac. 88; *Barnhart v. Fulkerth*, 92 Cal. 155, 28 Pac. 221; *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898; *Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082; *McMahon v. Thomas*, 114 Cal. 588, 46 Pac. 732; *Smith v. Jordan*, 122 Cal. 68, 54 Pac. 368; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Barclay v. Blackinton*, 127 Cal. 189, 59 Pac. 834; *Sutter Co. v. Tisdale*, 128 Cal. 180, 60 Pac. 757; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171; *Wolf v. Supervisors*, 143 Cal. 333, 76 Pac. 1108.

<sup>5b</sup> In *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454, the supreme court said: "An appeal is given as matter of right from an order granting or denying a new trial. If the proceedings on the motion anterior to the order are irregular or defective, such irregularity or defect is not cause for dismissing the appeal, but may, upon a proper showing, be passed upon in determining the same."

And in *Re Ryer*, 110 Cal. 556, 42 Pac. 1082, the same court said: "A failure to serve the adverse party with notice of the intention to move for a new trial, or with the draft of a statement of the case, may be a reason for denying the motion for a new trial, or for refusing to settle the statement, and may, upon an appeal, if such service was necessary, be a ground for affirming or reversing the order appealed from; but it does not deprive this court of jurisdiction to hear the appeal, or constitute a reason for its dismissal upon the ground that the court has not acquired jurisdiction to hear it. (*Barnhart v.*

ceptions a proper ground for dismissing the appeal. Such defects will be considered only when the case is heard on the merits.<sup>53</sup> Nor will an appeal be dismissed for failure to prosecute the same, unless the respondent himself is free from laches. It will not be dismissed where the record shows that both parties have been guilty of laches.<sup>54</sup> Nor will the assignment of all the rights of the appellant be ground for dismissing the appeal. It will be presumed that all further proceedings after such assignment are taken for and on behalf of the assignee or grantee in the name of the original party.<sup>55</sup> Nor is satisfaction of the judgment ground for dismissing the appeal therefrom. The provisions of section 1049, Code of Civil Procedure, cannot be invoked for the purpose of abridging the right of appeal, unless, indeed, the satisfaction suggested therein is a voluntary and not an adversary proceeding.<sup>56</sup> So there are other cases where the principle is illustrated.<sup>57</sup>

Fulkerth, 92 Cal. 155, 28 Pac. 221.) Matters occurring prior to the judgment or order appealed from cannot be considered on a motion to dismiss an appeal on the ground that the appeal has not been perfected. (Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813.)"

<sup>53</sup> Richardson v. Eureka, 92 Cal. 64, 28 Pac. 102.

<sup>54</sup> Tripp v. Duane, 86 Cal. 149, 24 Pac. 867.

<sup>55</sup> Heilbron v. '76 L. & W. Co., 96 Cal. 7, 30 Pac. 802. But the proceedings may be continued in the name of the grantee. Malone v. Big Flat Co., 93 Cal. 384, 28 Pac. 1063.

<sup>56</sup> Kenney v. Parks, 120 Cal. 22, 52 Pac. 40. That is to say, on motion of the respondent. The right of the losing party to appeal from the decision of the trial court cannot be avoided by any adversary proceeding on the part of his opponent. It would be otherwise, of course, if the successful party were prosecuting the appeal, and the motion to dismiss came from the loser. A party cannot enforce a judgment in his favor, and while enjoying the benefits appeal therefrom and seek a reversal. People v. Burns, 78 Cal. 645, 21 Pac. 540; In re Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405. As to review of satisfied judgment by *certiorari*, see Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489. And see Vermont Marble Co. v. Black, 123 Cal. 21, 55

Pac. 599; and Warner v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017, where, although voluntary, the payment of the judgment was said to have been in effect compulsory, and hence, the defendant's right of appeal was not concluded. The following cases may also be noted in this connection: Bank of Martinez v. Jahn, 104 Cal. 238, 38 Pac. 41; In re Treadwell, 111 Cal. 189, 43 Pac. 584; Foster v. Smith, 115 Cal. 611, 47 Pac. 591; Estate of Shaver, 131 Cal. 219, 63 Pac. 340; Storke v. Storke, 132 Cal. 349, 64 Pac. 578; San Bernardino Co. v. Riverside Co., 135 Cal. 618, 67 Pac. 1047.

<sup>57</sup> Thus an appeal will not be dismissed for want of jurisdiction in the superior court. In Smith v. Westfield, 88 Cal. 374, 26 Pac. 206, the court said:

"This court will not, however, dismiss an appeal from a judgment of the superior court upon the ground that that court had no jurisdiction to entertain the proceeding, when it has assumed such jurisdiction and rendered an affirmative judgment therein. Our appellate jurisdiction over the judgments of the superior court include those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained. It is revisory of the action of that court, and it is to be exercised by affirming, correcting, modifying, or setting aside its judg-



There are, however, various grounds for dismissing appeals. Thus failure or neglect to comply with the rules of the appellate court often incurs the penalty of dismissal. In *Shain v. People's Lumber Co.*,<sup>\*</sup> the supreme court said:

ments; whereas, if the appeal therefrom is dismissed, the judgment would remain as originally pronounced."

So in *Woodbury v. Nevada etc. Co.*, 115 Cal. 85, 46 Pac. 862, it was held that an appeal would not be dismissed as without authority, if made by the attorney of record in the trial court, unless there should be a showing, strong and clear, and without substantial conflict of evidence, that such appeal was in fact without proper authorization; and the supreme court would not direct a substitution of attorneys for the purpose of allowing the dismissal of the appeal by consent of the parties.

So in *Vosburg v. Vosburg*, 131 Cal. 628, 63 Pac. 1009, it was held that it was not ground for dismissing an appeal that the appellant had disobeyed the order of the court to bring a child, subject to an order of the court with respect to its custody, into the jurisdiction of the court.

So in *Woodman etc. v. Rutledge*, 133 Cal. 640, 65 Pac. 1105, it was held that an appeal would not be dismissed on the ground that the firm of which the appellant's attorney is a member, are the attorneys of record, and that the single attorney is without authority.

So in *Casey v. Gibbons*, 136 Cal. 368, 68 Pac. 1032, it was held that it was not ground for dismissing an appeal from a new trial order that the bill of exceptions does not contain copies or the substance of the exhibits admitted in evidence at the trial.

An appeal from an order dissolving a preliminary injunction will be dismissed where a final judgment has been reached on the merits. *Wallace v. Deane*, 8 Idaho, 344, 69 Pac. 62. An appeal from a new trial order will be dismissed where all the questions involved therein have been disposed of on appeal from the judgment. *Coats v. Harris*, 9 Idaho, 470, 75 Pac. 246.

<sup>\*</sup> 98 Cal. 120, 32 Pac. 878; and see to same effect, *White v. White*, 112 Cal. 577, 44 Pac. 1026; *Headstrom v. Hellieson*, 136 Cal. 498, 69 Pac. 148.

Rules of the supreme court have, by virtue of the power conferred by the Constitution (art. 6, sec. 4, as amended in 1904), the force and effect of positive law, unless they conflict with legislative enactment. *Brooks v. Union Trust & Realty Co.*, 146 Cal. 134, 79 Pac. 843. "Rules of court are made for the orderly and proper dispatch of business, and must be enforced. Where a party willfully fails to comply with them his appeal will be dismissed." *Coats v. Coats*, 146 Cal. 443, 80 Pac. 694. It has, therefore, been frequently held that a failure to file points and authorities in accordance with the provisions of Rule II would be ground for dismissing the appeal. See *Shain v. People's Lumber Co.*, *supra*; *Suman v. Archibald*, 116 Cal. 41, 47 Pac. 865; *Pilger v. Strassman*, 119 Cal. 691, 52 Pac. 40. And the rule must be complied with as to time. Thus in *Egreesy v. Stansbury*, 149 Cal. 392, 87 Pac. 280, it was held that failure to file points and authorities within the prescribed time is ground for dismissing the appeal, and that it was no defense to a motion to dismiss on this ground, made on May 7, 1906, that legal holidays had been prevailing continuously since April 19, 1906, where the time to file such points and authorities had expired long before the last-named date. And in *McFadden v. Dietz*, 115 Cal. 697, 47 Pac. 777, it was held that the ground would be particularly cogent for dismissal where the failure had continued for a considerable period after the expiration of the time required by the rule; and in *Headstrom v. Hellieson*, 136 Cal. 498, 69 Pac. 148, it was held that it was no excuse for such failure that motions for dismissal upon other grounds were pending.

But the failure to file points and authorities may be excused. The

"The right of the appellant to be heard depends in the first place upon his compliance with the provisions of the Code of Civil Procedure in taking his appeal, as well in the manner as in the time provided by that code, and after his appeal has been taken, his right to a consideration thereof by this court depends upon his compliance with the rules of this court in perfecting his appeal, by filing his transcript, and thereafter his points and authorities, within the time specified in those rules."

Again, an appeal upon a matter not within the appellate jurisdiction of the court will be dismissed.<sup>6a</sup> So where the appeal is not taken within the time prescribed by law it will be dismissed.<sup>7</sup> So an appeal from a nonappealable order or judgment will sometimes be dismissed.<sup>8</sup> So an appeal in the name of a dead man will

power to make the rule exists side by side with the power and the discretion to suspend its operation or to mitigate its effects. Thus in *Barbour v. Flick*, 121 Cal. 425, 53 Pac. 927, it was held that where there were cross-appeals and a stipulation for a single record for both appeals, a misapprehension of the plaintiff that such stipulation covered the briefs as well as the transcript, and that both briefs were to be printed together, was held to excuse his failure to file his brief as respondent within the required time, it being shown that at the hearing of the motion both briefs, printed together, were on file, and that no delay had been occasioned by such failure. Moreover, sometimes the motion to dismiss itself offers an opportunity to escape the penalty of failure; as where the motion failed to specify the date for hearing the motion, and a second notice of motion became necessary, the court holding that if the points and authorities were filed before the effective notice was given, it would be in time, although filed after the abortive notice. *Swortfiguer v. White*, 137 Cal. 391, 70 Pac. 214. But a motion to dismiss on this ground will be determined by the facts in existence at the time the motion is made, and the right of the respondent to have the appeal dismissed cannot be affected or destroyed by any subsequent filing and service of appellant's brief. *McCabe v. Healey*, 139 Cal. 30, 72 Pac. 359; *Bank (Santa Rosa) v. Striening*, 1 Cal. App. 515, 82 Pac. 551.

So failure to file the transcript within the prescribed time is ground for dismissing the appeal. See section 273, *post*.

<sup>6a</sup> The jurisdiction of the supreme court, so far as it is affected by the subject matter, is outlined in chapter 27, *ante*. But there are jurisdictional facts not involved in the subject matter, as the time within which the appeal is taken. This has always been held to be jurisdictional, and not subject to the control of either court or litigants. So the want of a valid undertaking is sometimes jurisdictional. These matters are considered elsewhere, however, and the language of the text applies solely to the subject matter of the appeal, and it may be stated in general terms that if the judgment or order appealed from is not within the appellate jurisdiction of the higher courts, as the same is outlined in chapter 27, it will be dismissed. See cases cited in section 171, *et seq.*, *ante*.

<sup>7</sup> See sections 204 and 205, *ante*.

<sup>8</sup> The question whether an appeal will be dismissed on the ground stated, upon motion, and prior to a review of the merits, will depend upon whether the appealability of the order or judgment appears upon the face of the judgment-roll, or can be determined without a review of the entire record. See note 2d, *supra*.

In the recent case of *Hibernia etc. Soc. v. Doran* (Cal.), 118 Pac. 526, it was held that while the court would not dismiss an appeal where the motion to dismiss involved an examina-

be dismissed.\* So a second appeal taken during the pendency of

tion of the record, yet where a mere inspection alone was necessary to disclose the fact that no relief for appellant was possible, to save unnecessary delay and expense to litigants, an order of dismissal would be made. In that case the appellant had failed to give the notice presented by section 941b, Code of Civil Procedure.

\* Provision is made in the new and alternative method of appeal for the prosecution by an attorney of record of an appeal in the interest of a deceased person, section 941b, California Code of Civil Procedure; and there are specific provisions for taking care of the interests of deceased parties on appeal in the code; as, for example, in partition suits. See section 763, California Code of Civil Procedure. In general, however, under the old method of appeal, the death of a party suspends the proceedings as to him, and his attorney loses his right of representation. The point is not without its difficulties, however, as will be disclosed by a study of the cases. In *Sanchez v. Roach*, 5 Cal. 248, the earliest case noted, the appellant died on the day of rendition of judgment. His attorneys prosecuted the appeal in his name without taking the trouble to substitute his personal representatives. The appeal was dismissed, whether on motion of respondent or of the court's own motion does not appear, the court holding that there was no authority for prosecuting the appeal without suggesting his death and substituting personal representatives. In *Judson v. Love*, 35 Cal. 463, the defendant (respondent, nominally) died after rendition of judgment, but prior to service of notice of appeal. The notice was served on the personal representative of the deceased, but he was never substituted in the cause, either in the upper or lower court. The appeal was dismissed on motion of the said representative, the court holding that it was its duty to stop all proceedings in the cause upon the suggestion of the death of a party to the record. The query is here suggested, Did not this suspension of proceedings apply to the order of dismissal, and ought not Love's representative to have been required to

substitute himself before making the motion to dismiss, and having so substituted himself, was not the appeal authorized, in view of the fact that, although not substituted, he had been as such representative duly served with notice of appeal? In *Whartenby v. Reay*, 92 Cal. 74, 28 Pac. 56, this query seems to have been answered in the negative, at least as to a portion thereof. In that case the motion was made by the attorney of the representative of a deceased respondent, and was based upon the failure of the appellant to file the transcript in time; but it seems that at the time the motion was made the representative of the deceased had been appointed but had not been substituted, and the court said: "The fact that the order of their substitution *pro forma* as plaintiffs had not been made in this court at that time (and which was made upon the hearing of the motion) is not sufficient to deprive the executors' attorney of the authority to make the motion." But if he had the authority to make the motion, being the attorney of record, did not he have authority to accept service of notice of appeal, notwithstanding the fact of want of substitution?

In *Shartzler v. Love*, 40 Cal. 93, respondent Love died before the notice of appeal was filed. The appeal was dismissed as to him upon the suggestion of his death, whether upon the motion of his representatives or on the court's own motion does not appear. In *Sheldon v. Dalton*, 57 Cal. 19, the appeal was taken by interveners. One of the two plaintiffs died "before the appeal was taken," no suggestion of his death was made, and no substitution of his personal representatives, and the court dismissed the appeal "without prejudice" as having been "prematurely taken." In *Lyons v. Roach*, 72 Cal. 85, 13 Pac. 151, the exact date of Lyons' death with reference to the perfecting of the appeal is not clearly indicated, but the court refused to grant a motion to dismiss the appeal until substitution of his personal representative in the supreme court could be made, substitution in the lower court, which

a former appeal upon the same matter will be dismissed.<sup>10</sup> So where the transcript is not filed as required by the rules of the court, the appeal will be dismissed.<sup>11</sup> So where there is no appear-

had been made, being held insufficient. In *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371, the court seemed to think there was need of reconciling *Lyons v. Roach* with the earlier decisions on the subject, *Harrison, J.*, saying: "In that case [*Lyons v. Roach*] the appeal had been perfected in the lifetime of the plaintiff, but he died before the transcript on appeal was filed in this court. A motion to dismiss the appeal for failure to file the transcript was served upon his attorneys of record before any substitution of his personal representatives had been made in the case, and was denied for the reason that by the death of the plaintiff the attorneys ceased to represent him in the cause, and this court had no jurisdiction over the personal representatives by which they would be bound by an order of dismissal. The court had jurisdiction of the appeal, but it did not have jurisdiction of the motion, whereas in the present case the court has never acquired jurisdiction of the appeal."

This would seem to be a sufficient answer to the query above suggested, and there can be no question that all proceedings taken in the name of a deceased person, or having the effect of binding the estate of such deceased person, are null and void, and dismissal must follow as a matter of course an appeal perfected after the death of either party, because the appellate court has never acquired jurisdiction. Such an appeal is an abortive proceeding, and dismissal effects nothing more than to remove from the record an attempt to take an appeal unsupported by adequate authority. See, also, *Moyle v. Landers*, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

The death of an uninterested party cannot affect the appeal. See *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

<sup>10</sup> *Hill v. Finnigan*, 54 Cal. 311; *Brown v. Plummer*, 70 Cal. 337, 11 Pac. 631; *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481.

<sup>11</sup> See section 273, *post*. So the appeal has been dismissed for want

of a copy of an indispensable part of the judgment-roll in the transcript, as, for example, a copy of the judgment or order appealed from. See *Savings etc. Soc. v. Meeks*, 66 Cal. 371, 5 Pac. 624. So the want of a certificate to the transcript has been held a sufficient ground for dismissal of the appeal.

But mere errors in the transcript will not be regarded as sufficient to justify dismissal of the appeal; nor will the failure to properly identify papers used in the lower court. *Herrlich v. McDonald*, 72 Cal. 579, 14 Pac. 357. But when the transcript contained erasures, alterations and corrections not noted in the clerk's certificate, and unexplained notations by means of capital letters scattered along the margin, and the rules of the supreme court have not been complied with as to printing and size of paper, and, as a result, the record appears to have become practically unintelligible and unreliable, the appeal was dismissed. *Green v. McMann*, 79 Cal. 561, 21 Pac. 964. This condition of affairs, however, is not perhaps, except in respect to the failure to comply with the rules in the matter of printing and size of paper, *per se* ground for dismissal. In *Swasey v. Adair*, 83 Cal. 136, 23 Pac. 284, where the printed record was "badly disfigured by interlineations, but not worse than others that have been tolerated" in the supreme court, it was held not to be so bad as to call for a dismissal of the appeal or a reprint of the record. Nothing was said as to what would have been the order of the court if the transcript had been worse than usual, but it is probable a reprint would have been ordered, but not a dismissal. In *Fogel v. Schmalz*, 83 Cal. 201, 23 Pac. 294, the court denied a motion to dismiss because of erasures and interlineations in the transcript, saying: "The transcript does not in some respects conform to the rules of this court, but the defects are matters of form, and not so irregular in character as to call for a dismissal of the appeal. The interlineations and

ance when the case is called for argument the appeal has been dismissed.<sup>12</sup> So an appeal from portions of an interlocutory judgment in an action for partition will be dismissed if such portions cannot be modified without disturbing the whole judgment, and materially affecting the rights of parties not served with notice of appeal.<sup>12a</sup>

With reference to whether an appeal will be dismissed for failure to serve or file the notice of appeal, or to file the undertaking, as required by the statute, there is some disagreement among the authorities. The earlier reports furnish many instances of dismissals for failure to serve or file the notice of appeal,<sup>13</sup> or to file the undertaking<sup>14</sup> in accordance with the statute. Later, however, such motions were denied, the decisions taking the ground that if either of the steps mentioned is not taken as required by the statute, no appeal is "taken," and consequently there is nothing to dismiss.

Thus, in *Dinan v. Stewart*,<sup>15</sup> where the defect was that the notice of appeal was not filed and served on the same day, as required by the statute then in force, the court denied a motion to dismiss, saying: "It appearing, therefore, that no appeal has been taken in this case, the motion to dismiss the appeal must be denied." So in *Reed v. Kimball*,<sup>15a</sup> where the undertaking was not filed within five days after service of the notice of appeal, the motion to dismiss was denied, the court saying: "For the reason, then, that no appeal appears to be pending the motion is denied." But the rule does not appear to have been uniformly acted upon.<sup>16</sup>

erasures were made before the transcript was filed and certified by the clerk, and do not in any respect render the record difficult to read or understand."

<sup>12</sup> See section 278, *post*.

<sup>12a</sup> *Miller v. Thomas*, 73 Cal. 437, 15 Pac. 55.

<sup>13</sup> *Hastings v. Halleck*, 10 Cal. 31; *Buffendeau v. Edmonson*, 24 Cal. 94; *Franklin v. Reiner*, 8 Cal. 340; *Whipple v. Mills*, 9 Cal. 641; *Senter v. De Bernal*, 38 Cal. 637; *Boston v. Haynes*, 31 Cal. 107; *Foy v. Domec*, 33 Cal. 517; *Lynch v. Dunn*, 34 Cal. 518.

<sup>14</sup> *Buckholder v. Byers*, 10 Cal. 481; *Gordon v. Wansey*, 19 Cal. 82; *Carpenter v. Williamson*, 24 Cal. 609; *Bornheimer v. Baldwin*, 38 Cal. 671;

*Elliott v. Chapman*, 15 Cal. 383; *Shaw v. Randall*, 15 Cal. 384.

<sup>15</sup> 48 Cal. 567. See, also, *Harlan v. Pratt*, 50 Cal. 94.

<sup>15a</sup> 52 Cal. 325.

<sup>16</sup> The appeal was dismissed in the following cases: *Whittle v. Renner*, 55 Cal. 395; *Boyd v. Burrell*, 60 Cal. 280; *Brown v. Green*, 65 Cal. 221, 3 Pac. 811; *Little v. Jacks*, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128; *Duffy v. Greenebaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; *In re Skerrett*, 80 Cal. 62, 22 Pac. 85; *Beets v. Chart*, 79 Cal. 185, 21 Pac. 730.

Dismissal denied in the following cases: *Biagi v. Howes*, 63 Cal. 384, and *Bellegarde v. San Francisco Bridge Co.*, 80 Cal. 61, 22 Pac. 57,

The reasons upon which this doctrine rested, other than that there is really nothing to dismiss, as heretofore suggested, were never given. It may be that the rule was adopted to avoid the effect of the provision of the code that a dismissal is equivalent to an affirmance, and consequently is a bar to a second appeal,<sup>16a</sup> or it may be that it occurred to the court that there was an inconsistency in dismissing an appeal which had not been "taken" in accordance with the statute. But a more obvious way of preventing the dismissal from operating as an affirmance is to state in the order of dismissal that it is made "without prejudice to another appeal."<sup>17</sup> And there does not seem to be any greater inconsistency in dismissing an appeal not properly taken than in entertaining an appeal from a *void* judgment,<sup>18</sup> or in dismissing appeals on some of the other grounds above mentioned.<sup>19</sup>

Whatever may have been the grounds for the refusal to dismiss an ineffectual appeal, its hardships were recognized, and it was made to give way to the modern view, which provides for the dismissal of all appeals alike, whether the ground is the failure to perfect the appeal or want of jurisdiction to entertain it

following the case of *Reed v. Kimball*, cited in the text.

It is to be noted that the two cases in the eightieth report, *In re Skerrett*, and *Bellegarde v. San Francisco etc. Co.*, although appearing in juxtaposition in the report, illustrate both phases of the matter, the opinions being written by different justices.

In *Stratton v. Graham*, 68 Cal. 168, 8 Pac. 710, the opinion was prepared by Commissioner Foote, and concluded as follows: "... Therefore on the authority of *Biagi v. Howes*, 63 Cal. 384, *Francis E. Stratton*, claiming to appeal under section 940, Code of Civil Procedure, without having in effect done so, should be refused a hearing by this court." Thereupon follows the judgment of the court: "For reasons given in the foregoing opinion, the appeal is dismissed."

So in *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411, the court concluded its opinion in the following language: "The order heretofore entered in this cause must be set aside, and the attempted appeal dismissed."

These cases clearly illustrate the fact that the court did not deem the

matter of sufficient importance to even require a uniformity in the use of terms.

The rule was applied in the case of an undertaking by money deposit as well as a bond, the court holding that a deposit must be made in time or the appeal was ineffectual, and in *Stratton v. Graham*, 68 Cal. 168, 8 Pac. 710, the appeal was dismissed because the deposit was not made within the statutory five days.

In *Koth v. Kessler*, 59 Wash. 641, 110 Pac. 540, the court held that the proper practice was to ignore and not dismiss the appeal. In the Oregon case of *Hilts v. Hilts*, 43 Or. 162, 72 Pac. 697, it was held that failure to file the transcript might be taken advantage of both by motion to dismiss and motion to affirm the judgment.

<sup>16a</sup> See section 277, *post*.

<sup>17</sup> Section 955, California Code of Civil Procedure.

<sup>18</sup> A void judgment is appealable. See *Livermore v. Campbell*, 52 Cal. 75; *Bond v. Pacheco*, 30 Cal. 530; *Huerstal v. Muir*, 62 Cal. 479.

<sup>19</sup> See cases cited above, notes 6 to 12.

as nonappealable. The case of *Centerville etc. Co. v. Bachtold*<sup>19a</sup> seems to mark the point of departure for the present rule. In that case, Harrison, J., for the court, said:

“There are two classes of cases in which an appeal may be dismissed—one where the order appealed from is not an appealable order; the other where the appeal has not been perfected as prescribed by the legislature. Although the action of the court is the same in each class of cases, it is effected for different reasons, and is governed by a consideration of different principles. Formerly it was the practice, if the appeal had not been perfected, to decline to hear the appellant (*Biagi v. Howes*, 63 Cal. 384); but the present practice is to grant a motion to dismiss, and thus remove an apparent appeal from the records in the case.

“A motion to dismiss an appeal upon the ground that the order is not appealable assumes that the appeal has been perfected, and that there is before this court a properly authenticated record of the action of the superior court. Whether the order appealed from is an appealable order is a question of law which can be determined only by a judicial comparison of the record containing the order, with the statutes prescribing the orders from which appeals may be taken, and as this court cannot exercise its appellate jurisdiction of a cause until after the appeal has been perfected, we are limited, upon a motion to dismiss an appeal upon the ground that it has not been perfected, to a consideration of the steps taken for perfecting the appeal, and cannot look into the record, either for the purpose of determining whether the order appealed from is appealable, or whether the appeal is without merit, or whether the court below has committed error in its rulings. On the other hand, whether an appeal has been perfected is a question of fact depending upon proceedings subsequent to the entry of the order in the court below. When a motion to dismiss an appeal is made upon this ground the character or nature of the order appealed from is not involved, and the action of the court is limited to determining whether the steps taken for the appeal are in compliance with the statute prescribing the mode of taking an appeal. The two motions proceed upon different records, the one upon a record of the action of the court below culminating in and including the order appealed from, while the other is to be determined upon a record of proceedings taken by

<sup>19a</sup> 109 Cal. 111, 41 Pac. 813.

the appellant subsequent to and independent of the order appealed from."

The motion to dismiss was granted in this case, and no distinction has been made between the two classes of defective appeals here described. The order, as well as the motion, is the same in both classes.<sup>19b</sup>

In a recent case<sup>19c</sup> the supreme court of California dismissed an appeal that had not been instituted by the notice prescribed by section 941b of Code of Civil Procedure.

It would seem from the case of the Bank of California v. Shaber,<sup>20</sup> that an appeal taken by a city attorney against the direction of the board of supervisors may be treated as a nullity.

**§ 273. Dismissal of Appeal for Failure to File the Transcript—Clerk's Certificate on Motion to Dismiss.**—The failure to file the transcript is ground for the dismissal of the appeal. The provision of the code is that "if the appellant fails to furnish the requisite papers, the appeal may be dismissed."<sup>1</sup> This provision does not specify the time within which the papers must be furnished. That matter is left to be regulated by rule of court. And the present rule requires that the transcript be filed within forty days "after the appeal is perfected and the bill of exceptions and the statement, if there be any, are settled."<sup>2</sup> The penalty for failing to comply with this requirement is prescribed by Rule V, which is as follows:<sup>3</sup>

"Rule V. If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the tran-

<sup>19b</sup> See *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371; *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Estate of Wells*, 148 Cal. 659, 84 Pac. 37.

<sup>19c</sup> *Hibernia etc. Soc. v. Doran* (Cal.), 118 Pac. 526. See note 8, *supra*.

<sup>20</sup> 55 Cal. 322.

<sup>1</sup> Section 954, California Code of Civil Procedure. The old Practice Act contained a similar provision. Section 346.

<sup>2</sup> See Rule II quoted in section 269, *ante*. This rule has been in force since October, 1872. See 41 Cal. 695; 49 Cal. (front of book); 52 Cal. 678.

Prior to that time the transcript was required to be filed after the appeal was perfected and the statement settled, and within a certain number of days before the commencement of the succeeding term. See 37 Cal. 705; 28 Cal. 703; 26 Cal. 671; 25 Cal. 658; 11 Cal. 408.

<sup>3</sup> See 144 Cal. xliii. A substantially similar rule has always existed. See 9 Pac. C. L. J. 841; 130 Cal. xxxviii; 11 Cal. 408; 25 Cal. 658; 26 Cal. 671; 28 Cal. 703; 37 Cal. 706; 41 Cal. 697; 49 Cal. 8; 52 Cal. 679. The provision as to the transcript being on file when the notice was given being an answer to the motion was first introduced in 1872.



script, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion. If the respondent shall not file his points and authorities within the time alleged therefor, the cause may be submitted for decision upon the motion of the appellant, on notice thereof to the respondent."

As above shown, the time within which the transcript is required to be filed, under Rule II, is within forty days after the appeal is perfected, and under the provisions of Rule V, failure to file the transcript within the specified time is ground for dismissing the appeal.<sup>4</sup> But it must be borne in mind that the "specified time" is not definitely fixed, but depends upon various conditions. In the first place, the time begins to run against appellant upon the perfecting of the appeal. But the appeal is not perfected until the undertaking is filed. It was therefore held in *Wadsworth v. Wadsworth*<sup>4a</sup> that the time to file the transcript was extended by an extension of the time to file the undertaking.

With respect to Rule II, it was said in *Wall v. Mines*<sup>4b</sup> that "the rule is framed for the purpose of affording the appellant a reasonable time within which to prepare and file a record upon which his appeal is to be heard, and should be construed as giving him the whole of this time to prepare that record after it is ready for preparation." The provision requiring a transcript to be filed within forty days after the appeal is perfected is of little or no importance in the face of the provisos appended thereto. It has been frequently held, therefore, that the time does not begin to run so long as there is an unsettled statement or bill of exceptions pending;<sup>4c</sup> but it is also well settled that in order to

<sup>4</sup> *Smith v. Arnold*, 60 Cal. 234; *Page v. Latham*, 60 Cal. 601; *Welch v. Kenney*, 47 Cal. 414; *Rowland v. Kreyenhagen*, 24 Cal. 52; *Hagar v. Mead*, 25 Cal. 598; *Dorland v. M. Glynn*, 45 Cal. 18; *Spinetti v. Brignardello*, 54 Cal. 521; *In re Fifteenth Avenue Extension*, 54 Cal. 604; *Wood v. Forbes*, 62 Cal. 37; *Gilmore v. Insurance Co.* (No. 8993, 1883); *Galloway v. Rouse*, 63 Cal. 280; *Smith v. Solomon*, 84 Cal. 537, 24 Pac. 286; *Buckley v. Althorff*, 86 Cal. 643, 25 Pac. 134; *Judge v. Ohm*, 89 Cal. 134, 26 Pac. 649; *Duncan v. Grady*, 99 Cal. 552, 34 Pac. 112; *Bethell v.*

*Rogers*, 100 Cal. 175, 34 Pac. 645; *Emerie v. Alvarado*, 106 Cal. 646, 40 Pac. 11; *Koelling v. Rutz*, 108 Cal. 664, 41 Pac. 781; *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006; *Depeaux v. Peck*, 118 Cal. 522, 50 Pac. 682; *Estate of Franklin*, 133 Cal. 584, 65 Pac. 1081; *Bell v. Southern Pacific Co.*, 137 Cal. 77, 69 Pac. 692.

<sup>4a</sup> 74 Cal. 104, 15 Pac. 447.

<sup>4b</sup> 128 Cal. 136, 60 Pac. 682.

<sup>4c</sup> See *McGrath v. Hyde*, 71 Cal. 454, 12 Pac. 497; *Somers v. Somers*, 83 Cal. 621, 24 Pac. 162; *Jackson v. Puget Sound Lumber Co.*, 115 Cal.

operate as an extension of the time to file the transcript, it is essential that the proceeding pending in the lower court for the settlement of a bill of exceptions or statement should be for the settlement of such a bill or statement as may be used on the appeal.<sup>40</sup> But the appellate court will not consider any question as to the availability of said proceedings, or whether the bill or statement can ever be settled or not. Such questions rest primarily with the trial court, subject to review in the appellate court by the usual proceeding for that purpose, but not upon a motion to dismiss the appeal. It is sufficient for the purposes of the rule that the proceedings have been actually inaugurated, and are pending undisposed of and not abandoned.<sup>40</sup> But the bill or statement must be one that can be used on the appeal in question, for if it should be made to appear in support of the motion that the paper cannot be used, as where it applies to an appeal from an order made after judgment, instead of the judgment itself, although it may be practically the same bill in both cases;<sup>40</sup> or, if it should appear that no bill can ever be settled, as where the appellant has long since abandoned his proceedings for such settlement,<sup>40</sup> or has irrevocably lost his right to have a bill or a statement settled,<sup>40</sup> the appellate court will hold that there is no "proceeding pending," etc., and will apply the rule.<sup>40</sup>

So, as to the second proviso in Rule II, as to the pendency of a new trial motion,<sup>41</sup> it has been held that such proviso contem-

632, 47 Pac. 603; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Castro v. Breidenbach*, 143 Cal. 335, 76 Pac. 1114.

<sup>40</sup> *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543; also *Moultrie v. Tarpio*, 147 Cal. 376, 81 Pac. 1112.

<sup>40</sup> *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543; also *Moultrie v. Tarpio*, 147 Cal. 376, 81 Pac. 1112.

<sup>40</sup> See *Buckley v. Althorff*, 86 Cal. 643, 25 Pac. 134; *Butler v. Soule*, 117 Cal. 226, 49 Pac. 5; and see *Pignaz v. Burnett*, 121 Cal. 292, 53 Pac. 633.

<sup>40</sup> *Moultrie v. Tarpio*, 147 Cal. 376, 81 Pac. 1112.

<sup>40</sup> *Coffey v. Grand Council*, 87 Cal. 370, 25 Pac. 548.

<sup>40</sup> In *Wall v. Mines*, 128 Cal. 136, 60 Pac. 682, it was held that the appellate court would not consider the question as to whether the statement or bill of exceptions might or might not be used on the appeal involved

in the motion to dismiss, and that, therefore, it must be made to affirmatively appear that the statement could not be used. This is also in harmony with the later decisions (see cases cited in notes 4d and 4e, *supra*); but there is a serious question whether the effect of the decision of the court in *Vinson v. Los Angeles etc. Co.*, 141 Cal. 151, 74 Pac. 757, is not to nullify the principle of these decisions. See section 250, *ante*.

<sup>41</sup> The amendment of Rule II, which provides that the time to file the transcript shall begin to run from the decision or the dismissal for want of prosecution of any pending new trial motion, was adopted to take effect February 18, 1905. See, as to the construction of this amendment, *Pollitz v. Wickersham*, 147 Cal. 371, 81 Pac. 1099; *People v. San Luis Obispo*, 152 Cal. 261, 92 Pac. 481; *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825.

plates a new trial proceeding of a veritable character, and duly authorized, and that the motion must have been made in a proceeding where a new trial is a legal step.<sup>4m</sup> And this last applies with equal force in the case of statements.<sup>4n</sup>

In order to avoid dismissal for failure to file the transcript within time on the ground that an unsettled bill of exceptions is pending, an appellant must proceed diligently to obtain his bill, neglect in this respect being deemed sufficient to negative his right to an extension on the ground claimed.<sup>4p</sup> And this is believed to apply also in the matter of a new trial motion, although there is no decision to that effect. Laches in procuring the settlement of a statement or bill of exceptions is not, generally speaking, a question for the determination of the appellate court on a motion to dismiss an appeal,<sup>4q</sup> unless, perhaps, such laches amount to an abandonment; but the cases are not entirely harmonious with reference to the point. In any event, an affirmative showing of neglect is essential in order to bring the question before the appellate court, and it will be disposed of rather as a failure to file the transcript within the time limited by the rule than as one of laches *per se*.<sup>4r</sup>

<sup>4m</sup> In *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825, it was held that new trial proceedings were not proper in proceedings under sections 1465 and 1466, Code of Civil Procedure, and hence the pendency of a new trial motion in such a proceeding would not operate as an extension of the time to file a transcript.

<sup>4n</sup> In *Estate of Franklin*, 133 Cal. 584, 65 Pac. 1081, it was held that an unsettled statement in a probate proceeding would not operate to extend the time to file the transcript on appeal.

<sup>4p</sup> *Depeaux v. Peck*, 118 Cal. 522, 50 Pac. 682; but see note 4r, below.

<sup>4q</sup> See note 4r, below.

<sup>4r</sup> In the case of *Depeaux v. Peck*, 118 Cal. 522, 50 Pac. 682, the court held that the neglect of an appellant, for a period aggregating more than six months, "to take such steps as are within his power and incumbent upon him to take for the purpose of securing the settlement of the bill is equivalent to his failure to file the transcript within the time limited." In *Curtin v. Ingle*, 155 Cal. 53, 99 Pac. 480, where the appellant delivered the statement to the clerk to

hand to the judge for settlement, and thereafter for more than six months, and not until the motion to dismiss the appeal had been made, neglected to take any steps to procure a settlement thereof, the court denied the motion in the following language:

"It is urged by the respondent that this extension of time within which to file a transcript, after a settled or authenticated bill has been filed, is only available when the party has diligently proceeded with the settlement of such statement or bill, and where a party fails to use such diligence this court should, upon a showing to that effect, dismiss the appeal. But whether a party has been guilty of laches in that respect or not is primarily a matter for the trial court before whom the proceedings for the settlement of the statement on appeal is pending, and this court should not be called upon originally to determine, on a motion to dismiss an appeal, whether an appellant has been derelict in securing with due expedition such settlement. If, as contended for by respondent, the appellant has been guilty of such laches in proceeding with the settlement as would justify

If the judge has refused to settle the bill of exceptions, the forty-day period is held to begin to run from such refusal in the same manner as though the bill had been settled instead of settlement having been refused.<sup>42</sup> The rule specifically provides that the time begins to run from the decision of a motion for new trial, or dismissal of the proceeding for want of prosecution.<sup>43</sup>

The rule does not require the filing of a perfect transcript. In other words, it is a sufficient compliance with the rule that a transcript has been filed, which, though defective, or otherwise incomplete, contains a sufficient record for the determination of the case, or which may, upon suggestion of diminution of the record,

this court in saying that it amounts to a practical abandonment of his appeal, the same point can be urged in the trial court. . . . If his motion is denied, or his objections are overruled, he can have them incorporated into the record on appeal and have the action of the court reviewed here. . . . And we think this is the course that should be pursued. . . . While it must be conceded that this court has the power to dismiss, on application therefor, an appeal where there has been a failure to proceed with proper diligence to procure settlement of the statement—a neglect which is equivalent to a failure to file the transcript within the time limited by the rule—it is deemed the better practice to require a respondent to avail himself of that objection in the lower court when the proceeding for the settlement of the statement is pending and where the disposition primarily belongs. In *Moultrie v. Tarpio*, 147 Cal. 376, 378, 81 Pac. 1112, 1113, referring to the object and purpose of Rule II of this court above quoted, it is said: 'The rule of this court quoted above contemplates a proceeding for a settlement that is alive, at least to the extent that it is being in some degree pressed by the applicant. Ordinarily, this court would not undertake to determine, on motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions, that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial

judge, subject to review on appeal.' Likewise, in *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543, it is said: 'We are satisfied, however, that the words, "When there is a proceeding pending for the settlement of a bill of exceptions," etc., in the rule above referred to, must be held to include any proceeding looking to the settlement of such a bill actually inaugurated by a party and pending undischarged of and not abandoned, regardless of all questions as to whether the proceeding can ultimately avail and the bill be legally settled. Those questions are primarily for the trial court to determine, subject to review by this court.' . . . It will readily be seen that this must be the proper rule of practice to be followed wherever a proceeding for the settlement of a bill of exceptions has actually been inaugurated by a party, and is pending undischarged of in the trial court, and the moving party is actively engaged thereunder in attempting to procure the settlement of his bill. . . .'

The distinction between this case and that of *Depeaux v. Peck*, *supra*, lies in the fact that the neglect of the appellant in the *Depeaux* case consisted in a failure to take, in the supreme court itself, the steps necessary to compel a settlement of the bill by the trial court. This is obviously a very different thing from a failure to press the settlement in the trial court in cases where no interference by the supreme court is possible.

<sup>42</sup> *White v. White*, 112 Cal. 577, 44 Pac. 1026.

<sup>43</sup> See Rule II, 144 Cal. xl.

be made so.<sup>4a</sup> It has been held that the rule, construed in connection with the code provision (section 954, Code of Civil Procedure), does not give to the respondent the absolute right to a dismissal upon the mere showing that the transcript is defective, "but as authorizing a dismissal if the appellant 'fails' to furnish the requisite papers after the diminution of record has been suggested."<sup>4v</sup>

Aside from the provisos of the rule itself, failure to file the transcript within the prescribed time may be excused.<sup>4w</sup> Thus, where the delay was due to the fact that the judgment-roll had been lost from the files of the court below, proceedings upon a motion to dismiss were stayed and the appellants allowed time for proceedings to have the lost record replaced.<sup>5</sup> And in *Pickett v. Wallace*,<sup>6</sup> where the transcript was not filed until eight months after the expiration of the time limited therefor, it was held that the fact that during that time four of the justices of the court were disqualified from sitting in the cause was a reason for suspending the rules, and the motion to dismiss was denied. And in *Hill v. Finnigan*,<sup>7</sup> where the appellant (erroneously supposing that the failure of the sureties to justify invalidated his appeal) took a second appeal, and filed his transcript on such second appeal, the supreme court allowed the transcript to stand

<sup>4a</sup> *Paige v. Roeding*, 89 Cal. 69, 26 Pac. 787; and see *Richardson v. Eureka*, 92 Cal. 64, 28 Pac. 102.

A motion to dismiss an appeal on the ground that certain papers which are a part of the record are not included in the transcript is not the proper practice, the remedy being by suggestion of diminution of record. *Zienke v. Railway Co.*, 7 Idaho, 746, 65 Pac. 431. See section 271, ante.

<sup>4v</sup> *Woodside v. Hewel*, 107 Cal. 141, 40 Pac. 103; and see *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006; *Hellings v. Duval*, 119 Cal. 199, 51 Pac. 335.

Where the appellant, pending a motion by his adversary to dismiss the appeal for defects in the record, obtains a correction thereof pursuant to an order of court, the motion will be denied. Rule VII, Sup. Ct.; *Botsford v. Van Riper* (Nev.), 106 Pac. 440.

<sup>4w</sup> For instances of a sufficient excuse: *Benn v. Chehalis Co.*, 10 Wash. 294, 38 Pac. 1039; *State v. Willson*, 7 Wash. 502, 35 Pac. 377; *Richardson v. Spangle*, 22 Wash. 14, 60 Pac. 64;

*Dean v. Oregon etc. Co.*, 38 Wash. 565, 80 Pac. 842; *Quartz etc. Co. v. Patterson*, 53 Or. 85, 96 Pac. 551. See, also, *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269; *Prescott v. Puget Sound etc. Co.*, 30 Wash. 158, 70 Pac. 252; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Gustin v. Jose*, 10 Wash. 217, 38 Pac. 1008; *McNamara v. Crystal etc. Co.*, 23 Wash. 26, 62 Pac. 81; *McAvoy v. Jennings*, 39 Wash. 109, 81 Pac. 77.

<sup>5</sup> *Buckman v. Whitney*, 24 Cal. 267; but look at *Hagar v. Mead*, 25 Cal. 598.

<sup>6</sup> 54 Cal. 147; and compare *United States v. Gomez*, 3 Wall. (U. S.) 752, 18 L. ed. 212.

<sup>7</sup> 54 Cal. 311. And see *Carter v. Paige*, 77 Cal. 64, 19 Pac. 2, where it appeared that the transcript was ready to be filed in time, and the delay was caused through a mistaken statement to appellant's counsel that copies had been left as requested with respondent's counsel for his certificate of correctness. It was held to be a sufficient excuse.

as a transcript upon the first appeal. Inability to procure means to print the transcript has been held to excuse an appellant from the operation of the rule, when properly presented to the court.<sup>7a</sup> But this is believed to be rather an exceptional case. However this may be, unavoidable delays in the preparation and printing of transcripts are always accepted as ample excuses for failure to file the same within the prescribed time. But the reports contain many instances of insufficient excuses. Thus, in *Smith v. Trefry*<sup>7b</sup> it was held that it was no excuse that a motion for a new trial was pending, and that there was a bill of exceptions destined for use on such motion unsettled. So, in *Wittram v. Crommelin*<sup>7c</sup> it was held that it was no excuse that the respondent had stipulated for an extension of time for the justification of sureties on the undertaking. So, in *White v. White*<sup>7d</sup> it was held that the pendency of a motion to dismiss the appeal would not excuse the failure of appellant to file his transcript in time. So in *Bethell v. Rogers*<sup>7e</sup> it was held that the failure of the attorney for respondent to accede to appellant's request for his certificate to the transcript, under Rule XI, for five days, was not a sufficient excuse for failure to file the transcript within the statutory time, and that the appeal would be dismissed on a motion made nearly a year after such appeal was taken, if the transcript was not on file when the motion was noticed. So in *Puckhaber v. Henry*<sup>7f</sup> it was held that it was no defense to a motion to dismiss

<sup>7a</sup> *Hubback v. Ross*, 79 Cal. 564, 21 Pac. 965. The court thus gave its reason for allowing the excuse: "It is apparent to us that counsel for appellant did not deal frankly with the court, and his course in the matter is subject to criticism. Therefore, if his interests alone were to be considered, we would dismiss the appeal without hesitation. But the true reason of the delay, as now developed, was, that the appellant is a poor man, and was unable in time to procure the means with which to get his transcript printed, or arrange to have the same printed, in any other way, although he endeavored to do so. The expenses of taking appeals under our practice are extremely burdensome to litigants of small means, and no doubt frequently result in injustice. For that reason, we do not feel that we should deprive the appellant of the benefit of his appeal under the cir-

cumstances of this case. The courts should be open to all litigants alike, whether rich or poor, and every facility should be afforded them to be heard.

<sup>7b</sup> 71 Cal. 404, 12 Pac. 351. This, of course, was prior to February 18, 1905, when the rule was amended by the addition of the proviso as to the pendency of a new trial motion. It is presumed that respondent omitted to make a showing in his motion to dismiss that the bill of exceptions, aside from its use on the motion, was intended for use on the appeal from the judgment.

<sup>7c</sup> 72 Cal. 89, 13 Pac. 160.

<sup>7d</sup> 112 Cal. 577, 44 Pac. 1026.

<sup>7e</sup> 100 Cal. 175, 34 Pac. 645.

<sup>7f</sup> 147 Cal. 424, 81 Pac. 1105. Other instances where the excuse was held to be insufficient are: *Cochrane v. Gunderson*, 11 Wash. 141, 39 Pac. 378; *Baker v. Iron Works*, 11 Wash.

for failure to file the transcript that a new trial had been granted. Certain rights under the judgment are suspended by the granting of the motion for a new trial, but the judgment is still potential, subsisting for the purpose of an appeal<sup>75</sup> therefrom; and unless the appellant deems his new trial order sufficient to secure his rights, he must prosecute his appeal from the judgment, and his failure to do so in accordance with the rules of the appellate court, which limit such an appeal, will result in the dismissal of the action.

The second clause of the rule above quoted is that "if the transcript, though not filed within the time prescribed, be on file at the time the notice of motion is given, that fact shall be a sufficient answer to the motion."<sup>76</sup> In *Hill v. Finnigan*,<sup>77</sup> it was held that the court "will not look into fractions of a day for the purpose of dismissing an appeal," and therefore it is sufficient if the transcript be filed on the same day the notice is given, although the giving of the notice was in fact before the filing of the transcript. The ruling in *Hill v. Finnigan* has been distinguished, however, and it may be questioned whether the court will, in cases arising under this provision of Rule V, be governed by the rule as to fractions of days. In *Hoyt v. San Francisco*,<sup>78</sup> where the transcript was actually filed at a later hour on the same day the notice of motion was filed, the court thus referred to the earlier decision:

"In the case of *Hill v. Finnigan*, 54 Cal. 311, the material fact as to whether the notice of motion to dismiss was given prior to the time of filing the transcript, was a matter of controversy, and what was there said about not looking into fractions of a day for the purpose of dismissing an appeal must be considered as having reference only to the then state of facts before the court, and the general language there used should not be considered as furnishing a rule for a case like this, in which it is not denied that the notice of motion to dismiss was given before the filing of the transcript on appeal."

535, 39 Pac. 642; *Chehalis Co. v. Pearson*, 10 Wash. 216, 38 Pac. 996; *Ellis v. Moon*, 36 Wash. 122, 78 Pac. 677; *Humes v. Hillman*, 39 Wash. 107, 80 Pac. 1104; *Johnson v. San Juan etc. Co.*, 30 Wash. 162, 70 Pac. 254; *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117.

<sup>75</sup> See section 2, *ante*.

<sup>76</sup> As stated in note 3 above, this clause was introduced in 1872.

<sup>77</sup> 54 Cal. 311; citing *St. John v. Myerstein* (No. 5856), unreported.

<sup>78</sup> 87 Cal. 610, 25 Pac. 160, 1066.

And again: "Rule 3 [V] provides that if the transcript is on file when the notice is given, that shall be a sufficient answer to the motion; and counsel now invokes the rule that the court will not take cognizance of fractions of days. We appreciate the force of and the reason for the rule so invoked, and have no doubt sometimes applied it on motions of this kind. But where, as in this case, an event had actually occurred, and a fact had been established, under which rights had accrued before the happening of another event, which, if it had occurred a few hours before, might have defeated those rights, we think it the duty of the court to take note of the order of those events, even though they may have all happened on the same day."

This view seems to have been adopted in later decisions, and is no doubt the correct one.<sup>9b</sup>

If the notice be given before the transcript is filed the subsequent filing of the transcript is of no avail,<sup>10</sup> even though such filing be by leave of the court;<sup>11</sup> particularly if no reasons are given for failure to file after appellant has been given an opportunity to make a showing.<sup>11a</sup> But, as above noted, such failure may be excused, and a plain inadvertence, without willful neglect, seldom

<sup>9b</sup> See *Chapman v. Bank of California*, 88 Cal. 419, 26 Pac. 608, and see *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006, where the notice of motion, applying at first to the judgment, was amended so as to include the new trial order. The court held that, as to the latter, the notice was effective only when notice of the amendment was given, and that if the transcript was filed before such last-mentioned notice, or the transcript was on file on that day, it was a sufficient answer to the motion to dismiss.

The principle involved, aside from the express requirement of the rule, is that the right of the respondent to have the appeal dismissed for failure or neglect to comply with the rules of the appellate court rests upon the conditions at the time the motion to dismiss is presented, or, to speak with greater accuracy, at the time the notice of motion to dismiss is served and filed. Thus in *Shain v. People's Lumber Co.*, 98 Cal. 120, 32 Pac. 878, where the motion to dismiss was based upon the failure

of the appellant to file his points and authorities on time, and such points and authorities were actually filed after notice of motion and before the hearing, the court held that the rights of the respondent were determined by the conditions at the time of the filing of the notice of motion, and not at the time of its hearing, and that therefore the appeal must be dismissed. So in *Ward v. Healy*, 110 Cal. 587, 42 Pac. 1071, where the printed transcript was filed on the same day the motion to dismiss was made, it was held that none of the appellant's rights were saved thereby, "for by Rule V of this court the filing of the transcript can only defeat the motion when it is filed before the notice of motion to dismiss is served, and such was not the fact in this case." And see *Carter v. Paige*, 77 Cal. 64, 19 Pac. 2.

<sup>10</sup> *Welch v. Kenney*, 47 Cal. 414; and see cases cited in note 9b, *supra*.

<sup>11</sup> *Page v. Latham*, 60 Cal. 601.

<sup>11a</sup> See *Heinlen v. S. P. R. R. Co.*, 65 Cal. 304, 4 Pac. 15.



fails of acceptance as an excuse, unless the substantial interests of the respondent are affected by the delay.<sup>11b</sup>

And the time to file may be extended by stipulation, or by the court, upon good cause shown by affidavit.<sup>11c</sup> And an order signed by four justices has been held to be sufficient.<sup>11d</sup>

Analogous to the provision of Rule V, last above noted, is the recognized principle that where the substantial interests of the respondent are unaffected by the ground complained of, and the same is a mere technical objection, not going to the merits, it will be a sufficient answer to a motion to dismiss, if, at the hearing of the motion, the defect complained of appears corrected.<sup>11e</sup> So, under the analogous provision of Rule XV, if the objection be one that may be cured by a suggestion of diminution of record, it may be obviated in that way prior to the hearing of the motion to dismiss.<sup>11f</sup>

The motion to dismiss an appeal on the ground of failure to file the transcript within the prescribed time must always be made upon the certificate of the clerk. Rule VI (formerly Rule 4) has existed in substantially the present form at least since 1864, except that in the interval between 1872 and 1875 the certificate was required only where the motion was made during the first week of the term without notice.<sup>12</sup> It is as follows:

<sup>11b</sup> Thus it was said in *Grant v. De Lamori*, 71 Cal. 329, 12 Pac. 228: "Under such circumstances we do not think the ends of justice would be subserved by enforcing a strict rule." There the appellant inadvertently failed to file the transcript for two days after the expiration of the extended time to file.

<sup>11c</sup> See subdivision 3, Rule II, and subdivision 9 of the same rule, as to orders made on stipulation.

<sup>11d</sup> *Desmond v. Faus*, 83 Cal. 134, 23 Pac. 303.

<sup>11e</sup> In *Shay v. Chicago Clock Co.*, 111 Cal. 549, 44 Pac. 237, there was a motion to dismiss on the ground that there was no certificate of the clerk that an undertaking on appeal had been duly filed. A copy of the undertaking appearing in the record at the hearing of the motion, together with a certificate in regular form, filed subsequent to notice of motion to dismiss, the court denied the motion. In *Re Stratton*, 112 Cal. 520, the motion was made on the ground of absence of proof of service of notice of appeal. It was held

that the defect was obviated by proof of service made at the hearing of the motion. See, also, *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Knowlton v. Mackenzie*, 110 Cal. 183, 42 Pac. 580; *In re Ryer*, 110 Cal. 556, 42 Pac. 1082; *Hellings v. Duval*, 119 Cal. 200; *Swortfiguer v. White*, 137 Cal. 391, 70 Pac. 214.

<sup>11f</sup> See *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986, where the motion to dismiss was based on the failure to authenticate the transcript, and the fact that the notice of appeal was not accompanied by proof of service. The appellant, under Rule XV, filed a properly authenticated transcript, and so obviated the first objection. He offered proof of service of notice of appeal at the hearing, and the court held that this was sufficient, inasmuch as its jurisdiction rested upon service rather than proof of the same, and that the proof might be shown *dehors* the record, if necessary. See section 265, *ante*.

<sup>12</sup> See 144 Cal. xliii. For earlier forms, see rules published in 57 Cal. 679; 49 Cal. 8; 41 Cal. 697; 32 Cal.

"On motion to dismiss an appeal for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing an undertaking on appeal, and that the same is in due form; the fact and the time of the settlement of the bill of exceptions, and statement on appeal, if there be any, and also that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such a request, that he has not paid the fees therefor, if the same have been demanded."

The certificate, in the form, and containing the required statements, must be furnished; otherwise the motion will be denied. This has been frequently decided. Thus, in *Bennett v. Bennett*,<sup>13</sup> the motion was denied because the certificate did not state whether a statement on an appeal had been filed, or the amount or character of the judgment, and it was held that recitals in the undertaking contained in the certificate could not supply the place of statements which the rule required the clerk to make. So, in *Thompson v. Thornton*,<sup>14</sup> the motion to dismiss was denied because the certificate did not state the fact or date of the service of the notice of appeal, or that the statement had been settled. An affidavit of the facts required to be stated in the certificate is insufficient.<sup>15</sup>

706; 28 Cal. 704; 26 Cal. 694; 25 Cal. 659. The rule published in 11 Cal. is as follows:

"Rule 4. Satisfactory evidence of the omission to file the transcript shall be deemed to be the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition, the time when the appeal was perfected and statement settled (if there be one), and also that the appellant has received the transcript, or that he has not directed a transcript of the record to be made out, or if he has given such direction that he has not tendered the fees therefor."

During the interval between 1872 and 1875 the certificate required by the present rule was required only where the motion was made during the first week of the term without notice. Where it was made upon notice it could be supported by "affidavits or other satisfactory proof, or the certificate of the clerk below to any or all of the several matters first above mentioned." See 41 Cal. 697.

<sup>13</sup> 42 Cal. 629.

<sup>14</sup> 43 Cal. 24; and see, also, *Lewis v. Longmaid*, 43 Cal. 54; *Frederick v. Tierny*, 54 Cal. 583.

<sup>15</sup> *Carpenter v. Bartlett*, 8 Pac. C. L. J. 27.

If the certificate is sufficiently certain, however, to afford the information or present the facts required, the motion will not be denied for minor defects, either of form or substance. Thus, in *Pio v. Aigeltinger*,<sup>15a</sup> where objection to the sufficiency of the certificate was made on the ground that it did not state what judgment or order was appealed from, or to what court the appeal was taken, although the date and amount and character of the judgment was given, and the certificate averred "that after the rendition of said judgment, the said defendant filed a notice of appeal in said action," it was held sufficient, the court saying: "There was but one appeal taken, and the appellant could not have been misled."

Under the rule the clerk's certificate is conclusive, and an affidavit of respondent will not be considered to vary the averments of the certificate in any essential particular; as, for example, the character of the record kept by the clerk.<sup>15b</sup>

Subdivision 2 of Rule VI provides for the use of the clerk's certificate in motions made on other grounds than failure to file the transcript, but unlike the latter, it is not conclusive.

The form of the certificate in *Gross v. Cassin* was recommended by the court as a "convenient and accurate form."<sup>16</sup>

**§ 274. Motion to Dismiss the Appeal.**—The motion to dismiss the appeal for failure to file the transcript as required by the rules of court has been considered in the preceding section. In other cases the respondent may move either upon the clerk's certificate mentioned in the preceding section, or upon affidavits, or upon both together. This is provided by subdivision 2 of Rule VI, which is as follows:<sup>1</sup>

"Rule VI (sub. 2). On motion to dismiss the appeal on any other ground than failure to file transcript within the prescribed time, the moving papers shall consist of the certificate of the clerk of the court below, as to any of the matters above mentioned or of affidavits, or both such certificate and affidavits.

<sup>15a</sup> 97 Cal. 81, 31 Pac. 895.

<sup>15b</sup> *Chevassus v. Burr*, 134 Cal. 434, 66 Pac. 568.

<sup>16</sup> 43 Cal. 27.

*N. B.*—Perhaps it would be well to give the date of the filing of the findings and the date of the entry of judgment, in case the appeal be from the judgment. Under the system of express findings the "rendition" of

the judgment might possibly be considered uncertain in meaning.

<sup>1</sup> 144 Cal. xliv. No substantial change has ever been made.

As to previous rules, see 52 Cal. 680; 49 Cal. 8; 41 Cal. 697; 37 Cal. 703; 28 Cal. 686; 26 Cal. 671; 25 Cal. 659; 11 Cal. 408. The provision allowing affidavits to be used dates only from 1872.

“(Sub. 3) Copies of the moving papers, except the transcript, shall be served with notice of the motion.”

The motion must be made upon notice,<sup>2</sup> specifying the grounds thereof; and it should be made on the day specified in the notice for the hearing, or at the first opportunity thereafter during the session of the court. If not so made it lapses, and cannot be revived at a subsequent session.<sup>2a</sup> The sufficiency of the notice must be determined by the facts of each case, and a notice of motion to dismiss, made on the usual clerk's certificate, and an affidavit averring failure to serve a copy on the respondents, is sufficient to apprise the appellants that the motion is made on the ground of failure to file the transcript in time.<sup>2b</sup>

The motion may be made by any adverse party, whether served with notice of appeal or not, if the ground for the motion goes to the jurisdiction of the appellate court to entertain the appeal. In *Bullock v. Taylor*,<sup>2c</sup> where the motion was made on the ground that necessary parties to the appeal had not been served with notice thereof, the motion having been made by parties not served, the court said:

“Concerning this [the objection that the moving party was not competent to make the motion], we observe: 1. The matter going to the jurisdiction of this court to entertain the appeal, it would seem to be immaterial in what manner comes the suggestion that the steps necessary to confer such jurisdiction have not been taken, and so the court has said in *In re Castle Dome Min. etc. Co.*, 79 Cal. 246, 21 Pac. 746; 2. To hold that only a party receiving notice of appeal may move to dismiss, is to place with the appellant in any case where there are several parties adverse to him the power to select his opponents on appeal; naturally he would choose those least interested in sustaining the judgment.”

In the earlier case of *Blanc v. Rodgers*,<sup>3</sup> the directly opposite view appears to have been taken, but it was there merely decided that no one not a party to the record on motion for new trial was a necessary party to an appeal from the order denying the motion,

<sup>2</sup> See Rule V. The motion must specify with particularity the precise grounds upon which it is made. A motion “that no sufficient undertaking on appeal was ever filed in said cause” is insufficient. *Jackson v. Barrett*, 12 Idaho, 465, 86 Pac. 270.

<sup>2a</sup> *Lamet v. Miller*, 68 Cal. 521, 9 Pac. 669.

<sup>2b</sup> *Bell v. Southern Pacific Co.*, 137 Cal. 77, 69 Pac. 692.

<sup>2c</sup> 112 Cal. 147, 44 Pac. 457.

<sup>3</sup> *Blanc v. Rodgers*, 47 Cal. 606; look at *Senter v. de Bernal*, 38 Cal. 637. And as to motions in the court below, see *Estate of Aveline*, 53 Cal. 259.

and that a motion to dismiss for want of jurisdiction on the ground that a codefendant who was not a party to the motion had not been served with notice of appeal from such order was of no avail, such codefendant not being a necessary party to such appeal, and not adverse within the rule of *Senter v. De Bernal*. So that the true rule seems to be that any party, adverse within the well-understood rule of *Senter v. De Bernal*, may make the motion to dismiss, whether served with notice of appeal or not.

The motion to dismiss must, as a matter of course, be made to the supreme court, as the court below has no power to dismiss an appeal.<sup>4</sup>

And where the motion is upon the ground that there exists some technical defect in the transcript, it must be taken as required by Rule XV, the operation of which has already been considered.<sup>5</sup> Where a motion to dismiss for some technical reason is filed, and the cause is submitted in briefs before the disposition of the motion, the respondent may urge the objection in his brief, and if well taken it will prevail.<sup>6</sup>

An appeal may, of course, be dismissed on appellant's motion at any time, with or without notice, in the absence of any infringement of respondent's rights. Sometimes, however, there is a question as to whether the person moving to dismiss is vested with the necessary authority. Thus, in *Allen v. San Bernardino Co.*,<sup>7</sup> where the county was appellant, and represented by special counsel, the district attorney made the motion to dismiss, pursuant to a resolution of the board of supervisors. The court held that as between the board and the district attorney, on the one hand, and an attorney claiming to be special counsel, on the other, the former are superior in authority, and have a right to control all proceedings in a case in which the county is a party, at least in the absence of an objection by the attorney general.

The appellate court will dismiss an appeal of which it has no jurisdiction on its own motion, whether there is a motion or

<sup>4</sup> *Younger v. Pagles*, 60 Cal. 517; *McGarrahan v. New Idria Co.*, 49 Cal. 331, 11 Morr. Min. Rep. 641; and see generally *People v. Center*, 54 Cal. 236; *Buckman v. Whitney*, 28 Cal. 555.

<sup>5</sup> See section 270, *ante*; and look at *Cook v. Klink*, 8 Cal. 347; *Comstock v. Clemens*, 10 Cal. 77.

<sup>6</sup> *Lynch v. Dunn*, 34 Cal. 518; and see generally *Page v. Latham*, 60 Cal. 601.

<sup>7</sup> 72 Cal. 450, 14 Pac. 18. The case of *Woodbury v. Nevada Southern Ry. Co.*, 115 Cal. 85, 46 Pac. 862, 120 Cal. 367, 52 Pac. 650, and 121 Cal. 165, 53 Pac. 450, is an interesting case in this connection.

whether the point is raised by counsel or not.\* But if the question of jurisdiction is not involved, the appellate court will not consider any ground not set out in a motion to dismiss. Thus, on a motion to dismiss because of a failure to serve the notice of appeal on all adverse parties, the supreme court declined to consider the want of a sufficient undertaking as a ground for dismissal, because it was not raised by the respondent on his motion. It was pointed out that the undertaking may have been waived.†

An appeal in a criminal case will be dismissed conditionally upon the failure of appellant to return to the custody of the sheriff within a specified time, where it is made to appear that he has escaped from custody and is at large.‡

**§ 275. Dismissal upon Stipulation.**—Dismissals upon stipulation are authorized by Rule XXIV, which is as follows:

“An appeal or writ of error may be dismissed at any time upon and in accordance with the written stipulation of the attorneys of record of the respective parties. Such stipulation shall be accompanied by a certificate of the clerk of the court below, showing the names of attorneys of the respective parties and the date and character of the judgment or order appealed from. Upon and in accordance with such stipulation, and upon order of the court, the clerk shall enter such dismissal, and the *remittitur* shall issue thereon in accordance with the terms of such stipulation.”

**§ 276. Reinstatement of an Appeal Which has been Dismissed.**—Under the rule which was in force between 1859 and 1875<sup>1</sup> (and perhaps before that period), it was provided with reference to appeals dismissed during the first week of the term, without notice, for failure to file the transcript, that they could be “restored during the same term, upon good cause shown or notice to the opposite party,” but that unless so restored the dismissal was final. This provision was dropped by the amendment to the rules made in 1875.<sup>2</sup> The present rules do not contain any such provision, and by subdivision 5 of Rule IV it is provided that,<sup>3</sup>—

\* *Bienenfeld v. Fresno Milling Co.*, 82 Cal. 425, 22 Pac. 1113; and see *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371; and see section 272, *ante*.

† *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Clark v. Mohr*, 125 Cal. 540, 58 Pac. 176.

‡ *People v. Elkins*, 122 Cal. 654,

55 Pac. 599; also see *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32.

<sup>1</sup> See Rule III, 11 Cal. 408; 25 Cal. 658; 26 Cal. 670; 28 Cal. 686; 37 Cal. 706; 41 Cal. 697; and look at *Stark v. Barnes*, 2 Cal. 162.

<sup>2</sup> See 49 Cal. 8.

<sup>3</sup> See 9 Pac. C. L. J. 841. Same provision in 52 Cal. 680.

"When an appeal has been dismissed, under the provision of this rule, a certificate of that fact shall be transmitted to the clerk of the court below, *forthwith*, under the seal of this court, unless stayed by an order of the court."

It is not to be doubted, however, but that in a proper case the court would have the power to relieve a party against a dismissal taken against him through accident, mistake, surprise, or excusable negligence, upon proper application therefor.<sup>4</sup> The application, however, would have to be made before the going down of the *remittitur*, which would not be recalled unless "improvidently" issued.<sup>5</sup>

Upon application to reinstate an appeal dismissed, it would have to be shown in addition to the other facts that the appeal was taken in good faith, and that in the opinion of counsel the record shows substantial errors.<sup>6</sup>

Where a motion to reinstate an appeal has been denied, it cannot be known unless leave has been given by the court to renew it.<sup>7</sup>

**§ 277. When a Dismissal is a Bar to a Subsequent Appeal.**—The old Practice Act contained no provision upon this subject. It was provided, however, by rule of court that the appeal could be dismissed during the first week of the term, without notice, if the appellant failed to file the transcript as required; that an appeal so dismissed could be reinstated during the same term upon notice and upon good cause shown;<sup>1</sup> but that "unless so restored the dismissal shall be final, and a bar to any other appeal in the same cause." This provision was in force from 1859 (and perhaps earlier) until 1870.<sup>2</sup> In 1870 the words "and a bar to any other appeal" were dropped.<sup>3</sup> But the words "unless so restored the dismissal shall be final" were retained, and were doubtless equivalent in effect to the prior provision. In 1875 the whole provision was dropped,<sup>4</sup> and it has not been restored.

The provision above quoted applied in terms only to dismissals made during the first week of the term without notice.<sup>5</sup> But *a fortiori*, a dismissal for failure to file the transcript, made upon no-

<sup>4</sup> Upon proper application, see *Welch v. Kenney*, 47 Cal. 414.

<sup>5</sup> See *Rowland v. Kreyenhagen*, 24 Cal. 52; and see section 293.

<sup>6</sup> *Hagar v. Mead*, 25 Cal. 598; *Dorland v. McGlynn*, 45 Cal. 18.

<sup>7</sup> See *Reed v. Allison*, 54 Cal. 489.

<sup>1</sup> See section 276, *ante*.

<sup>2</sup> See Rule III, 11 Cal. 408; 25 Cal. 658; 26 Cal. 671; 28 Cal. 686.

<sup>3</sup> See 37 Cal. 706; 41 Cal. 697.

<sup>4</sup> See 49 Cal. 8.

<sup>5</sup> See 52 Cal. 679; and 9 Pac. C. L. J. 841.

tice, was a bar. Under the above rules it became well settled that a dismissal for failure to file the transcript was equivalent to an affirmance of the judgment, and therefore a bar to a second appeal.<sup>6</sup> There was no provision in the rules, however, that a dismissal for failure to file the undertaking or to file or serve the notice of appeal should be equivalent to an affirmance or should operate as a bar to a second appeal. And the decisions were that it did not so operate.<sup>7</sup>

As above stated, the rule with reference to the operation of a dismissal was dropped in 1875. This was probably because the Code of Civil Procedure contained a provision upon the subject. This provision is in section 955, which, as first enacted and as still in force, is as follows:<sup>7a</sup>

"Sec. 955. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."

The only cases found since this section went into operation are in relation to the failure to file the transcript in time.<sup>7b</sup> And it is held that a dismissal for such cause is a bar to a second appeal.<sup>8</sup> The language of the provision is very broad, and would seem to apply to dismissals for any cause, including a failure to serve or file the notice of appeal or to file the undertaking. It was probably in view of this provision that the rule was adopted that where the undertaking had not been filed or the notice had not been served or filed no appeal had been taken, and consequently

<sup>6</sup> *Karth v. Light*, 15 Cal. 324; *Chamberlin v. Reed*, 16 Cal. 207; *Rowland v. Kreyenhagen*, 24 Cal. 52.

<sup>7</sup> *Martinez v. Gallardo*, 5 Cal. 155; *Karth v. Light*, 15 Cal. 324; *Bornheimer v. Baldwin*, 42 Cal. 27; and look at *Roush v. Van Hagen*, 17 Cal. 121; *Gordon v. Wansey*, 19 Cal. 82; *Dooling v. Moore*, 19 Cal. 81. A dismissal upon stipulation was held in *Osborn v. Hendrickson*, 6 Cal. 175, not to be equivalent to an affirmance. But the contrary was held in *Chase v. Beraud*, 29 Cal. 138.

<sup>7a</sup> Section 397, *Mills' Annotated Code of Colorado*. See, also, section 4823, *Revised Codes of Idaho*; section 7117, *Revised Codes of Montana* (section 1741, *Code of Civil Procedure*); section 555, *Lord's Oregon Laws*; sections 1734 and 1735, *Rem. & Bal. Code of Washington* (sections 6518 and 6519, *Bal. Code*).

<sup>7b</sup> So far as can be gathered from the report of the case of *Columbet v. Pacheco*, 46 Cal. 650, the first appeal was not dismissed, but was abandoned by counsel. Attention does not seem to have been called to section 955, *California Code of Civil Procedure*.

The effect of these sections (see note 7a, *supra*) is that in the absence of an express reservation that dismissal is without prejudice, the appeal is an affirmance of the judgment or order appealed from. See *McIntosh etc. Co. v. Flathead Co.*, 32 Mont. 254, 80 Pac. 239.

<sup>8</sup> *Spinetti v. Brignardello*, 54 Cal. 521; *Smith v. Arnold*, 60 Cal. 234; *Page v. Latham*, 60 Cal. 601; *Garribaldi v. Garr*, 97 Cal. 253, 32 Pac. 170; *Barnhart v. Edwards*, 128 Cal. 572, 61 Pac. 176; *Thomas v. Superior Court*, 6 Cal. App. 629, 92 Pac. 739. Also *Coffin v. Edgington*, 2 Idaho, 627 (595), 23 Pac. 80.



that a motion to dismiss would be denied. Whether that rule prevails has been considered elsewhere.<sup>9</sup> If not, it is thought the language of section 955 is broad enough to cover the case of appeals dismissed for failure to file or serve the notice or to file the undertaking. But the court will probably dismiss appeals for such causes "without prejudice to another appeal," if its attention is called to the matter at the hearing. The only case that throws any light upon the proposition is that of *Estate of Rose*.<sup>10</sup> The first appeal was dismissed because prematurely taken.<sup>11</sup> The respondent contended that this was a bar to another appeal, because of the effect of section 955, but the court thought otherwise, saying:

"The bar of section 955 of the Code of Civil Procedure will apply where the dismissal is for want of prosecution (unless it be expressly made 'without prejudice'), or where it is on the merits; but an appeal dismissed because there was nothing to appeal from will not preclude another appeal in the same case, when a record shall have been made up from which an appeal can be taken."

In *Ritzman v. Burnham*,<sup>12</sup> where the appeal was dismissed for some technical defect, the court said:

"Had the judgment appealed from been entirely void, I do not suppose such a dismissal would have made it a valid judgment, but, as it was merely erroneous, such dismissal did have the effect of putting it beyond attack for any error which could have been availed of by the appellant on that appeal."

But a dismissal of an appeal from the judgment would not be a bar to an appeal from an order denying a motion for new trial.<sup>13</sup>

A new appeal may be taken at once, after the order of dismissal without prejudice, even before the filing of the *remittitur*.<sup>14</sup>

<sup>9</sup> See section 272, *ante*.

<sup>10</sup> 80 Cal. 166, 22 Pac. 86.

<sup>11</sup> *Estate of Rose*, 72 Cal. 577, 46 Pac. 379.

<sup>12</sup> 114 Cal. 522. Where the appeal is absolutely void, the dismissal must be without prejudice, since the court is without jurisdiction to make any

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order that will be binding. *Coffin v. Edgington*, 2 Idaho, 627 (595), 23 Pac. 80.

<sup>13</sup> See *Fulton v. Cox*, 40 Cal. 101; and see section 2.

<sup>14</sup> *Jackson v. Barrett*, 12 Idaho, 465, 86 Pac. 270.

## CHAPTER XLIX.

## RULES OF PRACTICE AND DECISION IN THE APPELLATE COURTS.

- § 278. Duty of counsel in the presentation of the case.
- § 279. What points will be decided by the court—Waiver of points by counsel.
- § 280. Argument in the appellate court upon points not made in the trial court.
- § 281. One who does not appeal cannot avail himself of errors in the record, or be affected by an appeal to which he is not a party.
- § 282. A party will not be heard on an appeal from a judgment or order to which he consented in the court below.
- § 283. The appellate court is confined to the record before it, which it has no power to change.
- § 284. A right decision will not be reversed because it was based on a wrong reason—Where the reason of a decision does not appear, it will be presumed to have been adequately supported, if such a support exists.
- § 285. Presumption is in favor of the action of the court below—The party alleging error must make it affirmatively appear.
- § 286. A judgment or order will not be reversed for an error that was not injurious to the appellant.
- § 287. Where error is shown injury will be presumed unless the contrary affirmatively appears.
- § 288. Where there is a substantial conflict in the evidence, the appellate court will not disturb the decision of the court below.
- § 289. An exercise of discretion by the court below will, on appeal, be disturbed only for an abuse thereof.
- § 290. *Stare decisis*.
- § 291. Law of the case.
- § 292. Rehearings.
- § 293. *Remittitur*.
- § 294. Miscellaneous matters.

§ 278. Duty of Counsel in Presenting Case.<sup>1</sup>—The rules of the court require briefs to be filed, and sometimes an oral argument

<sup>1</sup> Section 282 of the California code prescribes and defines the duties of attorneys and counselors of law, and section 278 of the same code requires upon admissions an oath to "faithfully discharge the duties" as thus prescribed. Every attorney who

practices in the appellate courts and has to do with the presentation of causes therein is amenable to these provisions; and while no specific penalty is attached to the violation of the oath, or the failure or refusal to perform any of the duties thus

in addition.<sup>1a</sup> The failure to file briefs—points and authorities, so called—as required by the rules, is ground for affirming the

prescribed, except suspension or disbarment, the courts sometimes inflict upon those attorneys whose conduct is flagrantly derelict, without being corrupt or deserving of more severe punishment (see section 287, Code of Civil Procedure), certain minor penalties, which appear to be more or less fitted to the dereliction in question. The power of the court in this respect, in the present state of the law, is far short of being adequate, and disregard of those well-understood rules of professional ethics which members of the bench and bar are accustomed to regard as more or less indispensable to the proper presentation of cases in the higher courts, more often pass with not even a rebuke, where the state of the law is such as to render any notice at all worse than futile. Moreover, the courts no doubt refrain from bestowing well-merited punishment in many instances because of the fact that the punishment within their power falls heaviest upon the client, who is usually innocent of fault.

Nevertheless, the supreme court has always demanded conformity with the rules of conduct prescribed by the code, and oftentimes demand conformity with those not so prescribed, but equally well understood and recognized, and to secure such conformity sometimes impose penalties. Thus in *Sears v. Starbird*, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531, the court set aside the submission of the case, and struck appellant's brief from the files because of disrespectful language therein directed to the trial judge. So in *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846, where one of the attorneys was guilty of a similar offense, the court, by Mr. Commissioner Gibson, said:

"The explanation of appellant's counsel of his reflection in his brief upon the trial judge is hardly sufficient. We can easily conceive of a case where counsel, in the heat of

argument, during the excitement incident to a trial, might exceed the bounds of propriety and be excusable, but find it more difficult when counsel, after the excitement of the trial has passed, and the asperities it may have engendered been smoothed by the hand of time, deliberately, in the quietude of his chambers, pens in his brief that which is a reprehensible breach of the duty he owes the court and has sworn to perform."

So in *San Diego Water Co. v. San Diego*, 117 Cal. 556, 49 Pac. 582, the appellant's brief was ordered stricken from the files because of its "scandalous and impertinent" character reflecting upon the trial judge. So in *People v. Phelan*, 123 Cal. 551, 56 Pac. 424, where counsel were criticised for unfounded reflections upon the trial court. So in *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710, the brief of appellant was stricken from the files as containing disrespectful language. And see *Friedlander v. Sumner Co.*, 61 Cal. 116.

<sup>1a</sup> The present rules as to filing points and authorities are as follows: (Rule II:) "4. Thirty days after the filing of the transcript the appellant shall file with the clerk his printed points and authorities, and with it proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appeared separately in the superior court. Within thirty days after the service of appellant's points and authorities, the respondent shall file and serve his printed points and authorities; and within ten days after service of respondent's points the appellant may file a reply.

"In criminal cases the appellant shall file his points and authorities (with proof of service of a copy thereof on the attorney general) within ten days after the filing of the transcript. The attorney general shall file and serve his points and

judgment,<sup>2</sup> or dismissing the appeal.<sup>3</sup> And sometimes when there

authorities within ten days after service upon him of the appellant's points, and within five days thereafter the appellant may file and serve a reply. Such points and authorities may be either printed or type-written."

(Extension of Time:) "5. The time above limited for filing points and authorities shall not be extended except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor. No brief shall be filed after oral argument except by special order."

See 144 Cal. xli. Subdivision 9 authorizes the chief justice to make orders extending time to file briefs.

Subdivision 6 of Rule II provides for the filing of twenty-one copies (the same as the transcript).

(Calendar for Oral Argument:) "Rule IV. Thirty days after the commencement of a regular session the clerk shall, unless otherwise ordered by the court, place on the calendar for oral argument all cases which have been continued for such argument, and also, in the order in which the transcripts were filed, all cases in which points and authorities are on file, and also all motions and original proceedings pending and not under submission. Cases in *certiorari* shall, after the record is brought up by the return, be subject to the same rules with respect to argument and submission as cases on appeal." 144 Cal. xliii.

(Oral Argument:) "Rule XIX. No more than one counsel upon a side will be heard upon oral argument, except when otherwise ordered; but each defendant, or intervener, who appeared separately in the court below may be heard through his own counsel, unless the court otherwise order. The counsel for each party shall be allowed only one hour, unless an extension of time is ordered before the argument begins." 144 Cal. xlviii.

Under Rule XXVI all applications for prerogative writs, as *mandamus*, *certiorari*, prohibition, *procedendo*, and all applications of an *ex parte* character are required to be accom-

panied with a memorandum of authorities in support thereof.

Briefs are required, under Rule XVII, to be printed in the same form as transcripts.

Under the provisions of Rule XII the clerk of the appellate court is authorized, upon the deposit of the necessary funds, together with a copy of the transcript, to have the same printed. When this is done the time within which points and authorities require to be filed and served commences to run from the date of the filing of the printed copy.

In this connection, it may not be out of place to note that as this is a rule intended for the convenience of litigants, it must be strictly complied with. Failure to make the deposit required may result in a dismissal of the appeal just as though no attempt had been made to comply with the requirement as to filing a transcript at all. But failure to make such deposit may be excused, as where there was an understanding between the attorney for appellants and the clerk, and the attorney relied upon such understanding although the same was unauthorized on the part of the clerk. *Ward v. Healy*, 110 Cal. 587, 42 Pac. 1071.

<sup>2</sup> *Hickinbotham v. Monroe*, 28 Cal. 489; *Holm v. Roach*, 25 Cal. 37; *Edmonson v. Alameda Co.*, 24 Cal. 349; *Brewster v. Johnson*, 51 Cal. 222; *M. H. C. & M. Co. v. Woodbury*, 10 Cal. 188; *Estate of Montgomery*, 59 Cal. 583; *Faris v. Lampson*, 73 Cal. 190, 14 Pac. 674; *Scott v. Sowden* (Cal.), 16 Pac. 768; *Peek v. Peek*, 75 Cal. 298, 17 Pac. 213; *Drexler v. Tobacco Co.*, 78 Cal. 624, 21 Pac. 372.

The rule has undergone a material change since the decision of the earlier cases above noted. In *Peek v. Peek*, 75 Cal. 298, 17 Pac. 213, the court set aside an order of submission to enable the respondent to submit a brief, having delayed doing so because of the neglect of the attorney for appellant to file points and authorities. Mr. Commissioner Hayne, for the court, justified this ruling on the ground of order in the dispatch

is no appearance for the appellant when the cause is called for argument, the court affirms the judgment, although briefs are on

of the business of the court, and while discouraging such neglect, suggested a departure from the rule to the extent of limiting briefs filed out of time, or after the expiration of time required by the rule, or without permission of the court, to stand only as an argument upon the merits, all technical points being taken to have been waived, and this suggestion was adopted. This case thereupon became the leading one upon this point. In the later case of Campodonico v. Oregon Imp. Co., 85 Cal. 218, 24 Pac. 746, the court finally repudiated whatever remained of the old rule which prescribed affirmance as a penalty in all cases, and limited it to cases alone where the merits suggested affirmance; or, in fact, any penalty at all, except that the court may, in its discretion, refuse the appellant the privilege of an oral argument.

In Shafer v. Beecher, 54 Or. 273, 101 Pac. 899, the failure of appellant to file his brief within the time fixed by Rule XXXVII (91 Pac. xii), or to apply for an extension of time for the purpose, was held to require an affirmance of the judgment. To same effect, see Commercial Nat. Bank v. Temple (Or.), 109 Pac. 129; Buckner v. Oklahoma Nat. Bank, 25 Okl. 472, 106 Pac. 959; Reeves & Co. v. Brennan, 25 Okl. 544, 106 Pac. 959.

<sup>s</sup> Williams v. Hall, 24 Cal. 156; Fowler v. Harbin, 23 Cal. 630; People v. O'Brien, 39 Cal. 686. But if any brief at all be on file at the time the motion is made to dismiss for want of a brief of points and authorities, the court will not examine it to ascertain whether it is a sufficient compliance with the rule requiring points. Gregory v. Diggs, 108 Cal. 123, 41 Pac. 34.

Also, Gillespie v. Frisbie, 27 Okl. 861, 112 Pac. 968; Leavitt v. Bank, 26 Okl. 164, 109 Pac. 71; Fred Miller Brewing Co. v. Kelly, 27 Okl. 461, 112 Pac. 983; Waverly Inv. Co. v. Enid, 27 Okl. 553, 112 Pac. 992; Horner v. Goltry, 23 Okl. 905, 101 Pac. 1111; Des Moines Ins.

Co. v. Doggett, 27 Okl. 522, 112 Pac. 992; Missouri etc. Co. v. Wortman, 27 Okl. 455, 112 Pac. 1017; Le Breton v. Swartzel, 14 Okl. 521, 78 Pac. 323; Walker v. Hannevinle, 24 Okl. 152, 103 Pac. 585.

In Horner v. Goltry, 23 Okl. 905, 101 Pac. 1111, failure to file the brief of the plaintiff in error within the prescribed time was held to require the dismissal of the petition in error. In Hass v. McCampbell, 27 Okl. 290, 111 Pac. 543, the petition in error was dismissed for failure to serve briefs as required by Rule VII. In Roof v. Franks, 26 Okl. 392, 110 Pac. 1098, the writ of error was dismissed for failure of the brief to set out the instructions alleged to have been erroneous, *totidem verbis*, as required by Rule XXV (95 Pac. viii). And see Lynn v. Jackson, 26 Okl. 852, 110 Pac. 727, to same effect. The same rule requires that where error in the admission or rejection of evidence is alleged, the evidence must be set out in full substance in the brief; and in Great Western etc. Co. v. Davidson etc. Co., 26 Okl. 626, 110 Pac. 1096, the petition in error was dismissed for failure to comply with the rule in this respect; Terrapin v. Barker, 26 Okl. 93, 109 Pac. 931, to same effect. Also, Indian etc. Co. v. Taylor, 25 Okl. 542, 106 Pac. 863. In Monnington v. Cotteral, 26 Okl. 817, 110 Pac. 652, the appeal was dismissed for failure of plaintiff in error to prepare, serve and file a brief as required by Rule VII (95 Pac. vi). And see Cooper v. Chapman, 26 Okl. 600, 110 Pac. 722; School District v. Shelton, 26 Okl. 229, 109 Pac. 67; Leavitt v. Commercial National Bank, 26 Okl. 164, 109 Pac. 71; Baker v. Phelps (Okl.), 109 Pac. 72; and see Commercial National Bank v. Temple (Or.), 109 Pac. 129; A. F. Sharp-leigh v. Pritchard, 25 Okl. 808, 108 Pac. 360; Barker v. Forrest (Okl.), 108 Pac. 407; Butler v. Stinson, 26 Okl. 216, 108 Pac. 1103; Davis v. Elliott, 25 Okl. 433, 106 Pac. 838; Smith v. Smith, 55 Or. 128,

file; <sup>22</sup> but it is quite common, under such circumstances, for the case to be continued, if there be no objection by the opposing counsel. If there be neither briefs nor oral argument, the court will not look into the record to see whether any errors have been committed. This has frequently been announced. Thus in *Brown v. Tolles*,<sup>4</sup> where no brief was filed, Murray, C. J., delivering the opinion, said: "The counsel for the appellant has not adduced any argument, or vouchsafed any reason for his position; and we cannot, without some reason or reference to the testimony, be expected to wade through the record to find argument or invent pretexts for reversing the cause. If a party complains of error and seeks a reversal, it is due to us that he should show wherein the error consists. We cannot be expected to act in the double capacity of counsel and judges." So in *Edmonson v. Alameda County*,<sup>5</sup> where the cause was submitted without oral argument upon briefs to be filed, and the appellant failed to file his brief, the judgment was affirmed, and Sawyer, J., delivering the opinion, said: "This court will not perform the duties of counsel; it will not examine a record to see if it can find any errors upon which to reverse a judgment. If the appellant's counsel does not choose in some form to call the attention of the court to the points, provisions of the statute, and the authorities upon which he relies, the judgment will be affirmed." So in *Brewster v. Johnson* <sup>6</sup> the court said: "There was no oral argument of the cause, nor has either

105 Pac. 706; *Walker v. Hannerwinkle*, 24 Okl. 152, 103 Pac. 585.

Sometimes, however, the circumstances justify the court in overlooking the failure of the parties to comply with the rule requiring briefs to be filed within a fixed time. Thus, in *Campbell v. Order of Washington*, 53 Wash. 398, 102 Pac. 410, a day's delay was excused. And see *Sharkey v. Portland (Or.)*, 106 Pac. 331; *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444; *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9; *Brewer v. Howard*, 59 Wash. 580, 110 Pac. 384; *Price v. Werner (Or.)*, 111 Pac. 49; and see *Troy etc. Co. v. Drivers etc. Co.*, 13 Cal. App. 115, 109 Pac. 36.

Engagements in causes in other courts afford no excuse for failure to comply with the rule prescribing

the time within which briefs must be filed. *Flanagan v. Jones*, 54 Or. 271, 102 Pac. 301.

A motion to dismiss for failure to file briefs will be granted where no response is made to the motion. *Baker v. Phelps (Okl.)*, 109 Pac. 72.

<sup>22</sup> Section 1253, Penal Code, provides that "the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear." In *People v. Albitre*, 153 Cal. 367, 95 Pac. 653, the superior court held that under the provisions of this section "the failure of defendant to file a brief or appear on oral argument constitutes under our law sufficient reason for affirming the judgment and order."

<sup>4</sup> 7 Cal. 398.

<sup>5</sup> 24 Cal. 349.

<sup>6</sup> 51 Cal. 222.

party filed points and authorities. We decline to perform the duty of counsel by examining the record to ascertain if possible error may not have intervened in the court below. If an appellant omits to point out the errors of which he complains, the judgment will be affirmed without looking into the record. Judgment affirmed with twenty-five per cent damages."<sup>7</sup>

And the rule does not apply solely to the appellant, but the respondent is equally governed by it, and the court has upon occasion declined to consider that there was any defense to an appeal where counsel for respondent failed to submit a brief, and cases have even been affirmed where the only ground was insufficiency of the evidence, without examination, because of such failure. Thus in *Richter v. Fresno Canal Co.*<sup>8</sup> the court said:

"But as the respondent has not seen fit to file a brief or to argue the case orally, we do not feel called upon to perform the duty of counsel by hunting through the record for the purpose of discovering evidence to support the findings."

But there may be sufficient excuse for failure to argue an appeal, or even, if the judgment or order appealed from have been affirmed, to reinstate the appeal. This is particularly the case in criminal appeals and in capital cases. Thus in *People v. Busby*,<sup>9</sup> the appeal of defendant, convicted of murder, was placed upon the calendar, called for argument, and no appearance having been made, affirmed without examination of the record. Afterward, counsel for appellant having petitioned for the reinstatement of the case, upon a showing that he had been unable by reason of illness to appear for argument, which sickness also prevented the filing of a brief, the court expressed its readiness to grant such petition upon the showing made, if counsel had pointed

<sup>7</sup> And see, also, *Belloc v. Rogers*, 9 Cal. 123; *Williams v. Hall*, 24 Cal. 156; *People v. Leehon*, 8 Pac. C. L. J. 550; *People v. Romargie*, 8 Pac. C. L. J. 170.

<sup>8</sup> 101 Cal. 582, 36 Pac. 96; and also *Davis v. Hart*, 103 Cal. 530, 37 Pac. 486; *Kelly v. Bradbury*, 104 Cal. 237, 37 Pac. 872; *Mountain Tunnel Co. v. Bryan*, 111 Cal. 36, 43 Pac. 410; *Lawrence v. Johnson*, 131 Cal. 175, 63 Pac. 176. Also, *Flanagan v. Davis*, 27 Okl. 422, 112 Pac. 990; *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170 (leading case. See cases cited); *Buckner v. Bank*,

25 Okl. 472, 106 Pac. 959; *Reeves v. Brennan*, 25 Okl. 544, 106 Pac. 959; *Butler v. Stinson*, 26 Okl. 216, 108 Pac. 1103; *Ellis v. Outler*, 25 Okl. 469, 106 Pac. 957; *Missouri etc. Co. v. Long*, 27 Okl. 456, 113 Pac. 991.

It is probable, however, that this rule is subject to the qualification suggested in *Butler v. McSpadden*, *supra*, to the effect that the appellant's, or plaintiff's in error brief should appear to sustain his assignments of error, and justify a reversal.

<sup>9</sup> 113 Cal. 181, 45 Pac. 191.

out in the same any error in the record, or any plausible claim of error. The supreme court, in fact, has never been willing to affirm a judgment involving the death penalty without an examination of the record. In *People v. Clark*,<sup>70</sup> where appellant's case appeared to have been abandoned, no brief having been filed, or appearance entered for oral argument, the court, upon a submission by the attorney general, upon the record, did investigate the same, assuming, however, that the failure of counsel to prosecute the appeal arose solely from their conviction that no question of merit was presented thereby.

And where briefs are filed it is the duty of counsel to present all that is material to the points involved. Thus in *Williston v. Perkins*,<sup>8</sup> where the appellant's counsel in his brief made out a *prima facie* case of the insufficiency of the evidence to justify a finding of fact, and the respondent did not advert to the appellant's showing upon this point, the court modified the judgment, saying: "If there be in the voluminous record on file any evidence going to support the findings in the respect referred to, the respondent should have pointed it out. It is not our business to institute a search to find it."<sup>8a</sup> So in *Gavin v. Gavin*,<sup>8b</sup> where appellant's brief contained general statements to the effect that "the evidence was insufficient to justify the decision," that "the court erred," etc., but no reasons were given for such statements, and no authorities cited in support of the contention, the court affirmed the order appealed from, saying:

"Under these circumstances, we can hardly be expected to do the work of counsel, and elaborately hunt up and consider what counsel has not argued."

So in *Wheelock v. Godfrey*,<sup>8c</sup> where counsel for appellant contented himself in his brief with saying that he did not waive certain errors as set forth in the specification of errors, without any direction as to where they were to be found in the record of three hundred and seventy-three printed pages, the court nevertheless deemed itself justified in the conclusion that such errors were not important. So in *Tapscott v. Lyon*,<sup>8d</sup> where the appellant complained of errors in instructions, and said that "the specifications in his statement sufficiently indicate the instructions

<sup>70</sup> 121 Cal. 633, 54 Pac. 147.

<sup>8</sup> 51 Cal. 554.

<sup>8a</sup> See, also, *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.

<sup>8b</sup> 92 Cal. 292, 28 Pac. 567.

<sup>8c</sup> 100 Cal. 573, 35 Pac. 317.

<sup>8d</sup> 103 Cal. 297, 37 Pac. 225.



objected to, and he will not repeat them in his points," there being seventy-three such specifications of error in the statement, the supreme court said:

"I do not think this a compliance with the rule which requires an appellant to file and serve his points. In his points the appellant should at least specifically point out the errors he relies upon, and briefly state why he deems the rulings erroneous. The instructions are numerous and voluminous, and we cannot be expected to hunt through them to find those which the general discourse of appellant may apply to."

So in *People v. Gibson*,<sup>80</sup> where a large number of alleged erroneous rulings were merely assigned as such in appellant's brief without any accompanying suggestions as to the reason why they were so assigned, the court declined to deal with them in detail or seek the grounds thereof. So in *People v. Woon Tuck Wo*,<sup>81</sup> where the assignments of error on the part of the appellant were stated in his brief nakedly as points, by number, without any argument as to the reason for such assignment, the supreme court declined to pursue an independent inquiry of its own with a view to ascertain the reasons for or against the correctness of the rulings. So in *Alameda v. Cohen*,<sup>82</sup> the court held that an appellant who relies upon an erroneous ruling must point it out by page and folio, and that unless this was done the appellate court would refuse to read the transcript in search of it. So in *City Savings Bank v. Enos*,<sup>83</sup> it was held that assignments of error not referred to in appellant's brief were deemed waived. So in *People v. McLean* <sup>84</sup> it was held that alleged errors merely stated in appellant's brief, without argument or statement of reasons or authorities to show why the rulings were erroneous, will not be considered of sufficient importance to merit notice in the opinion of the court.

So in *Bell v. Staack*,<sup>85</sup> where there were two hundred and eighty-five specifications in the statement, and appellant's counsel contented themselves with a simple reference by page of the transcript the supreme court said:

"There is neither in the transcript nor brief any reference to the page or folio of the seven hundred and twenty-three page

<sup>80</sup> 106 Cal. 458, 39 Pac. 864.

<sup>81</sup> 120 Cal. 294, 52 Pac. 833.

<sup>82</sup> 133 Cal. 5, 65 Pac. 127.

<sup>83</sup> 135 Cal. 167, 67 Pac. 52.

<sup>84</sup> 135 Cal. 306, 67 Pac. 770. And to same effect, see *People v. Monroe*, 138 Cal. 97, 70 Pac. 1072.

<sup>85</sup> 151 Cal. 544, 91 Pac. 322.

transcript where any ruling complained of is shown, or any argument in support of the claim that the trial court erred to plaintiff's prejudice in any of these rulings. Under such circumstances we are justified in disregarding such claim altogether."<sup>9</sup>

So in numerous other decisions.<sup>8m</sup>

All the appellant's points should be made in his opening brief,<sup>9</sup> and the court may treat points not so made as having been waived, and disregard them.<sup>10</sup>

In some jurisdictions it has been held<sup>2</sup> that failure to file a brief, as the rule requires, is not necessarily fatal. Such failure may be excused.<sup>11</sup>

<sup>8m</sup> Whyte v. Rosencrantz, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; People v. Breen, 130 Cal. 72, 62 Pac. 408; Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416; People v. Cebulla, 137 Cal. 314, 70 Pac. 181; Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703; People v. Chutnacut, 141 Cal. 682, 75 Pac. 340; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Bell v. Southern Pacific Co., 144 Cal. 560, 77 Pac. 1124; Estate of Shively, 145 Cal. 400, 78 Pac. 869; People v. Mead, 145 Cal. 500, 78 Pac. 1047; Bird v. Potter, 146 Cal. 286, 79 Pac. 970; Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777; Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223.

Similar rules of court are to be found in practically all the other states, and have been held to be similar in scope and effect. Thus, in Jantzen v. Baptist Church, 27 Okl. 473, 112 Pac. 1127, the court declined, under the provisions of Rule XXV, which requires that where the party complains of instructions given or refused he shall set out *in totidem verbis*, separately in his brief, the portions to which he objects, to consider objections to instructions not so set out.

Rule XXV of the Oklahoma supreme court requires specifications of error to be separately stated in the brief. In Mahaney v. Union Investment Co., 23 Okl. 533, 101 Pac. 1054, the appeal was dismissed for failure to comply with this rule.

<sup>9</sup> Dougherty v. Henerie, 49 Cal. 686; Hihn v. Courtis, 31 Cal. 398.

<sup>10</sup> Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048; Hibernia etc. Soc. v. Farnham, 153 Cal. 578, 96 Pac. 9. In the last-cited case the supreme court held that it was at liberty to treat points for the appellant not raised in his opening brief, and raised for the first time in his reply brief as waived, where no good reason for such course appears, and it does not appear that appellant would be unjustly affected by the refusal of the court to consider them.

When counsel appear and orally argue a case upon its merits, and afterward, by leave of court, file briefs wherein reliance is upon objections to the statement exclusively, it was held that such objections were waived by such oral argument. Truckee Lodge v. Wood, 14 Nev. 293; Sweeney v. Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

<sup>11</sup> Johnson v. White (Or.), 112 Pac. 1083; and see Wood v. Fisk, 45 Or. 276, 77 Pac. 128, 738.

**§ 279. What Points will be Decided by the Court—Waiver by Counsel.**

1. *What Points will be Decided.*—As shown in the preceding section, the court has the right to require argument from counsel to aid it in determining the cause. But the court is not confined to passing upon the points raised by counsel, but will decide the cause upon the questions which appear to be involved, whether raised by counsel or not.<sup>1</sup> Nor will it always notice all of the arguments presented by counsel. In this regard Baldwin, J., delivering the opinion upon the application for rehearing in *Holmes v. Rogers*,<sup>2</sup> said: "Nor did we propose to follow the line of argument of counsel. It is not our habit to do so. An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions and of the principal reasons which have led us to them." Neither the old Practice Act nor the code, as first enacted, contained any provision as to what points the court should decide in passing upon the appeal. As a general rule, the court confined its decision to such questions as were necessary to a disposition of the appeal. But it was not an infrequent occurrence for it to pass upon questions which, though not necessary to a disposition of the appeal, had been argued by counsel and were likely to arise upon a retrial of the cause,<sup>3</sup> especially if such questions were of public importance,<sup>4</sup> and counsel requested a decision upon them.<sup>5</sup> But the court would not decide questions which were not necessary to a disposition of the appeal, nor likely to arise upon the retrial of the cause.<sup>6</sup> And it was said in one case that it would not

<sup>1</sup> *Hubbard v. Sullivan*, 18 Cal. 508; *Will of Bowen*, 34 Cal. 682; *Prost v. Moore*, 40 Cal. 347.

<sup>2</sup> 13 Cal. 191; and look at *Mahoney v. Wilson*, 15 Cal. 42.

<sup>3</sup> *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Richardson v. Williamson*, 24 Cal. 289; *Cahoon v. Marshall*, 25 Cal. 197; *Hicks v. Coleman*, 25 Cal. 122; *Robles v. Clarke*, 25 Cal. 317; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49; *Bond v. Pacheco*, 30 Cal. 530; *Anderson v. Fisk*, 36 Cal. 625; *Taylor v. W. P. R. R. Co.*, 45 Cal. 323; *Estate of Toomes*, 54 Cal. 509,

35 Am. Rep. 83; *Manly v. Howlett*, 55 Cal. 94.

<sup>4</sup> *Higgins v. Houghton*, 25 Cal. 252, 13 Morr. Min. Rep. 195; *Will of Bowen*, 34 Cal. 682.

<sup>5</sup> *Ferris v. Coover*, 11 Cal. 175; *Spring Valley W. W. Co. v. San Francisco*, 52 Cal. 111; *Wells, Fargo & Co. v. Coleman*, 53 Cal. 416. Counsel will not be allowed to treat such decision as mere *dictum*. *San Francisco v. S. V. W. W. Co.*, 53 Cal. 608.

<sup>6</sup> *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; and look at *Donner v. Palmer*, 51 Cal. 629; *Boggs v. Merced Min. Co.*, 14 Cal. 279, 10 Morr. Min. Rep. 334; *Whitney v. Board of Delegates*, 14 Cal. 479.

"anticipate the rulings of the court below on points that may not arise on the new trial, or furnish inferior tribunals with directions as to the manner of disposing of questions which may possibly come before them."<sup>7</sup> Nor will the court decide questions not raised in good faith.<sup>8</sup> Nor will the court determine matters not considered in the trial court. Its investigations are limited to the matters considered by the trial court.<sup>9a</sup>

The Code of Civil Procedure as amended in 1880 provided that ". . . The decision of the court shall be given in writing; and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. . . ."<sup>9</sup> The manifest intention of this provision was to require the court to determine all the questions presented on the appeal which are likely to arise upon the retrial, although the determination of less than all of such questions may be enough to reverse the judgment or order appealed from. It is probable this provision is merely directory.<sup>10</sup>

2. *Waiver of Point by Counsel.*—Counsel may waive a point at the argument,<sup>11</sup> or if the case has been decided upon a technical point, may waive such point and resubmit the case upon its

<sup>7</sup> *West v. Smith*, 5 Cal. 96; and look at *Gates v. Salmon*, 46 Cal. 361. In *Christopher v. Condodge*, 128 Cal. 581, 61 Pac. 174, the court held that it would not anticipate a ruling upon questions pending in the lower court between the same parties with respect to the same subject matter; that it would not consider the merits of an action prematurely, for the pleadings might be amended and the issues changed, even if it could go beyond the record which was before the court below at the hearing of the specific question, the determination of which is complained of, and appealed from.

<sup>8</sup> See *People v. Pratt*, 30 Cal. 223.

<sup>9a</sup> See *Marsteller v. Leavitt*, 130 Cal. 149, 62 Pac. 384.

<sup>9</sup> Section 53, California Code of Civil Procedure.

See note 1, section 295, *post*, for corresponding provisions of other codes, and for the remaining portion of the California section.

The effect of this provision was held in *Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477, to be that while it applies to all appeals, whether taken on bills of exceptions or statements of the case both in actions at law and suits in equity, in no form of appeal is the court required to pass upon and determine all the questions of law involved in the case unless a new trial is granted.

But see section 6253, Revised Codes of Montana, where an exception in this respect is made in appeals in equity cases.

<sup>10</sup> Provisions somewhat similar have been held to be merely directory. See *McQuillan v. Donahue*, 49 Cal. 157; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

<sup>11</sup> *Hatch v. Galvin*, 50 Cal. 441; *Mulcahy v. Glazier*, 51 Cal. 626; *Thompson v. Patterson*, 54 Cal. 542; *Beem v. McCusick*, 10 Cal. 538, 2 Morr. Min. Rep. 533. See, also, *Swafford v. Board of Education*, 127 Cal. 484, 59 Pac. 900.

merits;<sup>12</sup> and points so waived cannot be insisted on in a petition for rehearing;<sup>13</sup> and a waiver of any question may be incorporated in the record before the transcript is sent to the supreme court. Thus in *Glitzback v. Foster*,<sup>14</sup> where after service of the notice of appeal the parties stipulated that a certain sum was due, "hereby waiving all errors in record, referee's returns of amount due, also decree and execution," the supreme court held the stipulation to be binding, and refused to examine the errors waived. So in *Hihn v. Courtis*,<sup>15</sup> where the record contained a stipulation that if a certain question should be decided by the supreme court in a specified way, no error was committed by the court below, and the question was decided in the way specified, it was held that other questions could not afterward be raised.

Points may be waived by implication, or the court may indulge the presumption that points were waived by the language or the conduct of the attorneys. In *Neylan v. Green*<sup>16</sup> counsel for appellant referred to errors in law by reference to folios of the transcript, in the following language: "Having made so clear a case for the reversal of the order denying a new trial on the facts of the case, so far as errors are concerned, we simply point out where they are to be found in the transcript." The court said: "We do not suppose that the court will think it necessary to examine questions submitted to it in this manner."

So in *Piercy v. Piercy*,<sup>17</sup> where counsel for respondent directed his argument solely to the ground for a new trial upon which the order granting it was based, disregarding all other grounds upon which the motion was made, the supreme court held that while it was not confined to the ground stated, and might review all others stated in the motion, it would be presumed that the ground referred to in the brief was the only valid one.

No review will be had of any point not raised on the appellant's case. The respondent, who does not appeal, is not in a position to complain of any ruling, finding, order or judgment, made by the trial court, and only objections and exceptions of appellant can be considered.<sup>18</sup>

<sup>12</sup> *Cahoon v. Levy*, 10 Cal. 216.

<sup>13</sup> *Atherton v. Board of Supervisors of San Mateo*, 48 Cal. 157.

<sup>14</sup> 11 Cal. 37.

<sup>15</sup> 31 Cal. 398; and look at *Donner v. Palmer*, 51 Cal. 629.

<sup>16</sup> 82 Cal. 128, 23 Pac. 42.

<sup>17</sup> 149 Cal. 163, 86 Pac. 507; and see previous section (279), cases cited in notes 8 to 8m, inclusive.

<sup>18</sup> *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246, 18 Morr. Min. Rep. 353.

Jurisdictional points or questions of jurisdiction are never waived by implication, and may be raised at any time.<sup>10</sup>

**§ 280. Argument in the Appellate Court upon Points not Made in the Trial Court.**—It has frequently been said by the supreme court that it will not consider points “not made in the court below,” or “made in the appellate court for the first time.”<sup>1</sup> This

<sup>10</sup> See next section, note 2. And see *Neal v. Roach* (Or.), 107 Pac. 475, and cases cited.

<sup>1</sup> For instances, see:

*Arizona*: *Tevis v. Ryan* (Ariz.), 108 Pac. 461.

*California*: *Grogan v. Ruckle*, 1 Cal. 193; *Sutter v. Cox*, 6 Cal. 415; *Covillaud v. Tanner*, 7 Cal. 38; *Potter v. Carney*, 8 Cal. 574; *Douglass v. Kraft*, 9 Cal. 562; *Hentsch v. Porter*, 10 Cal. 555; *Markley v. Rand*, 12 Cal. 275; *McDonald v. Bear River Co.*, 13 Cal. 220, 1 Morr. Min. Rep. 626; *Randall v. Yuba Co.*, 14 Cal. 219; *Parke v. Hinds*, 14 Cal. 415; *Duff v. Fisher*, 15 Cal. 375; *De Leon v. Higuera*, 15 Cal. 483; *Minturn v. Burr*, 16 Cal. 107; *Baker v. Joseph*, 16 Cal. 173; *Mott v. Smith*, 16 Cal. 533; *Kuhland v. Sedgwick*, 17 Cal. 123; *Loucks v. Edmondson*, 18 Cal. 203; *Mamlock v. White*, 20 Cal. 598; *Gordon v. Clark*, 22 Cal. 533; *Towdy v. Ellis*, 22 Cal. 650; *Tibbetts v. Moore*, 23 Cal. 208, 9 Morr. Min. Rep. 348; *Coleman v. Woodworth*, 28 Cal. 567; *Stoddard v. Treadwell*, 29 Cal. 281; *Mendocino Co. v. Morris*, 32 Cal. 145; *King v. Myer*, 35 Cal. 646; *Wheeler v. Farmer*, 38 Cal. 203; *McAbee v. Randall*, 41 Cal. 136; *McCullough v. Clark*, 41 Cal. 298; *Bank of Stockton v. Howland*, 42 Cal. 129; *Raimond v. Eldridge*, 43 Cal. 506; *Gale v. Water Co.*, 44 Cal. 43; *Bell v. Knowles*, 45 Cal. 193; *Drake v. Foster*, 52 Cal. 225; *Wood v. Orford*, 56 Cal. 157; *Hodgdon v. Griffin*, 56 Cal. 610; *Deady v. Townsend*, 57 Cal. 298; *Ornbaum v. His Creditors*, 61 Cal. 455; *Hiatt v. Trustees*, 65 Cal. 481, 4 Pac. 464; *Yik Hon v. Water Works*, 65 Cal. 619, 4 Pac. 666; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *Scott v. Sierra Lumber Co.*, 67 Cal. 71, 7 Pac. 131; *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Brichman v.*

*Ross*, 67 Cal. 601, 8 Pac. 316; *Savings & Loan Soc. v. Moore*, 68 Cal. 156, 8 Pac. 824; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Alhambra etc. Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; *Knox v. Higby*, 76 Cal. 264, 18 Pac. 381; *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Laughlin v. Thompson*, 76 Cal. 287, 18 Pac. 330; *Carpenter v. Ewing*, 76 Cal. 487, 18 Pac. 432; *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Wallace v. Maples*, 79 Cal. 433, 21 Pac. 860; *Coburn v. Ames*, 80 Cal. 243, 22 Pac. 174; *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. 1134; *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48; *Preston v. Knapp*, 85 Cal. 559, 24 Pac. 811; *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132; *National Bank v. Holt*, 87 Cal. 158, 25 Pac. 272; *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546; *Carpenter v. Hathaway*, 87 Cal. 434, 25 Pac. 549; *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683; *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Davis v. Lezinsky*, 93 Cal. 126, 28 Pac. 811; *Campbell v. West*, 93 Cal. 653, 29 Pac. 219, 645; *Seligman v. Armando*, 94 Cal. 314, 29 Pac. 710; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106; *Johnson v. Visher*, 96 Cal. 310, 31 Pac. 106; *Labory v. Orphan Asylum*, 97 Cal. 270, 32 Pac. 231; *White v. National Bank*, 98 Cal. 166, 32 Pac. 979; *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51; *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271; *Colton etc. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878; *Shain v. Peterson*, 99 Cal. 486, 33 Pac. 1085; *Schmidt v. Brieg*, 100

language is loose and inaccurate, and is apt to convey the idea that the points must have been *argued* in the court below. But

Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Cooke v. Fowler, 101 Cal. 89, 35 Pac. 431; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; *In re Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595; Estate of Robinson, 106 Cal. 493, 39 Pac. 862; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Fudickar v. East Riverside Co., 109 Cal. 29, 41 Pac. 1024; Howland v. Oakland etc. Co., 110 Cal. 513, 42 Pac. 983; Ah Tong v. Earl Fruit Co., 112 Cal. 679, 45 Pac. 7; Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Poledori v. Newman, 116 Cal. 375, 48 Pac. 325; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; San Luis Obispo Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Frank v. Pennie, 117 Cal. 254, 49 Pac. 208; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Stockton etc. Works v. Glens Falls etc. Co., 121 Cal. 167, 53 Pac. 565; Barrett v. Lakeview etc. Co., 122 Cal. 129, 54 Pac. 594; Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Mock v. Santa Rosa, 126 Cal. 330, 58 Pac. 826; Estate of Scott, 128 Cal. 57, 60 Pac. 527; Broadway etc. Co. v. Wolters, 128 Cal. 162, 60 Pac. 766; Merchants' Ad-Sign Co. v. Los Angeles etc. Co., 128 Cal. 619, 61 Pac. 277; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570; Baum v. Roper, 132 Cal. 42, 64 Pac. 128; People v. Findley, 132 Cal. 301, 64 Pac. 472; Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Riverside etc. Co. v. Trust Co., 148 Cal. 457, 83 Pac. 1003; *In re Kilborn's Estate*, 158 Cal. 593, 112 Pac. 52; McPherson v. Alta etc. Co., 14 Cal. App. 353, 112 Pac. 193.

*Colorado*: Schilling v. Rominger, 4 Colo. 100; Denver etc. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79; Cone v. Montgomery, 25 Colo. 277, 53 Pac. 1052; Sigel etc. Co. v. Holly, 44 Colo. 58, 101 Pac. 68; Harrison v. Carlson, 45 Colo. 55, 101 Pac. 76; Healey v. Zobel, 45 Colo. 294, 101 Pac. 56; Portland etc. Co. v. O'Hara, 45 Colo. 416, 101 Pac. 773; Hinsdale etc. Co. v. Ogle, 45 Colo. 454, 101

Pac. 786; Guldman v. Wilder, 45 Colo. 551, 101 Pac. 759; Temple v. Teller Lumber Co., 46 Colo. 497, 106 Pac. 8; Grimes v. Greenblatt, 47 Colo. 495, 107 Pac. 1111; Messenger v. German-American etc. Co., 47 Colo. 448, 107 Pac. 643; Jakway v. Rivers, 48 Colo. 49, 108 Pac. 999; Rice v. Cassells, 48 Colo. 73, 108 Pac. 1001; Wolfer v. Redding, 48 Colo. 58, 108 Pac. 980; Benninghoof v. Palisade (Colo.), 108 Pac. 983; United States etc. Co. v. O'Conner, 48 Colo. 354, 110 Pac. 74; Kent etc. Co. v. Zimmerman, 48 Colo. 338, 110 Pac. 187; Sandberg v. Borstadt, 48 Colo. 96, 109 Pac. 419; Melcher v. Beeler, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181; Doty v. Heiser, 48 Colo. 490, 111 Pac. 67; Zobel v. Mining Co. (Colo.), 111 Pac. 843; Lavelle v. Julesburg (Colo.), 112 Pac. 774; Denver etc. Co. v. Rosuck, 7 Colo. App. 288, 43 Pac. 456.

*Idaho*: Meholin v. Carlson, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755; Foore v. Simon etc. Co., 18 Idaho, 167, 108 Pac. 1038; Johnson v. Gary, 18 Idaho, 623, 111 Pac. 855.

*Montana*: Mette etc. Co. v. Lowrey, 39 Mont. 124, 101 Pac. 966; Butte etc. Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078; Yergy v. Helena etc. Co., 39 Mont. 213, 102 Pac. 310; Ross v. Saylor, 39 Mont. 559, 104 Pac. 864; O'Meara v. McDermott, 40 Mont. 38, 104 Pac. 1049; *In re Koller's Estate*, 40 Mont. 137, 105 Pac. 549; Galvin v. O'Gorman, 40 Mont. 391, 106 Pac. 887; Maley v. Butte, 40 Mont. 453, 107 Pac. 411; Silver Bow Co. v. Davies, 40 Mont. 418, 107 Pac. 81; Smith v. Butte, 40 Mont. 445, 107 Pac. 409; Giovanetti v. Schab, 41 Mont. 297, 109 Pac. 141; Gleason v. Missouri etc. Co., 42 Mont. 238, 112 Pac. 394; Forquer v. North, 42 Mont. 272, 112 Pac. 439.

*Nevada*: McGurn v. McInnis, 24 Nev. 370, 55 Pac. 304, 56 Pac. 94; State v. Lawrence, 28 Nev. 440, 82 Pac. 614; Turley v. Thomas, 31 Nev.

this is not what is meant. The meaning is that the points must be made *of record* by some proceeding appropriate for that purpose. Thus the language above quoted is often applied to points with reference to the sufficiency of pleadings;<sup>2</sup> and when so used

181, 135 Am. St. Rep. 667, 101 Pac. 568; *Karna v. State Bank*, 31 Nev. 170, 101 Pac. 564; *Allen v. Ingalls* (Nev.), 111 Pac. 34.

*New Mexico*: *Radcliffe v. Chaves*, 15 N. M. 258, 110 Pac. 699; *Duncan v. Holder*, 15 N. M. 323, 107 Pac. 685.

*Oklahoma*: *Border v. Carrabine*, 24 Okl. 609, 104 Pac. 906; *Kansas City etc. Co. v. Shutt* (Okl.), 104 Pac. 51; *Kaufman v. Boismier*, 25 Okl. 252, 105 Pac. 326; *Coalgate Co. v. Bross*, 25 Okl. 244, 138 Am. St. Rep. 915, 107 Pac. 425; *Gann v. Ball*, 26 Okl. 26, 110 Pac. 1067; *Moore v. O'Dell*, 27 Okl. 194, 111 Pac. 308.

*Oregon*: *Alexander v. Munroe*, 54 Or. 500, 135 Am. St. Rep. 840, 101 Pac. 903, 103 Pac. 514; *Ferrari v. Beaver Hill Co.*, 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016; *Krebs Hop Co. v. Livesley*, 55 Or. 227, 104 Pac. 3; *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 987, 106 Pac. 444; *In re Murray's Estate* (Or.), 107 Pac. 19.

*Utah*: *Fee v. National Bank* (Utah), 106 Pac. 517; *Salt Lake etc. Co. v. Fox* (Utah), 108 Pac. 1132; *Sargent v. Union Fuel Co.* (Utah), 108 Pac. 928.

*Washington*: *Springfield etc. Co., v. Edgecomb etc. Co.*, 52 Wash. 620, 101 Pac. 233; *Ness v. Bothell*, 53 Wash. 27, 101 Pac. 702; *Hoffman v. Spokane etc. Co.*, 54 Wash. 179, 102 Pac. 1045; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026; *Belknap v. Platter*, 54 Wash. 1, 132 Am. St. Rep. 1097, 103 Pac. 432; *Northern Pacific Co. v. Myers-Parr Co.*, 54 Wash. 447, 103 Pac. 453; *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914; *Morrison v. Bernot*, 58 Wash. 302, 108 Pac. 772; *Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072; *Urquhart v. Coss*, 60 Wash. 249, 110 Pac. 1001; *Hall v. Northwest etc. Co.*, 61 Wash. 351, 112 Pac. 369.

*Wyoming*: *Bergquist v. West Virginia etc. Co.* (Wyo.), 106 Pac. 673.

A practical expression of the principle is to the effect that the appellate court will review the case only upon the theory advanced in the trial court, and that the appellant will not be permitted to try his case in the lower court upon one theory and in the higher court upon another.

*Arizona*: *Tavis v. Ryan* (Ariz.), 108 Pac. 461.

*Idaho*: *McDaniel v. Moore* (Idaho), 112 Pac. 317.

*Montana*: *Mette etc. Co. v. Lowrey*, 39 Mont. 124, 101 Pac. 966.

*Oklahoma*: *Overstreet v. Citizens' Bank*, 12 Okl. 383, 72 Pac. 379; *Harris v. First National Bank*, 21 Okl. 189, 95 Pac. 781; *Border v. Carrabine*, 24 Okl. 609, 104 Pac. 906; *Wattenbarger v. Hall*, 26 Okl. 815, 110 Pac. 911.

*Utah*: *Aaron v. Holmes*, 35 Utah, 49, 99 Pac. 450; *Twenty-second Corporation etc. v. Oregon etc. Co.*, 36 Utah, 238, 103 Pac. 243; *Schuyler v. Southern Pacific Co.* (Utah), 109 Pac. 1025.

*Washington*: *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593.

<sup>2</sup> *Grogan v. Ruckle*, 1 Cal. 193; *Sutter v. Cox*, 6 Cal. 415; *Kuhland v. Sedgwick*, 17 Cal. 123; *McCullough v. Clark*, 41 Cal. 298; *Duff v. Fisher*, 15 Cal. 375; *Minturn v. Burr*, 16 Cal. 107; *Towdy v. Ellis*, 22 Cal. 650; *Mendocino Co. v. Morris*, 32 Cal. 145; *McAbee v. Randall*, 41 Cal. 136; *Petersen v. Hornblower*, 33 Cal. 266; *Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271; *Gale v. T. C. Water Co.*, 44 Cal. 43; *Smith v. Penny*, 44 Cal. 161; *White v. San Rafael etc. Co.*, 50 Cal. 417; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Preston v. Knapp*, 85 Cal. 559, 24 Pac. 811; *Russ etc. Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747; *Seligman v. Armando*, 94 Cal. 314, 29 Pac. 710; *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51; *Fudickar*



it means, as a matter of course, that the questions must be raised by demurrer, or by motion to strike out, or, but more rarely, by

*v. East Riverside etc. Co.*, 109 Cal. 29, 41 Pac. 1024; *Cook v. Fowler*, 101 Cal. 89, 35 Pac. 431; *San Luis Obispo Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628; *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 Pac. 783; *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492; *Riverside etc. Co. v. Trust Co.*, 148 Cal. 457, 83 Pac. 1003.

If the objection to the complaint be that it wholly fails to state a cause of action, it is jurisdictional, and it is not essential that it should be raised in the lower court. See *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; *Kraemer v. Earl*, 91 Pac. 112, 27 Pac. 735; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466; *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492. Also, *Thornton v. Kaufman*, 35 Mont. 181, 88 Pac. 796; *Wyman v. Jensen*, 26 Mont. 227, 67 Pac. 114; *Whiteside v. Lebcher*, 7 Mont. 473, 17 Pac. 548; *Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697; *Quirk v. Clark*, 7 Mont. 31, 14 Pac. 669; *Badovinac v. Northern Pacific Co.*, 39 Mont. 454, 104 Pac. 543; *Leforce v. Haymes*, 25 Okl. 190, 105 Pac. 644 (and cases cited); *Alwin v. Morley*, 41 Mont. 191, 108 Pac. 778; *Robertson etc. Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795; *Aaron v. Holmes*, 35 Utah, 49, 99 Pac. 450. But if the objection is merely that the complaint is defective, and the parties tried the case in the lower court without raising the same, and as though the pleadings were sufficient, and the issue clearly and fully raised, it will be treated as sufficient in the appellate court. See *King v. Davis*, 34 Cal. 100; *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386, where it was held that it was too late to object to the manner of pleading an estoppel, in the appellate court, after having treated the same at the trial as having been sufficiently made; and see, to same effect, *Willey v. Crocker-Woolworth Bank*, 141 Cal. 508, 75 Pac. 106. Also *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497;

*San Luis Obispo Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075, where the plaintiff went to trial on the merits without objecting to defects in the answer, and the supreme court declined to consider such defects when raised for the first time on appeal. Also *Illinois T. & S. Bank v. Pacific etc. Ry. Co.*, 115 Cal. 285, 47 Pac. 60; *Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572, where objections to the sufficiency of the complaint were raised for the first time on appeal, and the supreme court declined to consider them, citing 36 Cal. 94; 45 Cal. 193; 51 Cal. 175; 76 Cal. 264, 18 Pac. 381, and 85 Cal. 1. Also *Bank v. Dodge*, 125 Cal. 77, 57 Pac. 687; *Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264; *Broadway Ins. Co. v. Wolters*, 128 Cal. 162, 60 Pac. 766, where the objection was sought to be raised in the appellate court for the first time that the complaint should have been in equity, but the court held that it was too late to raise this question on appeal after the action had been treated throughout as a case at law, without any objection or suggestion otherwise. Also *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091; *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278; *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105, where the contesting claimants litigated their conflicting claims fully, without objection to the method employed, and it was held that the losing party could not on appeal raise the objection for the first time that the case was not a proper one for interpleader. And also *Stockton etc. Works v. Glens Falls etc. Co.*, 121 Cal. 167, 53 Pac. 565, where the trial was conducted as though the averments of the cross-complaint were fully answered, the supreme court held that the defendant could not object for the first time on appeal that he should have had judgment on the pleadings; *Chamberlain v. Loewenthal*, 138 Cal. 47, 70 Pac. 932;

objection to evidence.<sup>2a</sup> So the language is often used with reference to the admissibility of evidence,<sup>3</sup> or to instructions given or refused,<sup>4</sup> or to irregularities,<sup>5</sup> or to rulings upon nonsuit;<sup>6a</sup> and when so used it means that there must have been a formal objection made in the trial court,<sup>6b</sup> and a ruling thereon, and formerly an exception in most instances,<sup>6c</sup> but not necessarily an argument thereon. So the language is often used with reference to motions which ought to have been made upon notice in the court below, such as a motion to dismiss an action for want of prosecution,<sup>6</sup> or a motion to retax costs.<sup>7</sup> An erroneous ruling upon questions of this character, properly raised in the court below, and saved by an appropriate record in a bill of exceptions, may be reviewed

*Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075. See, also, *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

But although such objections may be made at any time, they are not regarded with favor when made in appellate court for the first time when they might have been raised before. *Price v. Immal*, 48 Colo. 163, 109 Pac. 941.

But see *Western etc. Co. v. Merchants' etc. Co.*, 13 Cal. App. 4, 108 Pac. 891.

<sup>2a</sup> This was suggested in *Krasky v. Woolpert*, 134 Cal. 338, 66 Pac. 809.

<sup>3</sup> *Potter v. Carney*, 8 Cal. 574; *Covillaud v. Tanner*, 7 Cal. 38; *Randall v. Yuba County*, 14 Cal. 219; *Mott v. Smith*, 16 Cal. 533; *Mamlock v. White*, 20 Cal. 598; *Bell v. Knowles*, 45 Cal. 193; *Estate v. McCarty*, 58 Cal. 335; *Tebbs v. Weatherwax*, 23 Cal. 58; *Mayo v. Mazeau*, 38 Cal. 442; *Yik Hon v. Water Works*, 65 Cal. 619, 4 Pac. 666; *Scott v. Sierra Lumber Co.*, 67 Cal. 71, 7 Pac. 131; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125; *Knox v. Higby*, 76 Cal. 264, 18 Pac. 381; *Carpenter v. Ewing*, 76 Cal. 487, 18 Pac. 432; *Wallace v. Maples*, 79 Cal. 433, 21 Pac. 860; *Coburn v. Ames*, 80 Cal. 243, 22 Pac. 174; *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. 1134; *People v. Mauritzen*, 84 Cal. 37, 24 Pac. 112; *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683; *Colton etc. Co. v. Swartz*,

99 Cal. 278, 33 Pac. 878; *Poliodori v. Newman*, 116 Cal. 375, 48 Pac. 325; *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *Barrett v. Lakeview etc. Co.*, 122 Cal. 129, 54 Pac. 594; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826; *Estate of Scott*, 128 Cal. 57, 60 Pac. 527.

<sup>4</sup> *Sierra etc. Co. v. Baker*, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; *Liebrandt v. Sorg*, 133 Cal. 571, 65 Pac. 1098.

<sup>5</sup> *Alhambra etc. Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546; *Shain v. Peterson*, 99 Cal. 486, 33 Pac. 1085.

<sup>6a</sup> *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218; *Fogel v. Schmalz*, 92 Cal. 412, 28 Pac. 444.

<sup>6b</sup> See note 5c, below.

<sup>6c</sup> Section 647, Code of Civil Procedure, dispenses with formal exceptions in many cases where formerly exceptions were required. As to exceptions to rulings upon the admission or rejection of evidence, see section 107, *ante*. As to nonsuit, see section 119, *ante*. As to instructions, see section 127, *ante*. But, although formal exceptions are not required, where the same are dispensed with under section 647, there must be an objection.

<sup>6</sup> *Poole v. Caulfield*, 45 Cal. 107.

<sup>7</sup> *Stoddard v. Treadwell*, 29 Cal. 281; and see *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080.

on appeal; but otherwise, if raised for the first time in the appellate court.<sup>7a</sup> But it is never required that the record should show that the point was *argued* in the court below.

The rule has been enforced in connection with almost every conceivable question that might have been, but was actually not, raised in the trial court, review of which was nevertheless asked for in the appellate court. Thus it has been applied to a question of intervention;<sup>7b</sup> questions reviewable only on motion for new trial, where the appeal was from the judgment;<sup>7c</sup> and where the appeal was from the new trial order, and the question was whether the notice of intention was served in time or not;<sup>7d</sup> and to an objection that an amended complaint was served on the parties in person, instead of their attorneys;<sup>7e</sup> objection that the bill of exceptions was not served in time;<sup>7f</sup> objection to the right of a party to defend an action;<sup>7g</sup> objection to the right of a party to ask for the revocation of the probate of a will;<sup>7h</sup> objection to the competency of a witness;<sup>7i</sup> objection that an order of the trial court had not been obeyed;<sup>7j</sup> objection that the trial court abused its discretion in refusing permission to amend after demurrer sustained;<sup>7k</sup> and an objection to the form of the judgment of foreclosure of a mortgage.<sup>7l</sup> So that no principle or rule of appellate practice is more strongly entrenched, both by reason and by precedent, than that which requires objections or errors to be first brought to the attention of the trial court before the appellate court is asked to review them. But this does not mean, as above stated, that the contention must be argued in the trial court. Such a requirement has never been seriously advanced. Thus in

<sup>7a</sup> See *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080.

<sup>7b</sup> See *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105.

<sup>7c</sup> See *Ornbaum v. His Creditors*, 61 Cal. 455; *Davis v. Lezinsky*, 93 Cal. 126, 28 Pac. 811; *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570; *Lambert v. Marcuse*, 137 Cal. 44, 69 Pac. 620.

<sup>7d</sup> *Hodgdon v. Griffin*, 56 Cal. 610; *Briehman v. Ross*, 67 Cal. 601, 8 Pac. 316.

<sup>7e</sup> *Campbell v. West*, 93 Cal. 653, 29 Pac. 219, 645.

<sup>7f</sup> *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920.

<sup>7g</sup> *Labory v. Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

<sup>7h</sup> *In re Robinson*, 106 Cal. 493, 39 Pac. 862.

<sup>7i</sup> *Ah Tong v. Earl Fruit Co.*, 112 Cal. 679, 45 Pac. 7.

<sup>7j</sup> *Merchants' Ad-Sign Co. v. Los Angeles etc. Co.*, 128 Cal. 619, 61 Pac. 277.

A question of laches must be raised in the trial court. *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790.

<sup>7k</sup> *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132.

<sup>7l</sup> *National Bank v. Holt*, 87 Cal. 158, 25 Pac. 272.

*Carder v. Baxter*,<sup>8</sup> where the plaintiff was present but refused to argue his motion for new trial, the supreme court nevertheless reviewed and reversed the order made thereon, and Shafter, J., delivering the opinion, said: "But it is insisted for the respondents that the plaintiff abandoned his motion for a new trial by refusing to argue it in the court below. This point is not well taken. The statement sets forth specifically the grounds of the motion—the motion was duly made and submitted—and this includes everything essential to a prosecution of the proceeding." This case was approved and followed in *Chabot v. Tucker*,<sup>9</sup> where there was no appearance in opposition to the motion. So in *Lybecker v. Murray*,<sup>10</sup> where, there being no appearance for the defendant at the trial, the court ordered the answer to be stricken out and gave judgment by default, the order was reversed, the supreme court saying: "The error was none the less an error because the defendant was not present when it was committed." So in *San Francisco v. Certain Real Estate*,<sup>11</sup> where an order granting a motion for judgment on the pleadings recited that there was no opposition to the motion, the order was reversed, the court saying: "The record does not show that the defendant's attorney was present in court, and if he did not appear to the motion, there can be no inference that he consented to the judgment. If, however, he had been present, it may be that he was only passive and silent, and in that sense made no opposition to the judgment, choosing to stand upon his legal rights, and leaving the court to decide the question as it saw fit, without any suggestion from him."

It would seem, therefore, that it is not necessary to argue any question in the court below,<sup>12</sup> and it is very certain that there is no provision for incorporating the argument of counsel in the record on appeal. Consequently, the supreme court cannot know what was argued in the court below, and cannot concern itself with that question. If the record presents a question, the supreme court will not listen to a suggestion that it was not argued to the court below. Thus in *Myers v. South Feather Water Co.*,<sup>13</sup> Baldwin, J., delivering the opinion in answer to such a suggestion, said: "It is said that this defense was taken in argument for the first

<sup>8</sup> 28 Cal. 99. This case seems to overrule *Mahoney v. Wilson*, 15 Cal. 42; *Frank v. Doane*, 15 Cal. 302.

<sup>9</sup> 39 Cal. 434.

<sup>10</sup> 58 Cal. 186.

<sup>11</sup> 42 Cal. 513.

<sup>12</sup> Possibly the matter might be regulated by a rule of court.

<sup>13</sup> 10 Cal. 579, 2 Morr. Min. Rep. 541.

time in this court. This may be. But it is a defense which is directly and clearly set up in the answer." So in *Fuller v. Ferguson*,<sup>14</sup> in answer to a similar suggestion, Currey, J., delivering the opinion, said: "But it is now insisted on the part of the plaintiffs that such document was a forgery, and the instrument itself and the other documentary evidence in the case is relied upon as establishing this charge. The record fails to disclose that the point was made on the trial of the cause, and it is not pretended that this objection was suggested until after the case came to this court. But notwithstanding the omission, if the record contains internal evidence that the document is a forgery, it is not too late to raise the objection for the first time in this court." So in *Vassault v. Sietz*,<sup>15</sup> where it was contended that a defense of the statute of limitations, although pleaded, could not be insisted on in the supreme court because it was not argued in the court below, Rhodes, J., delivering the opinion, said:

"We have no means of ascertaining from the record whether it is true, as the counsel for the plaintiff insists, that the point was not urged in argument in the district court by the counsel of the defendants; but admitting it to be true, no rule is suggested by which a party is for that reason precluded from availing himself of every fact in issue found in his favor. The position that the point cannot be raised for the first time in this court has no application here. Had the court rendered judgment for the plaintiff, notwithstanding the evidence was such as to require a finding in favor of the defendants on the issue of the statute of limitations, and had they in moving for a new trial omitted to state that point as one of the grounds of their motion, then it might well be said, as was done in *McDonald v. Bear River Co.*, 13 Cal. 220, that the point could not be raised for the first time in this court. But where the defendants plead the statute, and the court finds all the facts necessary to sustain the issue on their part, and gives judgment in their favor, and the plaintiff appeals, there is no room for saying that they did not raise the point in the court below. The doctrine has no application in such a state of the record."

The foregoing decisions seem conclusive of the question. But aside from authority, it is manifest that if it had been the intention not to allow points to be made in the supreme court which

<sup>14</sup> 26 Cal. 546.

<sup>15</sup> 31 Cal. 225.

were not argued below; some provision would have been made for incorporating the argument in the record on appeal. But there is no such provision,<sup>16</sup> and consequently the supreme court cannot know what was argued in the court below, and cannot take that question into consideration.

The question of jurisdiction may be raised for the first time on appeal.<sup>17</sup> So, also, may a question upon an alleged error which results in a mistrial.<sup>18</sup>

§ 281. **A Party Who Does not Appeal cannot Avail Himself of Errors in the Record or be Affected by an Appeal to Which He is not a Party.**—The respondent cannot assign errors appearing in the record on appellant's appeal, or in any way avail himself thereof.<sup>1</sup> And where there was error in granting a new trial as to a certain defendant (who had obtained a nonsuit), it was held that the error could not be considered on an appeal by the other defendants from the order granting the new trial.<sup>2</sup> Where a judgment is against several defendants, only some of whom appeal, the judgment may be reversed as to the appellants, but will stand as to those who do not appeal.<sup>3</sup> A defendant who ap-

<sup>16</sup> See chapters in relation to the record on appeal from a judgment and the record on appeal from an order. In many cases, such as motions for new trial, motions made on affidavits, etc., the record is made up before the argument is made and no subsequent record is prepared. In such case it is evidently impossible for the record to show what was argued. And an argument has no place in any record.

<sup>17</sup> See note 2, *supra*. And see *Queen's Ins. Co. v. Cotney*, 25 Okl. 125, 105 Pac. 651, and cases cited; *Allen v. Ingalls* (Nev.), 111 Pac. 34; *Robertson etc. Co. v. Thomas*, 60 Wash. 514; 111 Pac. 795; *Duncan v. Holder*, 15 N. M. 323, 107 Pac. 685.

<sup>18</sup> See *Hickey v. Breen*, 40 Mont. 368, 106 Pac. 881, and cases cited.

<sup>1</sup> *Travers v. Crane*, 15 Cal. 12; *Paul v. Magee*, 18 Cal. 698; *Jackson v. Feather River Co.*, 14 Cal. 18, 5 Morr. Min. Rep. 594; *Hathaway v. Brady*, 23 Cal. 121; *Morley v. Elkins*, 37 Cal. 454; *People v. Noregea*, 48 Cal. 123; *Dougherty v. Henarie*, 47 Cal. 79; *Poppe v. Athearn*, 42

Cal. 606; *Bryan v. Idaho etc. Co.*, 73 Cal. 249, 14 Pac. 859. But see *Huntington v. Love*, 56 Wash. 674, 106 Pac. 185, where it was said that respondents, who had excepted to a finding of fact, were entitled to have the evidence in its support reviewed on an appeal prosecuted by his adversary.

If the respondent desires rulings upon points in the case he should take a cross-appeal. If he fails to do this the appellate court is precluded from reviewing such points. *Rockford Shoe Co. v. Jacob*, 6 Wash. 421, 33 Pac. 1057; *Langert v. David*, 14 Wash. 389, 44 Pac. 875; *Tacoma v. Tacoma etc. Co.*, 16 Wash. 288, 47 Pac. 738; *S. C.*, 17 Wash. 458, 50 Pac. 55; *Phillips v. Reynolds*, 20 Wash. 374, 72 Am. St. Rep. 107, 55 Pac. 316; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144.

<sup>2</sup> *McCreery v. Everding*, 44 Cal. 284.

<sup>3</sup> *Minturn v. Bayless*, 33 Cal. 129; *Lake v. Tebbetts*, 56 Cal. 481; *Nichols v. Dunphy*, 58 Cal. 605.

In a proceeding to recover possession of certain lands, where the judg-

peals has no right to have the judgment reversed as to those who do not appeal.<sup>4</sup> But if such an order is made, and a judgment against two defendants has been vacated and set aside on motion of one, after reversal on appeal by that one, the defendant who appealed cannot object to his codefendant participating in the resulting new trial.<sup>4a</sup> And where there are two defendants, and the demurrer of one of them to the complaint is sustained and that of the other is overruled, and judgment is given accordingly, and the plaintiff does not appeal, the error in sustaining the demurrer cannot be reviewed on the appeal of the defendant who appeals.<sup>5</sup>

Where only one defendant moves for a new trial, the others cannot appeal from the order disposing of the motion.<sup>6</sup> An appellant cannot have a reversal for errors affecting another party.<sup>7</sup> Thus an action against a number of defendants cannot be dismissed as against some who have appeared by demurrer on the ground that the summons had not been returned within three years and at the instance of defendants who had not appeared.<sup>8</sup> Appellants cannot avail themselves of defects in the service of summons on other parties.<sup>9</sup> So upon an appeal by the mortgagee from a judgment foreclosing a prior mortgage, no objections urged by the mortgagor defendant can be considered or reviewed.<sup>10</sup> So

ment is for defendants, the plaintiff cannot, upon appeal, complain that the evidence shows that one of the defendants is not entitled to the judgment, where the evidence shows that the other defendant is entitled to the whole property. *Le Clair v. Hawley* (Wyo.), 102 Pac. 853.

See, as illustrations of the principle, *Foster v. Winstanley*, 39 Mont. 314, 102 Pac. 574; *Sound etc. Co. v. Bellingham etc. Co.*, 53 Wash. 470, 102 Pac. 234; *Temple v. Teller etc. Co.*, 46 Colo. 497, 106 Pac. 8; *Dusenberry v. Horning* (Or.), 106 Pac. 1019; *Huntington v. Love*, 56 Wash. 674, 106 Pac. 185; *Turner v. Horton* (Wyo.), 106 Pac. 688; *Gibson v. Doyle* (Utah), 106 Pac. 512; *Pulos v. Denver etc. Co.* (Utah), 107 Pac. 241; *Cook v. Hensler*, 57 Wash. 802, 107 Pac. 178; *McIntyre v. MacGinniss*, 41 Mont. 87, 137 Am. St. Rep. 701, 108 Pac. 353; *Hipp v. Spencer*, 48 Colo. 433, 109 Pac. 1109; *Eastern etc. Co. v. Mannheim*, 59 Wash. 428, 110 Pac. 23.

The supreme court will not take notice of a judgment against one not a party to the suit, and not complaining. *Miller v. Shute*, 55 Or. 603, 107 Pac. 467. The court will not, on appeal, determine whether the instructions were erroneous as to the successful party. *Doyle v. Southern Pacific Co. (Or.)*, 108 Pac. 201. A party cannot complain of an instruction where the court at his request excluded all the evidence relating thereto. *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70.

<sup>4</sup> *Ricketson v. Richardson*, 26 Cal. 149.

<sup>4a</sup> *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

<sup>5</sup> *People v. Leet*, 23 Cal. 161.

<sup>6</sup> *Calderwood v. Brooks*, 28 Cal. 151.

<sup>7</sup> *De Leon v. Higuera*, 15 Cal. 483.

<sup>8</sup> See *Peck v. Agnew*, 126 Cal. 607, 59 Pac. 125.

<sup>9</sup> *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

<sup>10</sup> *Ambrose v. Drew*, 139 Cal. 665, 78 Pac. 543.

errors at law committed at the trial and excepted to by the defendant do not constitute ground for reversal of an order granting a new trial on plaintiff's motion.<sup>11</sup>

As heretofore noted,<sup>12</sup> the respondent will not be permitted to have a review of objections made by him upon his adversary's appeal. The reason is, as often given, that the appellate court will not review mere moot questions, points which are immaterial to a review of the judgment or order appealed from because they cannot be said to have entered into the decision resulting therein. For example, an appeal from a judgment on the merits in favor of defendant does not involve any question as to the sufficiency of the complaint raised by a demurrer which was overruled.<sup>13</sup> But there is an exception to this general rule. A defendant may always, and at every stage of the proceeding, even though while occupying the position of respondent on appeal, raise the question of an entire absence of an averment of fact essential to a recovery.<sup>14</sup> It is clear that although judgment was rendered in favor of the respondent, in such a case, yet such judgment was upon the merits, which he claims have no existence in point of fact. A reversal would have the effect of sending the cause back for a retrial only on the merits, and the question of the sufficiency of the complaint would have been affirmatively sustained.

**§ 282. A Party will not be Heard on Appeal from a Judgment or Order to Which He Consented in the Court Below.**—The rule is general that consent excuses error.<sup>1</sup> This rule applies not only

<sup>11</sup> De Haven v. McCauley, 138 Cal. 573, 72 Pac. 152.

<sup>12</sup> Section 154, *ante* (particularly the cases cited in note 9a of that section).

<sup>13</sup> See Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745.

<sup>14</sup> See Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; South San Bernardino Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699.

<sup>1</sup> An expression of this rule as applied to appeals is to be found in the case of Hibernia etc. Soc. v. Wayman, 152 Cal. 286, 92 Pac. 645, where Justice Angellotti said:

"It is the universal rule that a judgment or order will not be disturbed on appeal prosecuted by a

party who expressly consented to the making thereof. The doctrine is established in this state by a long line of decisions." Besides those cases cited in notes 2 to 8 below, the learned justice referred to the following: Mecham v. McKay, 37 Cal. 154; La Societe etc. v. Beardslee, 63 Cal. 160; San Francisco Savings Union v. Myers, 72 Cal. 161, 13 Pac. 403; Ouallahan v. Morrissey, 73 Cal. 297, 14 Pac. 864; Erlanger v. Southern Pacific Co., 109 Cal. 395, 42 Pac. 31; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Estate of Lorenz, 124 Cal. 495, 57 Pac. 381; Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 Pac. 82; Oliver v. Blair (Cal.), 5 Pac. 917.

In Ouallahan v. Morrissey, 73 Cal. 397, 14 Pac. 864, where the action



to steps taken during the progress of a trial, but also to judgments and orders made upon consent. Thus where an order on motion for new trial was made upon consent, and was afterward appealed from, the judgment was affirmed with twenty per cent damages.<sup>2</sup> So a demurrer which is overruled by consent,<sup>3</sup> or at the request of the party demurring,<sup>3a</sup> cannot be considered on appeal. So where a nonsuit is granted upon plaintiff's own motion, he cannot appeal from the judgment entered thereon,<sup>4</sup> unless when making the motion he obtained leave to move to have the nonsuit set aside.<sup>5</sup> So where a final judgment was entered against the defendants by consent, and the defendants afterward appealed

was dismissed by plaintiff, who afterward appealed from an order retaxing costs, it was said that, having consented to the judgment entered against him, he could not appeal therefrom except as to that to which he did not consent, that is the order taxing costs, which in the case at bar was not sufficient to give jurisdiction. Besides, it is not easy to see in what way an appellant from an order of dismissal under subdivision 1 of section 581, Code of Civil Procedure, under the conditions of this case, that is, where the plaintiff is appellant, could derive any benefit from such an appeal. So long as the plaintiff remains of the same mind as when he asked for the dismissal of his action, he will not take an appeal, and if he should desire to continue the prosecution, he must necessarily bring a new action, for no issue was raised under the old one, and a reversal of the order, even if it could be accomplished, would amount to naught.

See, also, *Thompson v. Connelly*, 43 Cal. 636; *Marius v. Bicknell*, 10 Cal. 217; and cases cited in notes 2 to 8, below.

The rule was thus expressed in the case of *Twitchell v. Risley* (Or.), 107 Pac. 459, where the court refused to allow an appeal from an order sustaining a demurrer to an answer, where the party subsequently consented to judgment: "It has been held by this court that no appeal lies from a judgment or decree rendered by consent of the parties. *Rader v. Barr*, 22 Or. 495, 29 Pac. 889; *Schmidt v. Oregon etc. Co.*, 28 Or.

9, 52 Am. St. Rep. 759, 40 Pac. 406, 1014. In the latter case it was held that, strictly speaking, such a decree is not given by confession or for want of an answer yet will be governed by section 548, B. & C. Comp. The purpose of an appeal is to bring up for review an erroneous action of the trial court; but the trial court performs no judicial act when an order, decree, or judgment is entered by consent. No appeal can be taken by either party from such decision, since the error, if any, is his own, and not the court's."

Upon a similar principle, it is well settled that a party cannot be heard to complain of error he has himself made, or induced the court to make. *Gaskill v. Washington etc. Co.*, 17 Idaho, 128, 105 Pac. 51. One who invites error will not be allowed a reversal of the judgment on that account. *Farmers' etc. Co. v. Riverside etc. Co.*, 14 Idaho, 450, 94 Pac. 761; *Gumaer v. Draper*, 33 Colo. 122, 79 Pac. 1040; *Aaron v. Holmes*, 35 Utah, 49, 99 Pac. 450.

<sup>2</sup> *Meerholz v. Sessions*, 9 Cal. 277; and see, also, *Brotherton v. Hart*, 11 Cal. 405.

<sup>3</sup> *Coryell v. Cain*, 16 Cal. 567, 5 Morr. Min. Rep. 226; *Conniff v. Kahn*, 54 Cal. 283. See, also, *Jackson v. Brown*, 82 Cal. 275, 23 Pac. 142.

<sup>3a</sup> *Haley v. Nunan*, No. 8,143, filed June 23, 1883.

<sup>4</sup> *Imley v. Beard*, 6 Cal. 666; *Sleeper v. Kelly*, 22 Cal. 456.

<sup>5</sup> *Natoma W. Co. v. Clarkin*, 14 Cal. 544; *Whipley v. Dewey*, 17 Cal. 314.

from it, the judgment was affirmed with ten per cent damages.\* And such consent may be given in advance and be made to depend upon a contingency, as in the case of a stipulation in an appeal bond that judgment be entered against the sureties if the judgment appealed from be affirmed or the appeal be dismissed.<sup>7</sup> So it is very common for parties to stipulate that a pending suit shall abide the event of an appeal in another action, and such a stipulation is binding. And where a party objects to an order being made, and his objection is sustained, the order sustaining the objection will be regarded as having been made upon his consent.\*

But this rule does not apply where it is apparent that the consent was given *pro forma* and merely for the purpose of hastening an appeal. This was held in *Mecham v. McKay*.<sup>8</sup> In that case the parties signed a stipulation that the motion for new trial on the part of said defendants in this action now pending in said court, may be overruled, that the order of said court staying all proceedings upon the judgment in favor of said plaintiff, be continued in force for ten days; and in case the said defendants perfect an appeal to the supreme court within said ten days, then and in that case the said order staying proceedings shall continue in full force and effect until the final determination of the rights of said parties on such appeal.

This stipulation was held to show that the consent was merely *pro forma*. And Crockett, J., delivering the opinion, said:

"We have several times decided that we will not review judgments and orders entered by consent. (*Brotherton v. Hart*, 11 Cal. 405; *Coryell v. Cain*, 16 Cal. 567, 5 Morr. Min. Rep. 226; *Sleeper v. Kelly*, 22 Cal. 456.) These decisions proceed upon the theory that by consenting to the judgment or order the party expressly waives all objection to it, and cannot be allowed afterward on appeal to question its propriety, because by consenting to it he has abandoned all opposition or exception to it. We are not inclined to retract or modify this proposition, but it is to be limited to cases where it does not appear from the record that the consent was given only *pro forma* to facilitate an appeal, and with the understanding on both sides that the party did not thereby intend to abandon his right to be heard on the appeal in opposition

\* *Spinetti v. Brignardello*, 53 Cal. 281; and see *Keys v. Warner*, 45 Cal. 60.

<sup>7</sup> *Meredith v. Santa Clara Min. Assn.*, 60 Cal. 617.

<sup>8</sup> *Fulton v. Cox*, 40 Cal. 101.

• 37 Cal. 154.

to the judgment or order. In other words, we will construe the stipulation according to the intention and understanding of the parties at the time, and give effect to it accordingly. If it appears from the record that it was intended by the parties to be only a *pro forma* judgment or order entered by consent for the mere purpose of hastening an appeal, and with no intention to waive an exception thereto, it would be a somewhat rigid ruling to give to the stipulation a conclusive effect not contemplated by the parties. We adopt the more liberal practice of construing the stipulation as the parties understood it at the time. At the same time we would not be understood as encouraging a loose practice in this respect, and recommend to attorneys greater care in framing stipulations, so as not to impose upon the court the necessity of construing doubtful clauses in them."

The rule presupposes consent by one competent to give a valid consent to an order against him. Thus it has been held that the rule could not be invoked to procure the dismissal of an appeal from an order obtained by consent adjudicating the appellant an incompetent.<sup>9a</sup> The court said:

"If the party is in fact mentally incompetent, his request or consent that he be so adjudged is unavailing for any purpose. He is incapable of making such request or giving such consent. (*McGee v. Hayes*, 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767.) If he be not in fact incompetent, his agreement that he is incompetent does not make him so, and the statute authorizes the appointment of a guardian on this ground only where, after full hearing and examination, it appears from the testimony that the person is in fact incapable of taking care of himself and managing his property. (Code of Civil Procedure, section 1764.) The consent of the alleged incompetent was therefore unavailing for any purpose, except perhaps as evidence upon the question of incompetency, and the attorney of her own selection, representing her in the proceeding, had no more power in this regard than had she. Instead of being barred from an appeal by any such consent, we are satisfied that if the order in question is based upon the consent of the incompetent, and is not the result of a full hearing and examination upon the merits, it should be reversed."

The failure to argue a motion or to appear at the hearing does not amount to a consent that it be granted.<sup>10</sup>

<sup>9a</sup> See *Guardianship of Sullivan*, 143 Cal. 462, 77 Pac. 153.

<sup>10</sup> See section 280, *ante*.

As to when consent will be presumed, see latter part of section 285, *post*.

§ 283. **The Appellate Court is Confined to the Record Before It, Which It has No Power to Change.**—It is a cardinal principle of appellate practice that the court of review derives its knowledge of the cause from a record made up in the court below. Such record consists of the papers designated by statute, and as has been explained, it is useless to send up papers not so designated, for they cannot be considered.<sup>1</sup> The original papers constituting the record remain in the court below, the supreme court being furnished with a duly authenticated transcript thereof. This transcript is conclusive, so far as the supreme court is concerned, and cannot be contradicted by extraneous evidence in that court,<sup>2</sup> even though such contradictory evidence be made a part of the record by stipulation of the parties.<sup>2a</sup> It has therefore been held that where the clerk's certificate stated that "sufficient undertakings on appeal in due form were properly filed," the supreme court held such statement to be conclusive, although attacked on motion to dismiss.<sup>2b</sup> And while the supreme court may, on suggestion of diminution of record, cause the transcript to be made a true copy of the originals remaining in the court below, it has no power over such originals, and cannot change them in any way.<sup>3</sup> This rule applies to all cases, but especially to cases where the decision appealed from was made upon a record previously prepared. If the supreme court should undertake to amend such a record, and then proceed to determine the appeal upon the amended record, it would not be reviewing the action of the court below, but would be passing upon a different case.<sup>4</sup>

<sup>1</sup> See section 265, *ante*; and look at section 229, *ante*.

<sup>2</sup> *Smith v. Brannan*, 13 Cal. 107; *Bonds v. Hickman*, 29 Cal. 460; *Boston v. Haynes*, 31 Cal. 107; *People v. Romero*, 18 Cal. 89; *Wormouth v. Gardner*, 35 Cal. 227; *Sanchez v. McMahon*, 35 Cal. 218; *In re Fifteenth Avenue Extension*, 54 Cal. 179; *Carey v. Brown*, 58 Cal. 180; *People v. Anderson*, 26 Cal. 129; *Hyde v. Boyle*, 89 Cal. 590, 26 Pac. 1092; *Vance v. McGinley*, 39 Mont. 46, 101 Pac. 247.

<sup>2a</sup> As where it is sought by stipulation to make the notice of intention

a part of the transcript for the purpose of contradicting the statement. *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700.

<sup>2b</sup> *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407.

<sup>3</sup> See section 271.

<sup>4</sup> See *Satterlee v. Bliss*, 36 Cal. 489; *Rogers v. Tennant*, 45 Cal. 184. See, also, the following later cases: *Boyd v. Burrell*, 60 Cal. 280; *In re Lamb*, 95 Cal. 397, 30 Pac. 568; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Mendocino Co. v. Peters*, 2 Cal. App. 24, 82 Pac. 1122. In this last case, where it was sought to cor-

So the only record which the appellate court will review is the record made up to the date of the appeal itself, and it will have naught to do with a record made up afterward. Thus in *People's Home Sav. Bank v. Sadler*<sup>4</sup> the district court of appeals of the first district was called upon to pass upon the question raised by a motion for an order remanding the cause, without either affirming or reversing the judgment appealed from, for the purpose of having the trial court act upon a showing of the death of the appellant, and determine anew the questions at issue as they might be affected by the fact of the death of the defendant. The appellate court held that it was limited to a consideration of the questions at issue as of the date of the appeal, upon a record made up as of that date; that if the judgment was affirmed it would be affirmed as of that date; if reversed, it would be the same as though no judgment had been rendered by the superior court. A record of matters subsequent to that event would clearly be irrelevant.

As a matter of course, the supreme court cannot look outside of the record before it.<sup>5</sup>

**§ 284. A Decision Which is Right will not be Reversed Because It was Based upon a Wrong Reason. And if It Does not Appear on What Ground the Decision was Made, It will be Presumed to have been Made upon a Ground on Which It can be Supported, if There be Such.**—The propositions involved here may conveniently be considered separately.

rect a bill of exceptions as to date of service of notice of intention so as to correspond with the date as it appeared on the notice itself, the district court of appeal in denying the motion said: ". . . It is well settled that a record authenticated by the trial court cannot be changed by the appellate court."

<sup>4</sup> 1 Cal. App. 189, 81 Pac. 1029.

<sup>5</sup> *McKinly v. Tuttle*, 42 Cal. 570; *Gates v. Walker*, 35 Cal. 289; *Fair v. Stevenot*, 29 Cal. 486, 11 Morr. Min. Rep. 11; *Oullahan v. Starbuck*, 21 Cal. 413. If, however, the counsel for a party prints in his brief a copy of a document not in the record, he at least cannot complain if the court treats it as properly before it. *Mott v. Reyes*, 45 Cal. 379. And in one case the court

seemed to think that some kind of credence could be given to the uncontradicted statement of counsel as to a document not in the record. *Hood v. Hamilton*, 33 Cal. 698. But this seems rather an extraordinary course. See, also, *People v. Marseller*, 70 Cal. 98, where it was held that alleged imperfections in the charge of the court to the jury could not be considered because the charge was not in the record.

As to a record of the supreme court, see *Wilson v. Broder*, 24 Cal. 190.

Matters referred to in the brief, but not contained in the record, cannot be considered. *Vance v. McGinley*, 39 Mont. 46, 101 Pac. 247.

1. *A Decision Which is Right will not be Reversed Because It was Based on a Wrong Reason.*—The supreme court reviews the action of the court below and not its arguments, and where the action is right, it is immaterial that the arguments which induced it are wrong. It is upon this principle that it is held that a judgment which is right upon the facts found will not be reversed because the conclusions of law are erroneous.<sup>1</sup> And the principle has other applications. Thus where the court below refused to give certain instructions because they were not requested as required by a rule of court, and this was assigned as error, Baldwin, J., delivering the opinion, said: "A conclusive answer is that the instructions are not correct. It is immaterial whether the reason for refusing the instructions be good or not, as we do not try the sufficiency of the arguments of the judge, but only the soundness of his conclusions."<sup>2</sup> "The reasons given for the decision may be bad, and the decision, at the same time, correct for other reasons. It is the action of the court that is presumed to be correct, and this presumption obtains even though the reasons given may be bad."<sup>2a</sup> So when the trial court refused an instruction because it was written in pencil, the instruction being misleading and erroneous, the supreme court held that it was not necessary to determine whether the reason given was valid or not.<sup>2b</sup> So where a motion for new trial was made upon several grounds, and granted upon a ground which the appellants contended was erroneous, the supreme court affirmed the order, and Currey, C. J., delivering the opinion, said: "Were we of opinion that the court was in error in respect to the exact question on which the order was made, we would not be justified in reversing it, provided there was any other ground on which the order should have been made. If for any cause the verdict and judgment ought to have been set aside, and a new trial granted, the order should be allowed to stand, whether the reason assigned for it was right or wrong. To hold otherwise would be to deprive the defendants of a right to which, if error intervened, they were entitled *ex debito justitiæ*."<sup>3</sup> So in *Coghill v. Marks*,<sup>4</sup> where the court

<sup>1</sup> See section 243, *ante*.

<sup>2</sup> *People v. Sears*, 18 Cal. 635; and see *Blevin v. Freer*, 10 Cal. 172.

<sup>2a</sup> *Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075; and see *Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904; *Boin v. Spreckels*, 155 Cal. 612, 102

Pac. 937; and see section 285, *post*, as to the rule of presumptions.

<sup>2b</sup> *Low v. Warden*, 77 Cal. 94, 19 Pac. 235.

<sup>3</sup> *Grant v. Moore*, 29 Cal. 644.

<sup>4</sup> 29 Cal. 673.

below granted a new trial on a ground which was erroneous, and it was contended for the appellant that the review should be confined to such reason, because of the provision of the Practice Act to the effect that the "court or judge granting or refusing a new trial shall state in writing the grounds upon which the same is granted or refused," the supreme court affirmed the order, and Shafter, J., delivering the opinion, said: "If it was intended to so limit the power of this court in error, that in reviewing the orders and judgments of district courts it could do no more than review the reasons given for rendering or entering them, the legislature has signally failed to express the intention. A rule of that kind would be both anomalous and improvident. Anomalous, for it would put us upon reviewing judicial arguments rather than judicial action; and improvident, inasmuch as rights would not unfrequently be lost for no better reason than that they had been adjudged to be such upon wrong grounds."

So in *Noyes v. Wood*,<sup>4a</sup> where a new trial was granted on a ground that was held by the supreme court to be untenable, the order was nevertheless sustained on another ground, the court saying:

"On this appeal the court is not confined to a consideration of the point on which a new trial was granted, but the order will be affirmed if, upon the whole record, it appears that a new trial should be had."

So in *White v. Merrill*<sup>4b</sup> the court said:

"No matter what reason the court below may assign for its action, this court is not bound by such reason. If this court finds that upon any ground or for any reason the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it."

So in *Wakeham v. Barker*,<sup>4c</sup> where a demurrer to the complaint was sustained on one of the two grounds assigned therein, the supreme court said:

"If well taken on any ground, this court will affirm the order of the court below, without regard to the reasons which the court may have assigned therefor."

So in *Wilson v. Carter*<sup>4d</sup> it was held that where it appears that a demurrer was properly sustained on any ground, it is not

<sup>4a</sup> 102 Cal. 389, 36 Pac. 766.

<sup>4b</sup> 82 Cal. 14, 22 Pac. 1129.

<sup>4c</sup> 82 Cal. 46, 22 Pac. 1131.

<sup>4d</sup> 117 Cal. 53, 48 Pac. 983.

material that it is also sustained on other grounds that may have been untenable. So in *Burke v. Maguire*,<sup>44</sup> the court said:

"The order sustaining the demurrer states that 'the same is hereby sustained upon the grounds as heretofore stated in the opinion on file herein.' It is claimed that the order cannot be affirmed, unless this court agrees with the lower court in the opinion referred to in the order. We do not so understand the law. If the complaint is insufficient upon any ground properly specified in the demurrer, the order must be sustained, although the lower court may have considered it sufficient in that respect and may in its order have declared it defective only in some particular in which we hold it to be good. The defendant is entitled to the decision of this court upon all questions presented by the demurrer and necessary to the decision made. (*Wilson v. Carter*, 117 Cal. 53, [48 Pac. 983]; *Wakeham v. Barker*, 82 Cal. 46, [22 Pac. 1131]; *White v. Merrill*, 82 Cal. 14, [22 Pac. 1129].)"

In the case of *Kauffman v. Maier*<sup>45</sup> the rule was stated as follows:

"The proposition of the appellant that this court is limited upon this appeal to a consideration of the grounds specified in the order granting the new trial is untenable. A party has the right to move for a new trial upon any or all of the grounds permitted by the statute, and if the record upon which his motion is based discloses more than one ground for which a new trial should be granted, the court cannot, by stating in its order that the motion is granted upon one ground only, and denied upon the others, deprive the party of the right to a review by this court of the entire record. The action of the court below is limited to granting or refusing a new trial, and except in those cases in which it is justified in limiting the new trial to one or more designated issues, the effect of an order granting a new trial is to place the cause in the position it held before any trial had been had. Upon an appeal from that order, this court will review the entire record upon which the order was based, and if there be found any error in the record which would have justified the court in making the order, the order will be affirmed, upon the same principles that an order sustaining a demurrer to a defective complaint will be sustained, even though the ground upon which the trial court sus-

<sup>44</sup> 154 Cal. 456, 98 Pac. 21.

<sup>45</sup> 94 Cal. 269, 48 Pac. 481, 18 L. R. A. 124.



tained it may be untenable. A motion for a new trial is a proceeding in the nature of a new action wherein the statement or bill of exceptions corresponds to the complaint, and the specifications of errors to a demurrer thereto, and the action of the trial court in sustaining the motion is to be treated on the same principles. If there be any grounds upon which its action can be upheld, the order will be sustained, irrespective of the particular grounds given by the court, whether in an opinion or by a statement in the order itself.

"A contrary rule might work great injustice. If a new trial is granted, the former decision is set aside, and the party whose motion has prevailed is not 'aggrieved,' and has no ground for an appeal. By the order granting the new trial the judgment is vacated, and the cause is in the same condition as when the issues were joined. But if upon an appeal from that order the action of this court is limited to a review of merely the ground designated by the lower court, and that ground should be held insufficient, the moving party would be deprived of the new trial to which the record might show that he is manifestly entitled."

And so in other cases.<sup>5</sup>

<sup>5</sup> See *Bolton v. Stewart*, 29 Cal. 615; *Chabot v. Tucker*, 39 Cal. 434; *Thompson v. Felton*, 54 Cal. 547; *People v. Crowey*, 56 Cal. 36; *McCarthy v. Loupe*, 62 Cal. 299; *People v. C. P. R. Co.*, 76 Cal. 29, 18 Pac. 90; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *Harnett v. C. P. R. Co.*, 78 Cal. 31, 20 Pac. 154; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. 772; *In re Kingsley*, 93 Cal. 576, 29 Pac. 244; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021; *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *In re Martin*, 113 Cal. 479, 45 Pac. 813; *Davey v. Southern Pacific Co.*, 116 Cal. 325, 48 Pac. 117; *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270; *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; *Newman v. Overland Co.*, 132 Cal. 73, 64 Pac. 110; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *Dundon v. McDonald*, 137 Cal. 1, 69 Pac. 498; *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439; *Newman v. Lassing*, 141 Cal. 174, 74 Pac. 761; *Ben Lomond Wine*

*Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332; *Weisser v. Southern Pacific Co.*, 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636; *Thompson v. California Construction Co.*, 148 Cal. 35, 82 Pac. 367; *Bresce v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A., N. S., 1059; *Wendling etc. Co. v. Glenwood etc. Co.*, 153 Cal. 411, 95 Pac. 1029; *Houghton v. Market Street Ry. Co.*, 1 Cal. App. 576, 82 Pac. 972; *Martin v. Markarian & Co.*, 1 Cal. App. 687, 82 Pac. 1072. And see other cases cited in following notes. Also, see *Vogel v. Minnesota etc. Co.*, 47 Colo. 534, 107 Pac. 1108, where, with reference to a certain finding of the trial court, the supreme court said: "We unhesitatingly adopt it as our own, not for the reason given by the learned trial judge, but for others hereinafter stated. It sometimes happens that entirely correct and proper findings are made, for which possibly inadequate and unsound reasons are stated. The force of such findings, however, are not necessarily impaired because the rea-

What is said above is founded upon the assumption that the record shows what the action of the court below was, and upon what ground it was based;<sup>6</sup> but it has been frequently held that if the order does not specify the grounds upon which it was based, and the record shows that it can be sustained on any of the grounds specified, it will not be disturbed.<sup>7</sup> If the order is silent, and the

son given therefor are not approved, if there be found in the record sufficient testimony to justify them." Also, *McCafferty v. Flinn* (Nev.), 107 Pac. 225.

"Ordinarily a judgment will not be reversed because a trial judge adopted a wrong reason in reaching a conclusion which might be right; but where it appears that a wrong reason was the result of a misconception of the law, which caused him to reach a wrong conclusion under the testimony, his judgment should be reversed." *Fleming v. Wells*, 45 Colo. 255, 101 Pac. 66.

If the trial court rules correctly, the fact that the ruling was based upon a particular point is immaterial; for if the point was inadequate, or constituted a wrong reason, the ruling would nevertheless be upheld on appeal. *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

Where the conclusion reached by the lower court was right, though the method of reaching it was wrong, the judgment based thereon will be sustained. *Tevis v. Ryan* (Ariz.), 108 Pac. 461. If the result arrived at is the correct one, it is immaterial that a wrong reason was given therefor. *Harper v. Independence etc. Co.* (Ariz.), 108 Pac. 701.

If a ruling excluding answers to certain questions is correct for any reason whatever, no error was committed, no matter what reason was given. *Holt v. Nielson* (Utah), 109 Pac. 470.

<sup>6</sup> As to a case where the court declined to pass upon all the grounds, see below.

<sup>7</sup> And if the grounds of the action of the court below be not shown by the record, the supreme court must presume in support of such action that it was upon some ground upon which it can be sustained if there be such. Thus, in *Weddle v. Stark*, 10 Cal. 301, where a motion for new

trial was made upon two grounds, viz., insufficiency of the evidence and errors in law, and the record did not show upon what ground the motion was granted, the supreme court affirmed the order on the ground that evidence was conflicting, and that the order must be deemed to have been made on that ground. So, in *Oullahan v. Starbuck*, 21 Cal. 413, a similar case, Field, C. J., delivering the opinion, said: "It is stated by the appellant's counsel that the only ground upon which the court below based its action in granting a new trial was a supposed error in its refusing to allow a peremptory challenge to a juror after he had been accepted, though not sworn. We do not doubt that such was the fact, but the record does not show this, and by its contents we must be governed. The record shows that the motion was also made on the further ground that the evidence was insufficient to justify the verdict, and does not indicate upon which of the two grounds it based its ruling. . . . Order affirmed."

The appellate court enters upon its investigation with the presumption that the ruling of the trial court was correct, and this presumption will be upheld if it can be done upon any reasonable hypothesis at all. *Smith v. Collie*, 42 Mont. 350, 112 Pac. 1070.

*Sherman v. Mitchell*, 46 Cal. 576; *Altschul v. Doyle*, 48 Cal. 535; *Pierce v. Schaden*, 55 Cal. 406; *People v. McAuslan*, 43 Cal. 55; *Thompson v. Felton*, 54 Cal. 547; *Clarkin v. Lewis*, 20 Cal. 634; *Gray v. Winder*, 77 Cal. 525, 20 Pac. 47; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439; and see cases cited in note 5, *supra*, and notes 7a and 7b, below.

record discloses a valid ground, it will be presumed in support of the action of the trial court that it was based upon that ground.<sup>7a</sup> If, for example, the order is one granting a new trial in an action where there was a jury trial,<sup>7b</sup> and one of the grounds of the motion is insufficiency of the evidence, if the record is silent as to the ground upon which the order was based, and the evidence is conflicting, it will be presumed that the court based its action upon that ground, and it will not be disturbed.<sup>7c</sup> If the ground referred to was expressly excluded, no such presumption will be indulged.<sup>7d</sup> But the exclusion must be set out in the order itself, which cannot be limited in any degree by the opinion of the court, even though such opinion be in writing.<sup>7e</sup> This rule is a corollary of the well-known rule as to conflict of evidence,<sup>7f</sup> and merely holds that if the ground of insufficiency of the evidence is specifically excluded by the trial court, conflicting evidence will not be exam-

<sup>7a</sup> See *Curtis v. Starr & Co.*, 85 Cal. 376, 24 Pac. 806; *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847; and see cases cited in previous notes, and note 7b, below; and see section 285, *post*, as to presumptions in general.

<sup>7b</sup> Although this limitation has been made, it is not always so made, and no reason has been suggested why the same rule cannot be held to apply where the trial was by the court in the first place. See *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26, where the court, citing *Curtiss v. Starr*, *supra*, and *Bjorman v. Redwood Co.*, 92 Cal. 500, 28 Pac. 591, said: "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court; and he is not bound by the rule as to conflicting evidence as is this court." Also, "In support of the order we must presume that the court changed its opinion as to the effect of the evidence and reached a different conclusion upon the hearing of the motion." And see to a like effect, *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791.

<sup>7c</sup> See *Savage v. Sweeney*, 63 Cal. 340; *Dewey v. Frank*, 62 Cal. 343; *Hook v. Hall*, 68 Cal. 22, 8 Pac. 596; *Tide Land Reclamation Co. v. Cunningham*, 71 Cal. 221, 16

Pac. 711; *In re Crozier*, 74 Cal. 180, 15 Pac. 618; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; *In re Martin*, 113 Cal. 479, 45 Pac. 813; *Tibbetts v. Bower*, 121 Cal. 7, 53 Pac. 359; *Newman v. Overland Co.*, 132 Cal. 73, 64 Pac. 110; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Petaluma v. White*, 152 Cal. 190, 92 Pac. 177; and see cases cited in previous notes.

<sup>7d</sup> See *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; *Newman v. Overland Co.*, 132 Cal. 73, 64 Pac. 110; *Siensen v. Oakland etc. Co.*, 134 Cal. 494, 66 Pac. 672; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439; *Thompson v. California Const. Co.*, 148 Cal. 35, 82 Pac. 367; *Bressee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A., N. S., 1059; *Brett v. Frank & Co.*, 153 Cal. 267, 94 Pac. 1051; *Wendling etc. Co. v. Glenwood etc. Co.*, 153 Cal. 411, 95 Pac. 1029.

<sup>7e</sup> See *Newman v. Overland Co.*, 132 Cal. 73, 64 Pac. 110; *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332; *Weisser v. Southern Pacific Co.*, 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636; *Bressee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A., N. S., 1059.

<sup>7f</sup> See section 288, *post*.

ined by the appellate court;<sup>78</sup> but if any other ground is excluded, the court will nevertheless examine it, and apply the rule that no matter what were the reasons of the trial court, whether expressed in the record or not, the appellate court will, with the single exception stated, examine the entire record, and if the order can be sustained upon any ground, it will not be disturbed.<sup>79</sup> Of course, if the ground upon which the decision is made is untenable, and there is no other, the order will be reversed. Thus, where a new trial was granted on the ground that a certain finding was not sustained by the evidence, the record showing that the finding in question was immaterial, as being upon averments in the com-

<sup>78</sup> See *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A., N. S., 1059, and cases cited.

<sup>79</sup> In *Newman v. Overland Co.*, 132 Cal. 73, 64 Pac. 110, the court said: " . . . And when this [insufficiency of the evidence] is made one of the grounds of the motion, although other grounds are also presented, if the order does not by direct language exclude this from the grounds upon which the motion is granted, it will be assumed that it was one of the grounds for making the order. . . . " And "the order entered in the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it." And see the other cases cited in note 76, *supra*.

The supreme court of Washington seems to have declined to go to the length here stated. In *Moore v. Marsh*, 59 Wash. 151, 109 Pac. 606, it was held that an order granting a new trial must stand or fall alone on the ground mentioned by the trial court. This was in strict accordance with the rule stated in the earlier case of *Armstrong v. Musser etc. Co.*, 43 Wash. 584, 86 Pac. 944, which, in turn, followed a number of earlier decisions, commencing with *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615, where the court said: "It is true that the granting of a motion for a new trial is, in a certain sense, discretionary with the trial court, and, if it were upon matters of fact, the appellate court would hesitate to set aside an order made by the

trial court unless it plainly appeared that the discretion was abused. But in the case at bar it is a pure question of law, and this court will act upon it independently and uncontrolled by the judgment of the lower court, as it would upon any other question of law which was brought to it upon appeal."

In other words, unlike the practice elsewhere, the supreme court will not go beyond the ground stated as the basis of the motion where it is an error of law alone, to ascertain whether there is any other ground upon which the order granting the motion could properly be made. The rule thus announced was that where an order granting a motion for a new trial upon questions of law and fact, shows that it is sustained upon one specific ground, stated as an error of law, which is erroneous, the supreme court will not determine whether the motion should have been sustained on other grounds. See *Gray v. Washington etc. Co.*, 27 Wash. 713, 68 Pac. 360. In *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011, it was held that where the new trial order specified the exact ground on which it was granted, and disclosed that it involved a question of law, only, the order will be reversed on appeal if the ground on which the new trial was based was insufficient, without regard to the trial court's discretion. See, also, *Allen v. Northern Pacific Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Tham v. Steeb etc. Co.*, 39 Wash. 271, 81 Pac. 711.

plaint admitted by the answer, and there was no other valid ground upon which the order could be sustained, it was reversed.<sup>7k</sup> So, if there is no adequate ground in the record save one that had been relieved against in the course of the proceedings, as, for example, where failure to propose the statement in time had been relieved against by a proceeding under section 473, Code of Civil Procedure, it was held that the ground in question could not be considered in support of an order denying a motion for a new trial.<sup>7l</sup>

The effect of all modern decisions is to render any expression of the trial judge in explanation of the action of the trial court in any matter whatever wholly nugatory, except in the single case of an exclusion of the ground of insufficiency of the evidence where motions for new trial are granted on other grounds. The exception is based, as above stated, on the principle which limits the appellate court in its review of the evidence to cases where there is no conflict, and where the decision is so plainly contrary to the evidence that it is no longer a question of fact, but one of law. For the same reason, if the ground in question is not expressly excluded, the appellate court is at liberty to treat it as having been determined either way, as the support of the order appealed from requires.<sup>7m</sup>

2. *Failure of the Court Below to Act upon a Question Presented by the Record.*—It is to be observed that the rule established by the cases cited presupposes that the court below *has acted*. It is manifest that if the court below has not acted the rule does not apply, and there may be cases where the court acts upon a *portion* of the case before it, and leaves the remainder untouched. Thus where a complaint is demurred to, or a motion for a new trial made upon several grounds, the court below may, and frequently does, base its order upon some one of the grounds, leaving the others unnoticed. Where *it appears* that such was the fact, there may be two cases, viz., where the unnoticed grounds involve questions of discretion and where they provide pure questions of law.

(a) Where the unnoticed grounds involve questions of discretion it is believed (although no decision has been found upon the

<sup>7k</sup> Hayes v. Fine, 91 Cal. 391, 27 Pac. 772.

<sup>7l</sup> Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104.

<sup>7m</sup> See section 285, *post*, as to the rule of presumption in general.

point) that the supreme court should not undertake to determine them for the first time, but if the case cannot be disposed of upon other points, should send it back to the court below for the orderly disposition of the matter. Unless this is done the grossest injustice may result. Suppose, for example, that a motion for new trial is made upon two grounds, viz., error in law, and insufficiency of the evidence, and that there is a conflict of evidence.

If the trial court should *erroneously grant* the motion on the ground of error of law, or if it should rightly deny the motion on that ground, in either case expressly declining to consider the other ground, it would seem that the supreme court should reverse the order, with instructions to the court below to consider the ground of insufficiency, and, if it finds the evidence insufficient, to grant the motion, otherwise to deny it.

(b) Where the case involves questions of law only, no practical difficulty would arise. For the supreme court would look at the questions from precisely the same point of view as the court below. And while it might be error for the court below not to rule upon a question presented by the record, it would be error without injury.

**§ 285. The Presumption is in Favor of the Action of the Court Below, and the Party Alleging Error must Make It Affirmatively Appear.**—If the record does not show what the action of the court was, and upon what it was based, and all the material circumstances in regard to it, it will be presumed to have been regular and correct.<sup>1</sup> “On appeal all intendments are in favor of the regularity

<sup>1</sup> As to the general rule, see the following cases: *Rabe v. Wells*, 3 Cal. 148; *Allen v. Phelps*, 4 Cal. 256; *Gates v. Buckingham*, 4 Cal. 286; *Jessup v. King*, 4 Cal. 331; *De Johnsson v. Sepulveda*, 5 Cal. 149; *Ford v. Holton*, 5 Cal. 319; *Morgan v. Hugg*, 5 Cal. 409; *Clarke v. Ray*, 6 Cal. 600; *Freeborn v. Glazier*, 10 Cal. 337; *McDonald v. B. & A. W. W. Co.*, 13 Cal. 220, 1 *Morr. Min. Rep.* 626; *Baker v. Joseph*, 16 Cal. 173; *People v. Conner*, 17 Cal. 354; *People v. Robinson*, 17 Cal. 363; *Herri-ter v. Porter*, 23 Cal. 385; *People v. Williams*, 24 Cal. 31; *Waldie v. Doll*, 29 Cal. 555; *People v. Jocelyn*, 29 Cal. 562; *Dimick v. Campbell*, 31 Cal. 238; *Moyes v. Griffith*, 35 Cal.

556; *Todd v. Winants*, 36 Cal. 129; *Talbert v. Hopper*, 42 Cal. 397; *People v. McAuslan*, 43 Cal. 55; *Walbridge v. Ellsworth*, 44 Cal. 353; *Moore v. Massini*, 43 Cal. 389; *Wilson v. Dougherty*, 45 Cal. 34; *Ferrer v. Home Mut. L. Ins. Co.*, 47 Cal. 416; *Doyle v. Franklin*, 48 Cal. 537; *Roper v. McFadden*, 48 Cal. 346; *Miller v. Sharp*, 49 Cal. 233; *Canning v. C. P. R. Co.*, 50 Cal. 166; *Mulcahy v. Glazier*, 51 Cal. 626; *Livermore v. Webb*, 56 Cal. 489; *Strathern v. Dakin*, 63 Cal. 478; *Nash v. Harris*, 57 Cal. 242; *Larkin v. Larkin*, 76 Cal. 323, 18 *Pac.* 396; *Gordon v. Donahoe*, 79 Cal. 501, 21 *Pac.* 970; *Pardy v. Montgomery*, 77 Cal. 326, 19 *Pac.* 530;

of the action of the trial court. Error will never be presumed,

Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; Caruthers v. Henaley, 90 Cal. 559, 27 Pac. 411; Parker v. Altschul, 60 Cal. 380; Paige v. Roeding, 96 Cal. 388, 31 Pac. 268; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; People v. Douglass, 100 Cal. 1, 34 Pac. 490; Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393; In re Yoakum, 103 Cal. 503, 37 Pac. 485; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; In re Bates, 105 Cal. 646, 38 Pac. 941; People v. Gibson, 106 Cal. 458, 39 Pac. 864; Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. 400; Leadbetter v. Lake, 118 Cal. 315, 50 Pac. 686; McLennan v. Wilcox, 126 Cal. 51, 58 Pac. 305; Estate of Roach, 139 Cal. 17, 72 Pac. 393; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Woods v. Diepenbrock, 141 Cal. 55, 74 Pac. 546; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Wyckoff v. Pajaro etc. Co., 146 Cal. 681, 81 Pac. 17; Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70; Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080; and see cases cited in remaining notes of this section; and see sections 130 and 151, *ante*.

The decision of a court of general jurisdiction is presumed to be correct until the contrary is shown. Watt v. Decker, 16 Idaho, 184, 101 Pac. 253. On appeal it will be presumed that official duty has been performed; hence, that, in a particular case, it was properly transferred from the justice to the circuit court, that the court had jurisdiction of the subject matter, and that, as an answer was filed, it also had jurisdiction of the judgment defendant. White v. Brown, 54 Or. 7, 101 Pac. 900. Where the record fails to show what disposition was made of a demurrer and motion, but shows default for want of an answer, it will be presumed that they were overruled. Smith v. Clyne, 16 Idaho, 466, 101 Pac. 819. In the absence of a showing in the record, it will not be presumed that the trial court abused its discretion. Crosby v. Portland Ry. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204. All

presumptions are in favor of the regularity of the proceedings of the trial court. Adams v. Rogers, 31 Nev. 163, 102 Pac. 699. The appellate court commences the investigation of every appeal with the presumption that the trial court did not err. Toole v. Weirick, 39 Mont. 359, 133 Am. St. Rep. 576, 102 Pac. 590. The supreme court will presume that the pleadings contained in the transcript certified by the clerk constitute the judgment-roll. Armstrong v. Henderson, 16 Idaho, 566, 102 Pac. 361. On appeal every presumption will be indulged to sustain the judgment. Coughlin v. Holmes, 53 Wash. 692, 102 Pac. 772.

For other instances, see Yergy v. Helena etc. Co., 39 Mont. 213, 102 Pac. 310; Wilson v. Collin, 45 Colo. 412, 102 Pac. 21; Legget v. Evans, 16 Idaho, 760, 102 Pac. 486; Sanden v. Northern Pacific Co., 39 Mont. 209, 102 Pac. 145; Foster v. Winstanley, 39 Mont. 314, 102 Pac. 574; Dailey v. Aspen etc. Co., 46 Colo. 145, 103 Pac. 303; Street v. Smith, 15 N. M. 95, 103 Pac. 644; Kluska v. Yeomans, 54 Wash. 465, 132 Am. St. Rep. 1121, 103 Pac. 819; Hill v. Nelson etc. Co., 40 Mont. 1, 104 Pac. 876; Thompson v. Emerson, 55 Wash. 138, 104 Pac. 201; Golden v. Northern Pacific Co., 39 Mont. 435, 104 Pac. 549; Bartlett etc. Co. v. Fairhaven etc. Co., 56 Wash. 437, 105 Pac. 848; Gallegos v. Sandoval, 15 N. M. 216, 106 Pac. 373; Sierra Nevada etc. Co. v. McCormick (Utah), 106 Pac. 666; Raski v. Wise (Or.), 107 Pac. 984; Culver v. Mountain Home etc. Co., 17 Idaho, 669, 107 Pac. 65; Beach v. Schroeder, 47 Colo. 312, 107 Pac. 271; Curn v. Perkins, 40 Mont. 588, 107 Pac. 901; Southern Pacific Co. v. Richey (Ariz.), 108 Pac. 225; Phoenix etc. Co. v. Landis (Ariz.), 108 Pac. 247; White v. Barling, 41 Mont. 138, 108 Pac. 654; Robinson v. Salt Lake City (Utah), 109 Pac. 817; Lively v. Huseby, 60 Wash. 47, 110 Pac. 673; Swanson v. Pacific etc. Co., 60 Wash. 89, 110 Pac. 795; Bell v. Thomas (Colo.), 111 Pac. 76; Murray v. Osborne (Nev.),

and the burden is upon the appellant to show that it exists."<sup>12</sup> There must, therefore, be a record on appeal to make the facts upon which error can be deduced appear to the appellate court; and since the presumption stated is against the appellant, the burden of preparing such a record is cast upon him. He must, in all cases, furnish the judgment-roll, if there be one.<sup>13</sup> On appeal on the judgment-roll alone every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, it will be sustained, if there is any possible ground on which it can be sustained.<sup>14</sup> If the judgment-roll does not, therefore, itself disclose the error complained of, it is incumbent upon the appellant to make a showing *dehors* such judgment-roll. This can be done in no other way than by bill of exceptions, or,

111 Pac. 31; *Williams v. Board of Commissioners*, 48 Colo. 541, 111 Pac. 71; *Lonsinger v. Ponca*, 27 Okl. 397, 112 Pac. 1006.

<sup>12</sup> *Niles v. Gonzalez*, 155 Cal. 359, 100 Pac. 1080, citing *Cutting etc. Co. v. Canty*, 141 Cal. 692, 75 Pac. 564, and *McLennan v. Wilcox*, 126 Cal. 51, 58 Pac. 305, and see to same effect, *People v. Williams*, 45 Cal. 25; *People v. Marks*, 72 Cal. 46, 13 Pac. 149; *People v. Huff*, 72 Cal. 117, 13 Pac. 168; *People v. Curtis*, 76 Cal. 57, 17 Pac. 941; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254; *Campbell v. Walls*, 77 Cal. 250, 19 Pac. 427; *Silvarer v. Hansen*, 77 Cal. 579, 20 Pac. 136; *People v. Carroll*, 80, Cal. 153, 22 Pac. 129; *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678; *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116; *People v. Gillis*, 97 Cal. 542, 32 Pac. 586; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *In re Weringer*, 100 Cal. 345, 34 Pac. 825; *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393; *In re Yoakam*, 103 Cal. 503, 37 Pac. 485; *People v. Gibson*, 106 Cal. 458, 39 Pac. 864; *People v. Reilly*, 106 Cal. 648, 40 Pac. 13; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; *Tomlinson v. Ayres*, 117 Cal. 568, 49 Pac. 717; *Rudel v. Los Angeles Co.*, 118 Cal. 281, 50 Pac. 400; *People v. Holmes*, 118 Cal. 444, 50 Pac. 675;

*Pacific Paving Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205; *People v. Campbell*, 138 Cal. 11, 70 Pac. 918; *People v. Allen*, 144 Cal. 298, 77 Pac. 948; *Grunsky v. Field*, 1 Cal. App. 623, 82 Pac. 979; and see cases cited in note 1, *supra*, and other notes of this section.

Also, *Pierce v. Pierce*, 52 Wash. 679, 101 Pac. 358; *Dailey v. Aspen etc. Co.*, 46 Colo. 145, 103 Pac. 303; *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626; *Linson v. Spaulding*, 23 Okl. 254, 108 Pac. 747; *Cassidy v. Slemmons*, 41 Mont. 426, 109 Pac. 976.

" . . . Error is never presumed by an appellate court; it must always be affirmatively shown by the record, or it will be presumed that no prejudicial error was committed by the trial court, and the judgment must be sustained." *Board of Commissioners v. Hubble*, 8 Okl. 169, 56 Pac. 1058.

<sup>13</sup> As to record on appeal from judgments, see section 229 *et seq.*, *ante*; record on appeal from orders, section 261, *et seq.*, *ante*, and on new trial orders, section 168, *ante*. And see chapter 47, as to the transcript on appeal. And see section 271a, *ante*, as to record on appeal under new and alternative method.

<sup>14</sup> See *Pardy v. Montgomery*, 77 Cal. 326, 19 Pac. 530; *Woods v. Diepenbrock*, 141 Cal. 55, 74 Pac. 546; and see other cases cited in notes 1 and 1a, *supra*.



in case of a new trial order, a statement.<sup>1a</sup> This is the record of which it is said error must be affirmatively shown therein, and it must contain everything necessary to make the error apparent; for if anything should be wanting the omission would be fatal. The rule of presumption supplies what is necessary to the validity and the correctness of the action of the trial court, but supplies nothing indicative of error. If, therefore, it appears that the record does not contain a complete account of what took place in the court below, the judgment or order appealed from will be affirmed. The reports contain many illustrations of this principle. Thus, it has been often held that if the evidence be not in the record, it will be presumed to have been sufficient to justify the findings.<sup>2</sup> So, like-

<sup>1a</sup> See, generally, chapters on statements and bills of exception. The respondent has nothing to do with the preparation of the bill of exceptions. *People v. Von*, 78 Cal. 1, 20 Pac. 35. It is incumbent on the appellant to show error, and he must therefore make up his record so as to clearly show the basis for the points he makes. *Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65. And see *People v. Gillis*, 97 Cal. 542, 32 Pac. 586; also *Paige v. Roeding*, 96 Cal. 388, 31 Pac. 264; *Caruthers v. Hensley*, 90 Cal. 559, 27 Pac. 411; *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306; *Jaffe v. Lillenthal*, 101 Cal. 175, 35 Pac. 636; *In re Bates*, 105 Cal. 646, 38 Pac. 941; *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686.

<sup>2</sup> *Bunting v. Beideman*, 1 Cal. 181; *Folsom v. Root*, 1 Cal. 374; *Crane v. Brannan*, 3 Cal. 192; *Grewell v. Henderson*, 7 Cal. 290; *Thompkins v. Weeks*, 26 Cal. 50; *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *In re Sharp*, 78 Cal. 483, 21 Pac. 182; *Borel v. Kappeler*, 79 Cal. 342, 21 Pac. 841; *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557; *Rowe v. Blake*, 112 Cal. 637, 44 Pac. 1084; *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60; *Pacific Paving Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205; *Contreras v. Merck*, 131 Cal. 211, 63 Pac. 336; *McDougald v. Hulet*, 132 Cal. 154,

64 Pac. 278; *In re Guardianship of Dow*, 133 Cal. 446, 65 Pac. 890; *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105; *Keyes v. Moy Jin Mun*, 136 Cal. 129, 68 Pac. 476; *Casey v. Gibbons*, 136 Cal. 368, 68 Pac. 1032; *Freeman v. Marshall*, 137 Cal. 159, 69 Pac. 986; *Beardsley v. Clem*, 137 Cal. 328, 70 Pac. 175; *Estate of Brown*, 143 Cal. 450, 77 Pac. 160; *Lewis v. San Francisco*, 2 Cal. App. 112, 82 Pac. 1106. Also, as to the verdict, *Chamberlain v. Loewenthal*, 138 Cal. 47, 70 Pac. 932. If findings are waived, the same presumption will be indulged as to the support of the judgment by the evidence. *Curly v. Curly*, 130 Cal. 638, 63 Pac. 65; *Bowers C. D. Co. v. San Francisco Bridge Co.*, 132 Cal. 342, 64 Pac. 475. And also where there are no specifications of insufficiency. *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Meads etc. v. Lasar*, 92 Cal. 221, 28 Pac. 935; *Estate of Depeaux*, 118 Cal. 290, 50 Pac. 387; *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603. So if the particulars are specified, but the evidence is not included to support them. *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589; *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557. And the same rule has been applied to the absence of specifications in the statement on motion for new trial. *O'Leary v. Castle*, 133 Cal. 508, 65 Pac. 950. And see note 6g, below.

And see, to the same effect, *Holden v. Romamo*, 61 Wash. 458, 112 Pac. 489; *Barkley v. American*

wise, it will be presumed in such a case that a statement of the court in an instruction that the evidence "tends to show" was sufficiently supported by the facts.<sup>2a</sup> So, where the case was tried on an agreed statement which was not set out in the record, it will be presumed that it presented facts sufficient to support the findings.<sup>2b</sup> So, if the evidence is conflicting, it will be presumed that that tending to establish the facts which support the contention of the prevailing party is true;<sup>2c</sup> and the rule applies whether the evidence is oral or in the form of affidavits.<sup>2d</sup> So, since error is never presumed, the evidence in support of the case of the successful party must be deemed to establish not only the facts directly stated, but also all facts which may reasonably be presumed or inferred therefrom.<sup>2e</sup> So where the facts found might authorize different inferences, that inference will be presumed which will uphold rather than defeat the judgment.<sup>2f</sup> "If different inferences may be drawn

Sav. etc. Bank, 61 Wash. 415, 112 Pac. 495; Runyan v. Snyder, 45 Colo. 156, 100 Pac. 420; Henry etc. Co. v. Semonian, 45 Colo. 260, 100 Pac. 425; Halbouer v. Cuenin, 45 Colo. 507, 101 Pac. 763; Pierce v. Pierce, 52 Wash. 679, 101 Pac. 358; Carpenter v. Barry, 26 Wash. 255, 66 Pac. 393; Lohman v. Claussen, 55 Wash. 408, 104 Pac. 624; Willett v. Kinney, 54 Or. 594, 104 Pac. 719; Helland v. Bridenstine, 55 Wash. 470, 104 Pac. 626; Sheer v. Zollverein etc. Co., 48 Colo. 350, 109 Pac. 862; Cook v. Hughes, 1 Colo. 51; Barr v. Foster, 25 Colo. 28, 52 Pac. 1101; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532; Nelson v. McPhee, 59 Wash. 103, 109 Pac. 305; Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; State v. Fawcett, 17 Wash. 188, 49 Pac. 346; Gay v. Havermale, 30 Wash. 622, 71 Pac. 190; Gould v. Austin, 52 Wash. 457, 100 Pac. 846; Trowbridge v. Allen, 48 Colo. 419, 110 Pac. 193; Larsen v. Oregon etc. Co. (Utah), 110 Pac. 983; Bell v. Thomas (Colo.), 111 Pac. 76.

<sup>2a</sup> People v. Cummings, 113 Cal. 88, 45 Pac. 184.

<sup>2b</sup> Cooley v. Calaveras, 121 Cal. 482, 53 Pac. 1075.

<sup>2c</sup> See section 288, *post*, as to the rule of conflicting evidence. Also,

Dahlstrom v. Inland Box Co., 61 Wash. 325, 112 Pac. 345.

Findings of fact will be presumed to be responsive to the pleadings if the record contains no statement or bill of exceptions showing the contrary. Silverstone v. Hanley, 55 Wash. 458, 104 Pac. 767.

<sup>2d</sup> See Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001, and cases there cited.

<sup>2e</sup> See Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001, and cases there cited; and see cases cited in notes 2f, 2g and 2h, below.

<sup>2f</sup> See Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319. And see cases cited in notes 2e, 2g and 2h, herein.

Also, Halbouer v. Cuenin, 45 Colo. 507, 101 Pac. 763; Price v. Immel, 48 Colo. 163, 109 Pac. 941.

A corollary of this rule was thus expressed in Lavelle v. Julesburg (Colo.), 112 Pac. 774: "In the absence of specific and unambiguous findings of fact to the contrary, appellate courts must assume that the lower court did find those facts which were responsive to the issues made by the pleadings, and essential to the judgment rendered. Fanny Rawlings M. Co. v. Tribe, 29 Colo. 302, 68 Pac. 284." And see Persee v. Gaffney, 5 Colo. App. 374, 38 Pac. 837.

from those facts (found by the trial court), this court will not, upon an appeal from the judgment, draw an inference contrary to that drawn by the trial court, or which will have the effect to defeat the judgment of that court."<sup>20</sup> So, in accordance with the principle here stated, it has been held that the findings of the trial court will receive that construction which will uphold rather than defeat the judgment; and if facts must be deemed to have been inferred by the trial court from facts as found, such inferred facts will, by the appellate court, be presumed to have been so inferred.<sup>21</sup> So where a secondary finding is necessary to support a primary finding of an ultimate fact, it will be presumed in support of the judgment that such secondary fact was found.<sup>22</sup> So where the finding of an ultimate fact amply supports the judgment, it will be presumed that all probative facts necessary to the determination of the ultimate fact were properly found.<sup>23</sup> So, on an appeal from a judgment without a bill of exceptions, where it appears that certain findings were omitted, but that the judgment is amply supported by the findings made, it will be presumed in support of such judgment that no evidence upon the omitted issues was introduced which would justify any finding in contravention of the findings made.<sup>24</sup> So there are many other illustrations of the rule in respect to findings.<sup>25</sup>

<sup>20</sup> *Paine v. San Bernardino etc. Co.*, 143 Cal. 654, 77 Pac. 659.

<sup>21</sup> *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 256; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *People's Home Savings Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276.

<sup>22</sup> *Mills v. Home etc. Assn.*, 105 Cal. 232, 38 Pac. 723.

<sup>23</sup> *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488.

<sup>24</sup> See section 242, *ante*, and particularly the following cases: *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504; *Dedmon v. Moffitt*, 89 Cal. 211, 26 Pac. 800; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Rogers v. Duff*, 97 Cal. 66, 31 Pac. 836; *Hihn & Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Stewart v. Hollingsworth*, 129

Cal. 177, 61 Pac. 936; *Cutting etc. Co. v. Canty*, 141 Cal. 692, 75 Pac. 564; *Damon v. Quinn*, 143 Cal. 75, 76 Pac. 818; *Schoonover v. Birnbaum*, 150 Cal. 734, 89 Pac. 1108; *People v. McCue*, 150 Cal. 195, 88 Pac. 899; and later cases in which the last-named case was cited.

<sup>25</sup> Thus, in *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21, it was held that on an appeal from the judgment on the judgment-roll alone it would be presumed that all the facts in issue were found, that they are true, and that no other or different or inconsistent facts exist. So, in *Horwege v. Sage*, 137 Cal. 539, 70 Pac. 621, it was held that in an action on a note, where an equitable defense was pleaded, in the absence of an express contrary showing, it would be presumed that the defendant consented to a trial by jury, and if there are no findings in the record, it will be presumed that findings were waived,

So, if the instructions are not brought up, it will be presumed that the judge instructed the jury fully and correctly upon every material issue;<sup>3</sup> and this includes the correction of an improper remark made by the judge during the progress of the trial.<sup>4</sup> So where proper instructions were refused, it will be presumed that they were afterward given, unless the record shows the contrary, in which event the presumption will be overcome.<sup>4a</sup> So where the record contains a portion only of the instructions given, it will be presumed that among those not so included were instructions correctly and fully charging the jury in reference to matters concerning which instructions were improperly refused.<sup>4b</sup> So where the only instructions contained in the bill of exceptions were those given by the court of its own motion, associated with a recital that they were "all the law *so* given," it will be presumed that the court gave other instructions at the request of the parties.<sup>4c</sup> So where the record on appeal in a criminal case shows that oral instructions were given to the jury, it will be presumed that they were properly taken down by the official reporter, although there are no transcripts thereof in the record. It devolves upon the appellant to overcome this presumption, and show by bill of exceptions that such oral instructions were not taken down. They are not themselves a part of the record on appeal unless they are written out and indorsed by the trial judge as correct, and if the appellant omits to make the affirmative showing required, it will be at his own peril.<sup>4d</sup>

and that the verdict was fully sustained by the evidence. So, in *La Fetra v. Gleason*, 101 Cal. 246, 35 Pac. 765, it was held that on an appeal from the judgment on the judgment-roll alone, where there was a special finding of service, the defendant being a nonresident, and the action being one to foreclose a mortgage, it would be presumed in support of the judgment, there being no affirmative showing to the contrary, that the finding of service was based upon such service as the statute requires. So, in *Williams v. Savings & Loan Society*, 133 Cal. 360, 65 Pac. 822, where there was an appeal from the judgment on the judgment-roll alone, where the findings, which were against the interest of the appellant, were not attacked, it was held that he was not aggrieved thereby, and could not

maintain an appeal thereon, without attacking the findings in the manner pointed out by the statute. And see to same effect, *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522; *In re Blythe*, 108 Cal. 124, 41 Pac. 33; and see notes 15 and 20 below.

<sup>3</sup> *Hall v. Dowling*, 18 Cal. 619; *Aldrich v. Palmer*, 24 Cal. 513; *Seale v. Emerson*, 25 Cal. 293; *Garrison v. McGlockley*, 38 Cal. 78; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

<sup>4</sup> *People v. Galvin*, 9 Cal. 115; and look at *Waldie v. Doll*, 29 Cal. 555.

<sup>4a</sup> *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.

<sup>4b</sup> *Hewlett v. Pilcher*, 85 Cal. 542, 24 Pac. 781; and see *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589.

<sup>4c</sup> *People v. Marks*, 72 Cal. 46, 13 Pac. 149.

<sup>4d</sup> See *People v. Ludwig*, 118 Cal. 328, 50 Pac. 426. If the instruc-

So where the instructions are brought up but the evidence is not, the appellate court will presume, with reference to the instructions refused, that they were not warranted by the evidence, and with reference to the instructions given, that the evidence was such as to require them, unless they are erroneous in every conceivable state of the evidence.<sup>5</sup> So where the evidence showed a naked objection, ruling, and exception, without sufficient of the evidence to explain it, the supreme court refused to disturb the ruling. "As the appellant must affirmatively show error, we cannot infer that the court erred in admitting testimony which under a certain state of facts may have been pertinent and competent."<sup>6</sup> So where the bill of exceptions does not contain, or purport to contain, all the evidence, an alleged erroneous ruling will not be considered, or if it is considered will not be held prejudicial; for it may be that it was cured, or that it was not prejudicial, and if all the evidence bearing on the matter had been brought up, that fact would have been apparent.<sup>6a</sup> So the supreme court refused to infer error where the record failed to show what answers were given to certain questions, or whether any answers at all were given, since in the one case there might have been error without injury, and in the other no error at all.<sup>6b</sup> So where the record did not contain evidence as to dates certain payments were said to have been made, it was presumed that they were made after maturity of the obligations to which they were applied.<sup>6c</sup> So it will be presumed that all the evidence tending to explain an objection is inserted in the bill of exceptions.<sup>6d</sup>

If there is no exception to an order, as, for example, of nonsuit, it will be deemed to have been properly granted;<sup>6e</sup> and if such an

tions are written out and indorsed "given," without further information, they will be presumed to have been given at the request of the defendant. It is incumbent upon him, otherwise, to show the facts. So, likewise, as to instructions marked "refused," in the absence of a definite showing it will be presumed that they were given elsewhere, or that they were requested by the people. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181.

<sup>5</sup> See section 130, *ante*.

<sup>6</sup> *Ferrer v. Mut. Ins. Co.*, 47 Cal. 416.

<sup>6a</sup> *Brown v. Casey*, 80 Cal. 504, 22 Pac. 257.

<sup>6b</sup> *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091.

<sup>6c</sup> *Coalter v. Hurst*, 97 Cal. 290, 32 Pac. 248.

<sup>6d</sup> See *Wilson v. Atkinson*, 68 Cal. 590, 10 Pac. 203. But this would seem to be doubtful doctrine.

<sup>6e</sup> *Kennedy etc. Co. v. Dusenbery*, 116 Cal. 124, 47 Pac. 1008. Or that no exception was taken. *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218; *Hanna v. De Garmo*, 140 Cal. 172, 73 Pac. 830.

order is assigned as prejudicial error, without an accompanying showing of the grounds, it will be sustained.<sup>60</sup>

Every possible intendment sustains the action of the trial court where the record fails to show error affirmatively. Thus, if the statement does not specify any error of fact on which the motion for a new trial was made, the decision of the court is regarded as conclusive of the facts as determined by the same.<sup>61</sup> So if the appellant alleges error in granting a continuance by the committing magistrate without the affidavit or consent prescribed by section 861 of the Penal Code, he must show the fact; and if he object to the transcript of the magistrate on the ground that the reporter's notes were not filed therewith, he must show that they were not filed. "The presumption is in support of the judgment, and it is the duty of the appellant to make an alleged error apparent from the record. It may be that it appeared that the original notes were on file."<sup>62</sup> So where the appellant urged that there was no evidence of the appointment of a guardian *ad litem*, a paper having been introduced at the trial without any disclosure of its contents, but purporting to be an appointment of a guardian *ad litem*, the court held that it was incumbent upon the appellants to show what its contents were, or that it was not what it purported to be.<sup>63</sup> So where the appeal was without a bill of exceptions, and the judgment recited that no evidence was introduced, and that the cause was tried upon the records and papers on file and the statements of the parties, in the absence of an affirmative showing to the contrary, it will be presumed that the records and papers and the statements of the parties contained sufficient evidence to support the judgment, and that the statement that no evidence was introduced must be taken to mean that no evidence other than that contained in the records, papers and statements referred to was introduced.<sup>64</sup> So where error is alleged in sustaining an objection to the introduction of the pleadings in another action, it is the duty of the appellant to set out in the record (in a bill of exceptions, of course) a showing as to the bearing of such pleadings, that is, as

<sup>60</sup> It will be presumed that the objection is waived. *Miller v. Wade*, 87 Cal. 410, 25 Pac. 487.

<sup>61</sup> See *Graham v. Stewart*, 68 Cal. 374, 9 Pac. 555.

<sup>62</sup> *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

<sup>63</sup> *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269: " . . . . The pre-

sumption is in favor of the judgment, and the party alleging error must make it affirmatively appear." See, also, to same effect, *Boyer v. Pacific etc. Co.*, 1 Cal. App. 54, 81 Pac. 671.

<sup>64</sup> *Davis v. Lezinsky*, 93 Cal. 126, 28 Pac. 811.

to the character of the action, to what it related, who were the parties, etc., and in the absence of such a showing of materiality, the action of the trial court will not be disturbed.<sup>5m</sup> So where old deeds were introduced in evidence, objections being overruled, the supreme court, per Rhodes, J., said: "The objection was that they 'appeared never to have been sealed by the said Hayes.' This objection was overruled, and, so far as we can know from the record, properly. Upon inspection it may have appeared to the court that the deeds were sealed, and that the seals had become detached." So where the action was upon a judgment rendered in New York, upon which the plaintiff was not entitled to interest and the recovery was for a much larger amount than that of the judgment sued on, but the record did not show how such amount was arrived at, the supreme court affirmed the judgment, saying: "That may have resulted from the addition of the costs. We cannot presume error unless it is clearly disclosed." So where there was nothing in the record to show the character of a proposed amendment to a pleading, it was held that the refusal of the court below to allow it could not be held to be erroneous.<sup>9</sup> So where the judgment-roll shows that a third amended complaint was stricken out, and judgment "therefore entered in favor of defendant," in the absence of an affirmative showing to the contrary, it will be presumed that the amended complaint was properly stricken out.<sup>9a</sup> So where the bill of exceptions was silent as to the circumstances of the refusal of the court below to permit the appellant to reopen the cause after it had been submitted, the supreme court said that it could not presume that the discretion was incorrect or improvidently exercised, and affirmed the judgment.<sup>10</sup> So where the court refused to postpone the trial to enable the plaintiff to obtain evidence made necessary by an amendment to the answer, in the absence of a showing in the record that the motion for a continuance was made on the statutory affidavit as to materiality and due diligence, it will be presumed that there was no such affidavit, and that the refusal of the court to grant a postponement was a proper exercise of its discretion.<sup>10a</sup>

<sup>5m</sup> Dyer v. Leach, 91 Cal. 191, 25 Am. St. Rep. 171, 27 Pac. 598; and see Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413.

<sup>7</sup> Clark v. Sawyer, 48 Cal. 133.

<sup>8</sup> Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318.

<sup>9</sup> Jessup v. King, 4 Cal. 331.

<sup>9a</sup> Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730.

<sup>10</sup> Miller v. Sharp, 49 Cal. 233.

<sup>10a</sup> Storch v. McCain, 85 Cal. 304, 24 Pac. 639.

So where there was a question as to the statute of limitations, but the transcript did not show when the original complaint was filed, the court, per Sanderson, J., said: "All presumptions are in favor of the judgment below, and we must therefore presume that the action was not commenced until after the expiration of four years from the time at which, under the contract, the plaintiff became entitled to a conveyance."<sup>11</sup> So where only the judgment-roll was brought up, and in the roll appeared an amended answer, but there was nothing to show that it had been served or that it had been filed by leave of the court, the supreme court, per McKinstry, J., said: "In favor of the regularity of the proceedings below we must presume that the second answer was served on the other parties and filed with the permission of the court."<sup>12</sup> So where certain declarations were received upon the express understanding that they were not to be considered unless the plaintiff proved that the defendant was cognizant of the declarations, which the plaintiff failed to do, it was held that in the absence of anything showing the contrary it must be presumed that the judge did not consider the declarations.<sup>13</sup> So where the statute authorized one county judge to hold court for another in certain specified cases, and the record simply showed a request from the judge of the court to the other judge to hold court for him, without specifying that it was for the trial of any particular cause, and without showing that any of the cases mentioned in the statute existed, the supreme court held that no objections appearing to have been made, it would be presumed that one of the cases mentioned in the statute existed, and the parties had consented that the judge who presided should be requested to act.<sup>14</sup> So where disqualification of the trial judge is made a ground for a new trial, his qualification will be presumed on appeal from an order denying the motion in the absence of an affirmative showing to the contrary, by facts of a positive and

<sup>11</sup> *Miles v. Thorn*, 38 Cal. 335, 99 Am. Dec. 384; and see, also *Reamer v. Nesmith*, 34 Cal. 624, 5 Morr. Min. Rep. 610; *Hoffman v. Fett*, 39 Cal. 109; *Fratt v. Tombs*, 48 Cal. 28; *Cameron v. San Francisco*, 68 Cal. 390, 9 Pac. 430.

<sup>12</sup> *Livermore v. Webb*, 56 Cal. 489; and look at *Roper v. McFadden*, 48 Cal. 346; and see *Riverside Co. v. Stockman*, 124 Cal. 222, 56 Pac. 1027.

<sup>13</sup> *Jones v. Morse*, 36 Cal. 205.

<sup>14</sup> *People v. Mellon*, 40 Cal. 648; and see *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933, where it was presumed in support of the authority of the trial judge that he had been invited by the regular judge to sit in the case, under the authority of Constitution, article 6, section 8, and of section 71, Code of Civil Procedure.



unequivocal character.<sup>14a</sup> So under a system of implied findings, which authorized the judge to file additional findings upon request of the party, it was held that where the record showed the filing of additional findings, the request would be presumed.<sup>15</sup> So where a street assessment was alleged to be void because of a protest which in certain cases is a bar to further proceedings for six months, and not a bar in other cases differently circumstanced, it was presumed, there being no showing to the contrary in the record, that the case was one within the purview of the latter class.<sup>15a</sup> So where the record does not contain a certain deposition, it will be presumed, in the absence of a contrary showing, that it was inadmissible, and properly excluded.<sup>16</sup> So where a motion is made upon several grounds, and it does not appear upon what ground the decision was based, the appellate court will presume that it was based upon a ground upon which it can be sustained, if there be such.<sup>17</sup>

And where there is no record of what transpired in the court below, the supreme court will, if necessary to support the judgment or order appealed from, presume that it was made upon the consent of the appellant.<sup>17a</sup> Thus in *Leese v. Clark*,<sup>18</sup> where upon motion a judgment which had been regularly entered was set aside and a different one ordered, the supreme court affirmed the order, and Shafter, J., delivering the opinion, said: "There is another view of the matter which may be very briefly stated. If there is any state of facts under which the entry of the third judgment can be vindicated, we must presume that that state of facts existed at the time the entry was ordered, and that the order was made on the ground of them. The files and affidavits used at the hearing are not inserted in the transcript. For anything that we can know to the contrary, there may have been a stipulation among the files, or one may have been brought forward by affidavit, fully accounting for all the phenomena put as the basis of the argument submitted for the appellant, and conserving also the plaintiff's right to a several judgment against Clark, and by direct expres-

<sup>14a</sup> *Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. 838.

<sup>15</sup> *Ogburn v. Conner*, 46 Cal. 346, 13 Am. Rep. 213.

<sup>15a</sup> *McDonald v. Dodge*, 97 Cal. 112, 31 Pac. 909.

<sup>16</sup> *Adams v. Weaver*, 117 Cal. 42, 48 Pac. 972.

<sup>17</sup> See section 284, *ante*.

New Trial—100

<sup>17a</sup> Thus, in *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110, it was held that on an appeal from the judgment without a bill of exceptions everything complained of by the appellant would be presumed to have been done with his consent.

<sup>18</sup> 28 Cal. 26.

sion." So in *Wilson v. Dougherty*,<sup>19</sup> where the court below struck out the appellant's notice of intention to move for a new trial, the supreme court affirmed the order, saying: "The propriety of the order striking out the notice of motion for a new trial cannot be considered, inasmuch as no statement in support of the appeal from the order is presented. Every presumption and intendment consistent with the record is to be indulged in favor of the order, and so far as the record here speaks, it would not be inconsistent with it to presume that the plaintiff consented to the order, in which case, of course, he could not afterward be heard to complain of it." So where the action was dismissed against several defendants who were necessary parties, and the other defendants assigned such dismissal as error, the supreme court affirmed the judgment, saying: "For anything appearing to the contrary such dismissal may have been consented to by the appellant. All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not."<sup>20</sup> So where the public was excluded from the courtroom during the trial of a criminal case, in the absence of a showing to the contrary, it will be presumed to have been with the defendant's consent.<sup>20a</sup> And the same presumption was indulged in the case of a continuance beyond the sixty days prescribed in section 1382, Penal Code;<sup>20b</sup> and where the jury were discharged after rendering a void verdict;<sup>20c</sup> and where there was an unexplained jury trial in an equity case.<sup>20d</sup> So on an appeal from an order confirming a sale of real property, it is the duty of the appellant to incorporate the return of sale in the record, otherwise the presumption will be against error with respect to the same. For it may have been that the appellant consented to the making of the order.<sup>20e</sup> So there

<sup>19</sup> 45 Cal. 34.

<sup>20</sup> *Parker v. Altschul*, 60 Cal. 380; *Reynolds v. Hosmer*, 45 Cal. 616; *Benedict v. Cozzens*, 4 Cal. 381; but see to the contrary, *Borkheim v. N. B. & M. Ins. Co.*, 38 Cal. 623.

<sup>20a</sup> *People v. Swafford*, 65 Cal. 223, 3 Pac. 809.

<sup>20b</sup> *People v. Douglass*, 100 Cal. 1, 34 Pac. 490.

<sup>20c</sup> *People v. Curtis*, 76 Cal. 57, 17 Pac. 941.

<sup>20d</sup> *Horwege v. Sage*, 137 Cal. 539, 70 Pac. 621.

<sup>20e</sup> Or, if it does not appear that the price bid was disproportionate to the value of the property, or that an increased bid of ten per cent could have been obtained (by appellant's bidding), it will be presumed that no error existed. *Estate of Robinson*, 142 Cal. 152, 75 Pac. 777.

may be presumptive waiver, which is a species of consent. Thus where no findings appear in the judgment-roll, and there is no bill of exceptions showing that they were not waived, the appellate court will presume a waiver.<sup>201</sup> So, although findings may have been waived, upon the principle that the waiver of findings extends solely to the writing and filing thereof, and not to the actual elimination of findings by the trial judge as a step by which he must arrive at his decision, it may be complained that the court omitted to make findings upon material issues involved in the case, but if the record is silent upon the point, it will be presumed that findings were made on all material issues,<sup>202</sup> or that there was no evidence pointed thereat.<sup>203</sup> Inasmuch as it was plainly the duty of the appellant to show the error complained of affirmatively, his failure will be treated as an abandonment or a waiver of any merit there may have actually been in his contention.

But the principle is rather to be invoked in aid of the record than of the parties thereto; and it is the condition of the record and not the acts or omissions of the parties that raises the presumption in question—the record of the acts and doings of the trial court. If complete in all respects there is no room for a presumption of any sort. It is only when it is incomplete, or inconsistent, or imperfect, that it becomes necessary to explain it, and to explain the record is to explain the acts of the court. In explaining such acts the appellate court is called upon to assume conditions which the record ought to, but does not, disclose. It will never assume that the court below committed error in any respect. On the other hand, it will always assume that the court acted correctly and with legal warrant. The cases heretofore cited show clearly enough the exact character of the presumption which the appellate court thus indulges in support of a silent record, but certainly no clearer illustration can be given than that found in those cases wherein the appellate court is driven to evolve, so to speak, a consistent course of lawful action from an inconsistent, rather than a silent, record. Thus where the transcript shows two judgments or orders, of different dates, or two sets of findings and conclusions of law, one

<sup>201</sup> See section 241, *ante*.

<sup>202</sup> See *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

<sup>203</sup> See sections 239 and 241, *ante*. For other illustrations of the presumption of consent and waiver, see

*Parker v. Altschul*, 60 Cal. 380; *People v. Huff*, 72 Cal. 117, 13 Pac. 168; *People v. Otto*, 77 Cal. 50, 18 Pac. 872; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *Cockrill v. Clyma*, 98 Cal. 123, 32 Pac. 888.

purporting to be an amendment of the other,<sup>20k</sup> one judgment alone can be recognized. Findings may be amended before entry of judgment, and possibly earlier findings may thus be properly disposed of and if the record does not disclose anything more than the bare fact, it is not possible to say with certainty which judgment should receive recognition and which set of findings. In this state of the record it will be presumed that the last judgment in point of date is the final judgment prescribed by the code, and that earlier judgments have been properly set aside, and, if necessary, consent of all the parties will be presumed. Correctness of action will also be presumed in the case of the findings. It will be presumed that the last findings in point of date took the place of the earlier findings which were regularly amended before the expiration of the time within which amendment could be properly made.<sup>20l</sup> So where, although but a single judgment and a single set of findings appear in the record, the findings were filed subsequently, although purporting to be the findings upon which the judgment was based, it will be presumed that findings were waived.<sup>20m</sup> Without such a presumption the judgment would appear unsupported, and the court would be even justified in the additional presumption that the findings in the record refer to some other judgment altogether, later in date, since without such presumption it must be manifest that the court below has made findings which are useless as the basis for a legal judgment, to assume which would be to assume that the court committed error.<sup>20n</sup>

For other instances of the application of the rule, see section 151, *ante*.<sup>21</sup>

<sup>20k</sup> See *Colton etc. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878; *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361; and see *Paige v. Roeding*, 96 Cal. 388, 31 Pac. 264; *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601; *Estate of Mitchell*, 126 Cal. 248, 58 Pac. 549; *Hawley v. Gray Brothers Co.*, 127 Cal. 560, 60 Pac. 437; *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572.

<sup>20l</sup> But if there is a bill of exceptions setting forth all the facts in explanation of the anomalous condition, and it appears that the first judgment in point of time was not in fact vacated, the presumption cannot be indulged. It is not difficult

to conceive of a state of facts that would sustain the first judgment, but the court will usually seek to uphold the other.

<sup>20m</sup> See *Benton v. Benton*, 122 Cal. 395, 55 Pac. 152; and see, also, *Van Court v. Winterson*, 61 Cal. 615.

<sup>20n</sup> See section 246, *ante*.

<sup>21</sup> See *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386, where the court permitted a portion of the testimony to be read to the jury from the reporter's notes, and there was nothing in the record to show what portion was read, and it was not possible, therefore, for the court to ascertain whether the error was prejudicial or not, it was held that it would be presumed that the action of the court

But the presumption in favor of the action of the court below has some limitations. Thus, although the testimony be not in the record, the supreme court will not presume that evidence was received which contradicted or was outside of the issues made by the pleadings.<sup>22</sup> And the presumption only applies where it is apparent that all the facts or evidence upon which the court below acted are not before the appellate court. It never applies to protect the legal conclusions of the court below, where everything which was before such court is before the supreme court.<sup>23</sup> And

was authorized; *Gross v. Kelleher*, 80 Cal. 519, 22 Pac. 293, where a motion for a new trial was denied upon condition that the successful party remit a specified portion of a money judgment, and the appeal is from an order granting the motion, and it was held that it would be presumed that the condition of the waiver referred to was not performed; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211, where an action arising in one county was transferred to another, and, the record containing no explanation of such transfer, it was held that it would be presumed that the judge of the county in which the action originated was disqualified, and that it was transferred to the nearest county in which a like disqualification did not exist; *Fox v. Townsend*, 149 Cal. 659, 87 Pac. 82, where there was an appeal from an order setting aside a judgment by default, and, there being no bill of exceptions, it was held that it would be assumed that there was a showing made in the lower court sufficient to justify the order setting the judgment aside; *Ford v. Bushard*, 116 Cal. 273, 48 Pac. 119, where, the record failing to show whether a substitution of an assignee of a party in his stead was *ex parte* or not, it was held that it would be presumed that it was not, and that notice had been given; *Farnsworth v. Sutro*, 136 Cal. 241, 68 Pac. 705, where the record failed to show whether the assignee of an insolvent had ever qualified or not, and it was held that since such qualification was made a condition precedent to the assignment and conveyance of the property of the debtor, it would be presumed to have been properly and regularly done; *People*

*v. Rader*, 136 Cal. 253, 68 Pac. 707, where, the record failing to show that the defendant was in court in person or by counsel when his case was set for trial, although it showed that he had been properly arraigned, it was held that the presumption that the proceedings were regular would be indulged in the absence of a contrary showing; *Estate of Gordon*, 142 Cal. 125, 75 Pac. 672, where a bill of exceptions was settled a week before the entry of the order appealed from, and the certificate of the judge was to the effect that it had been "duly presented within the time allowed by law," and it was held in favor of the regularity of the proceedings that it would be presumed that settlement was made under the provisions of section 649, Code of Civil Procedure, which provides for settlement at the time this settlement was made; *Estate of Angle*, 148 Cal. 102, 82 Pac. 668, where documentary evidence was excluded, and it was held that in the absence of a contrary showing it would be presumed that it was correctly excluded. For other instances see *Mazkewitz v. Pimental*, 83 Cal. 450, 23 Pac. 527; *Brittan v. Oakland Bank of Savings*, 112 Cal. 1, 44 Pac. 339; *Merrill v. Bachelder*, 123 Cal. 674, 56 Pac. 618; *Escondido High School v. Escondido Seminary*, 130 Cal. 128, 62 Pac. 401.

<sup>22</sup> *Estate of McKinley*, 49 Cal. 152; *N. S. & S. C. Co. v. Kidd*, 37 Cal. 282; but see *Hentsch v. Porter*, 10 Cal. 555.

<sup>23</sup> *Seaver v. Cay*, 9 Cal. 564. As where the question presented is purely one of law upon an appeal from an order granting a new trial. *Santa Marina v. Connolly*, 79 Cal. 517, 21 Pac. 1093.

unless the contrary appears from the record itself, it will be presumed that the statement or bill of exceptions contains everything that is material to the specifications.<sup>24</sup> And no presumption in conflict with the record will be indulged,<sup>25</sup> and if the record shows error, it will not be presumed to have been cured by something which does not appear on the face of the record.<sup>26</sup>

With respect to the presumption of facts which go to the jurisdiction of the trial court, the rule is not different. It depends solely upon a silent record, and the rule has been stated to be that in all particulars wherein the record is silent, or noncommittal, the presumption is in favor of the validity and regularity of the action of the court; and unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done, or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak was properly done.<sup>27</sup> No presumption will be indulged with respect to a jurisdictional fact which

<sup>24</sup> See section 152. In such case the presumption in support of the judgment gives way to the presumption that the record contains all the evidence. The presumptions are not, in such case, of equal force. Where two presumptions of equal force oppose each other on the face of the record, the presumption in favor of the judgment may come in. *Whipley v. Flower*, 6 Cal. 630; *Brittan v. Oakland Bank*, 112 Cal. 1, 44 Pac. 339. But see *Mazkewitz v. Pimental*, 83 Cal. 450, 23 Pac. 527, where it was presumed in support of an order granting a motion for a new trial that there was a second notice of intention which did not appear in the bill of exceptions in support of the motion, the notice which did appear therein containing three grounds, only one of which was a legal one, and that one clearly insufficient on the record. On the other hand, in *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700, where there was a notice in the statement, and another in the record by stipulation, the two not being identical, it was presumed in support of the correctness of the notice contained in the statement that there was another notice, which did not appear in the record, or that the notice appearing in the transcript

by stipulation had been amended so as to conform to the notice of the statement.

<sup>25</sup> See *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 89 Pac. 348, where the record showed that a guardian *ad litem* had been appointed upon the application of the guardian alone, and there was nothing in the proceedings to show that the provisions of section 373, Code of Civil Procedure, as to consent of the minor, had been complied with, the court held that such consent would not be presumed, and it said: "Whenever the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred." It is true this applies to jurisdictional facts, but certainly no distinction can be made in this respect.

<sup>26</sup> See *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442.

<sup>27</sup> See *County Bank v. Jack*, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705.

In Colorado the rule as to jurisdiction has been thus stated: "When a judgment is rendered by a district

is shown by the record. In such a case, it will be assumed that the record speaks the truth, and it will not be presumed that any other fact different from or inconsistent therewith exists, or can be shown *dehors* the record.<sup>24</sup>

§ 286. A Judgment or Order will not be Reversed for Errors Which were not Injurious to the Appellant.—Section 475 of the Code of Civil Procedure is as follows:<sup>1</sup> “The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings, which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect, was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.”

This section, prior to the amendments of 1897,<sup>1a</sup> was the same as section 71 of the old Practice Act, which remained in operation

court, it will be conclusively presumed that all steps necessary to give the court jurisdiction of the parties against whom such judgment was pronounced were taken, unless it affirmatively appears from the record that they were not. *Burris v. Craig*, 34 Colo. 383, 82 Pac. 944; *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac. 698; *Farmers' Union D. Co. v. Rio Grande C. Co.*, 37 Colo. 512, 86 Pac. 1042; *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 88 Pac. 473, 8 L. R. A., N. S., 1215, 120 Am. St. Rep. 132; 1 *Black on Judgments*, sections 270, 271; *Trowbridge v. Allen*, 48 Colo. 419, 110 Pac. 193.

<sup>24</sup> See *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 89 Pac. 348; and see, also, *Smith v. Los Angeles etc. Co.*, 98 Cal. 210, 33 Pac. 53, and *Latta v. Tutton*, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844.

“Legal presumptions do not come to the aid of the record, except as to

acts or facts touching which the record is silent.” *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Tustin v. Gaunt*, 4 Or. 305.

<sup>1</sup> Corresponding provisions of other codes are as follows: Section 78, *Mills' Annotated Code of Colorado*; section 4231, *Revised Codes of Idaho*; section 6593, *Revised Codes of Montana* (section 778, *Code of Civil Procedure*); section 3166, *Cutting's Compiled Laws of Nevada* (section 71, *Civil Practice*); section 2685, subsection 85, *Compiled Laws of New Mexico*; section 6886, *Revised Codes of North Dakota*; section 5680, *Compiled Laws of Oklahoma*; section 107, *Lord's Oregon Laws*; section 153, *Code of Civil Procedure of South Dakota*; section 3008, *Compiled Laws of Utah*; section 307, *Rem. & Bal. Code of Washington* (section 4957, *Bal. Code*); section 4599, *Compiled Statutes of Wyoming*.

<sup>1a</sup> *Stats. 1897*, p. 44.

ever since its adoption in 1851 until the code took its place.<sup>1b</sup> In accordance with this provision of the statute it became an established rule of practice that no judgment or order would be reversed for immaterial errors,<sup>2</sup> or for errors which do not affect the substantial rights of the appellant.<sup>2a</sup> And this is still the controlling

<sup>1b</sup> See Laws of 1851, p. 61.

<sup>2</sup> Clayton v. West, 2 Cal. 381; Jones v. Post, 6 Cal. 102; Reynolds v. Jordan, 6 Cal. 108; Priest v. Union Canal Co., 6 Cal. 170, 4 Morr. Min. Rep. 515; Phillips v. Mayer, 7 Cal. 81; McGarrity v. Byington, 12 Cal. 426, 2 Morr. Min. Rep. 311; Thompson v. Lyon, 14 Cal. 39; Lafontaine v. Greene, 17 Cal. 294; Dennis v. Table Mt. Water Co., 10 Cal. 369; Carpenter v. Norris, 20 Cal. 437; Clark v. Lockwood, 21 Cal. 220; Kid v. Teeple, 22 Cal. 255; Merle v. Mathews, 26 Cal. 455; Preston v. Keys, 23 Cal. 193; Roberts v. Chan Tin Pen, 23 Cal. 259; Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118; Hicks v. Whitesides, 23 Cal. 404; People v. Mier, 24 Cal. 61; St. John v. Kidd, 26 Cal. 263, 4 Morr. Min. Rep. 454; Hoag v. Pierce, 28 Cal. 187; Zeigler v. Wells, Fargo & Co., 28 Cal. 263; Hager v. Shindler, 29 Cal. 47; Carpenter v. Gardiner, 29 Cal. 160; Tarpey v. Shepherd, 30 Cal. 180; Henry v. Everts, 30 Cal. 425; Thompson v. Mahoney, 32 Cal. 231; Harper v. Lamping, 33 Cal. 641; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Enright v. S. F. & S. J. R. R. Co., 33 Cal. 230; Garwood v. Wood, 34 Cal. 248; Hisler v. Carr, 34 Cal. 641; Tully v. Harloe, 35 Cal. 302; Campbell v. B. R. & A. W. Co., 35 Cal. 679, 10 Morr. Min. Rep. 656; Jones v. Morse, 36 Cal. 205; Satterlee v. Bliss, 36 Cal. 489; N. S. C. Co. v. Kidd, 37 Cal. 282; Dougherty v. Miller, 38 Cal. 548; S. B. L. A. Co. v. Christy, 41 Cal. 501; Bruck v. Tucker, 42 Cal. 346; Hobbs v. Duff, 43 Cal. 485; Delger v. Johnson, 44 Cal. 182; Porter v. Peckham, 44 Cal. 204; Lovell v. Frost, 44 Cal. 471; Mott v. Reyes, 45 Cal. 379; Green v. Ophir G. & S. M. Co., 45 Cal. 522; 12 Morr. Min. Rep. 140; Estate of Minor, 46 Cal. 564; Hastings v. Jackson, 46 Cal. 234; Baldwin v. Bornheimer, 48 Cal. 433; Byrne v. Jansen, 50 Cal. 624; Pratalongo v.

Larco, 47 Cal. 378; Wing Chung v. Los Angeles, 47 Cal. 531; Branson v. Caruthers, 49 Cal. 374; Moody v. Palmer, 50 Cal. 31; Brown v. Kentfield, 50 Cal. 129; Spect v. Gregg, 51 Cal. 198; People v. Hagar, 52 Cal. 171, 184; Hansen v. Martin, 54 Cal. 394, 5 Morr. Min. Rep. 643; and see cases cited in note 2a, and following notes below, to same effect.

<sup>2a</sup> *Arizona*: Brooklyn etc. Co. v. Miller (Ariz.), 108 Pac. 471.

*California*: Willard v. Archer, 63 Cal. 33; Ferrier v. Ferrier, 64 Cal. 23, 27 Pac. 960; Hayford v. Kocher, 65 Cal. 389, 4 Pac. 350; Reclamation District v. Hagar, 66 Cal. 54, 4 Pac. 945; Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867; George v. Silva, 68 Cal. 272, 9 Pac. 257; Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179; Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Rowland v. Madden, 72 Cal. 17, 12 Pac. 226, 870; Estate of Briswalter, 72 Cal. 107, 13 Pac. 164; Gassen v. Bower, 72 Cal. 555, 14 Pac. 206; Fraser v. Oakdale Lumber Co., 73 Cal. 187, 14 Pac. 829; Riverside Land Co. v. Jensen, 73 Cal. 550, 15 Pac. 131; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Maggini v. Pezzoni, 76 Cal. 631, 18 Pac. 687; Thomas v. Jameson, 77 Cal. 91, 19 Pac. 177; Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729; Averett v. Sobrunes, 79 Cal. 207, 21 Pac. 739; Ex parte Fil Ki, 79 Cal. 584, 21 Pac. 974; Spring Valley Water Works v. San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756; King v. Ponton, 82 Cal. 420, 22 Pac. 1087; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077; Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Stark v.



principle, concerning which there is no possible doubt. The difficulty at the present day, as always, is to know what errors are immaterial and what errors affect the substantial rights of the party appealing. But the difficulty does not stop here, for it is

Wellman, 96 Cal. 400, 31 Pac. 259; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; San Diego Co. v. Seifert, 97 Cal. 594, 32 Pac. 644; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; First National Bank v. Henderson, 101 Cal. 307, 35 Pac. 899; Alexander v. Central etc. Co., 104 Cal. 532, 38 N. W. 410; Jager v. California etc. Co., 104 Cal. 542, 38 Pac. 413; Bancroft Co. v. Haslett, 106 Cal. 151, 39 Pac. 602; Sloane v. So. Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Redfield v. Oakland etc. Co., 112 Cal. 220, 43 Pac. 1117; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816; Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, 37 L. R. A. 626; Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716; Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908; Stockton etc. Works v. Glens Falls etc. Co., 121 Cal. 167, 53 Pac. 565; Hirshfeld v. Weill, 121 Cal. 13, 53 Pac. 402; Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821; Estate of Young, 123 Cal. 337, 55 Pac. 1011; Holland v. McDade, 125 Cal. 353, 58 Pac. 9; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; San Jose etc. Co. v. San Jose etc. Co., 126 Cal. 322, 58 Pac. 824; Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Glenmore Dist. Co. v. Craig, 128 Cal. 264, 60 Pac. 858; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940; Farmers' Exchange Bank v. Altura etc. Co., 129 Cal. 263, 61 Pac. 1077; Eachus v. Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829; Hoffman v. Keeton, 132 Cal. 195, 64 Pac. 264; Guardianship of Dow, 133 Cal. 446, 65 Pac. 890; Hunt v. Davis, 135 Cal. 31, 66 Pac. 957; Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985, 21 Morr. Min. Rep. 694; Miller v. Balserino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323; Hooker v. Burr, 137 Cal. 663, 99 Am. St. Rep. 17,

70 Pac. 778; Foster v. Bowles, 138 Cal. 449, 71 Pac. 495; Jones v. Jones, 140 Cal. 587, 74 Pac. 143; Peterson Bros. v. Mineral King etc. Co., 140 Cal. 624, 74 Pac. 162; Abner Doble etc. Co. v. Keystone etc. Co., 145 Cal. 490, 78 Pac. 1050; Rooney v. Gray Brothers Co., 145 Cal. 753, 79 Pac. 523; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. N. S., 699; Bacon v. Kearney etc. Syndicate, 1 Cal. App. 275, 82 Pac. 84; Chatham v. Mansfield, 1 Cal. App. 298, 82 Pac. 343; People v. Taggart, 1 Cal. App. 423, 82 Pac. 396; Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566; People v. Rea, 2 Cal. App. 109, 83 Pac. 165; Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 Pac. 256; McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260; Wells-Fargo Co. v. McCarthy, 5 Cal. App. 301, 90 Pac. 203; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344; Dennis v. Crocker-Hoffman etc. Co., 6 Cal. App. 58, 91 Pac. 425; Mushet v. Fox, 6 Cal. App. 77, 91 Pac. 534; Hentig v. Johnson, 8 Cal. App. 221, 96 Pac. 390; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672; Compressed Air Co. v. San Pablo Co., 9 Cal. App. 361, 99 Pac. 551; Preston v. Central etc. Co., 11 Cal. App. 190, 104 Pac. 462; Bradley v. Bush, 11 Cal. App. 287, 104 Pac. 845; Baird v. Justice's Court, 11 Cal. App. 439, 105 Pac. 259; Neher v. Hansen, 12 Cal. App. 370, 107 Pac. 565; Vine v. Vine, 12 Cal. App. 458, 107 Pac. 702.

*Colorado:* Graves v. Davenport, 45 Colo. 270, 100 Pac. 429; Central etc. Co. v. Mills, 45 Colo. 283, 100 Pac. 410; Mulford v. Rowland, 45 Colo. 172, 100 Pac. 603; Eaches v. John-

sometimes impossible to ascertain from the record on appeal whether an error has affected substantial rights, or whether it is unimportant or immaterial and should be disregarded. In the determination of this question, the recognized rule of practice was, as will hereafter appear,<sup>2b</sup> that error will always be presumed to

ston, 46 Colo. 457, 104 Pac. 940; Rocky Mountain News Co. v. Frid-born, 46 Colo. 440, 104 Pac. 956, 24 L. R. A., N. S., 891; Farmers' etc. Bank v. Union etc. Co., 46 Colo. 466, 104 Pac. 943; Koch v. Story, 47 Colo. 335, 107 Pac. 1093; Board of Commissioners v. Hider, 47 Colo. 443, 107 Pac. 1068; Mitchell v. Turley, 48 Colo. 25, 108 Pac. 995; Jak-way v. Rivers, 48 Colo. 49, 108 Pac. 999; Rice v. Cassells, 48 Colo. 73, 108 Pac. 1001; Harrison v. Hodges (Colo.), 111 Pac. 706; White v. Nuckolls (Colo.), 112 Pac. 329.

*Idaho:* Havlick v. Davidson, 15 Idaho, 787, 100 Pac. 91; McClain v. Lewiston etc. Assn., 17 Idaho, 63, 104 Pac. 1015, 25 L. R. A., N. S., 691; Valentine v. Rosenhaupt (Idaho), 112 Pac. 685; Rowley v. Stack etc. Co. (Idaho), 112 Pac. 1041.

*Montana:* Shandy v. McDonald, 38 Mont. 393, 100 Pac. 203; Foster v. Winstanley, 39 Mont. 314, 102 Pac. 574; Sutton v. Lowry, 39 Mont. 462, 104 Pac. 545; Ross v. Saylor, 39 Mont. 559, 104 Pac. 864; Neary v. Northern Pacific Co., 41 Mont. 480, 110 Pac. 226; John v. Northern Pacific Co., 42 Mont. 18, 111 Pac. 632; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70; De Atley v. Northern Pacific Co., 42 Mont. 224, 112 Pac. 76.

*Nevada:* Burch v. Southern Pacific Co. (Nev.), 104 Pac. 225; Sherman v. Southern Pacific Co. (Nev.), 111 Pac. 416.

*New Mexico:* Patten v. Balch, 15 N. M. 276, 106 Pac. 388; Melini v. Freige, 15 N. M. 455, 110 Pac. 563.

*Oklahoma:* Linson v. Spaulding, 23 Okl. 254, 108 Pac. 747; Kuchler v. Weaver, 23 Okl. 420, 100 Pac. 915; Chicago etc. Co. v. Logan, 23 Okl. 707, 105 Pac. 343; Mullen v. Thaxton, 24 Okl. 643, 104 Pac. 359; Harding v. Gillett, 25 Okl. 199, 107 Pac. 665; Terrapin v. Barker, 26 Okl. 93, 109 Pac. 931; Meyer v. White, 27 Okl. 400, 112 Pac. 1005.

*Oregon:* Batdorf v. Oregon City, 53 Or. 402, 100 Pac. 937.

*Utah:* Bristol v. Brent, 36 Utah, 108, 103 Pac. 1076; In re Miller's Estate, 36 Utah, 228, 102 Pac. 996; Bown v. Owens (Utah), 106 Pac. 708; Gay v. Y. M. C. etc. Inst. (Utah), 107 Pac. 237; Cromeenes v. San Pedro etc. R. R. Co. (Utah), 109 Pac. 10.

*Washington:* Snarski v. Washington etc. Co., 52 Wash. 221, 101 Pac. 839; Gould v. Austin, 52 Wash. 457, 100 Pac. 1029; Ryder-Gouger Co. v. Garretson, 53 Wash. 71, 132 Am. St. Rep. 1053, 101 Pac. 498; Sound etc. Co. v. Bellingham etc. Co., 53 Wash. 470, 102 Pac. 234; Peyser v. Western etc. Co., 53 Wash. 633, 102 Pac. 750; Meador v. Northwestern etc. Co., 55 Wash. 47, 103 Pac. 1107; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149; Chaney v. Chaney, 56 Wash. 145, 105 Pac. 229; Curtis v. Parks, 57 Wash. 223, 106 Pac. 740; Bartelt v. Oregon etc. Co., 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487; Buckles v. Reynolds, 58 Wash. 435, 108 Pac. 1072; Portland etc. Co. v. Skamania etc. Co., 59 Wash. 191, 109 Pac. 814; Dickerman v. Reeder, 59 Wash. 405, 109 Pac. 1060; McLeod v. Russell, 59 Wash. 676, 110 Pac. 626; Thornton v. Dow, 60 Wash. 622, 111 Pac. 899; Manvell v. Weaver, 61 Wash. 23, 111 Pac. 890; Jones v. Nelson, 61 Wash. 167, 112 Pac. 88; Schoening v. Maple etc. Co., 61 Wash. 332, 112 Pac. 381; Shaw v. Woodland etc. Co., 61 Wash. 56, 111 Pac. 1070; Hall v. Northwest etc. Co., 61 Wash. 351, 112 Pac. 369; Lasityr v. Olympia, 61 Wash. 651, 112 Pac. 752; Jaggy v. Rooney, 61 Wash. 381, 112 Pac. 367; White v. Ratliff, 61 Wash. 383, 112 Pac. 502; Hemmingson v. Carbon Hill Co. (Wash.), 112 Pac. 1111.

*Wyoming:* Le Clair v. Hawley (Wyo.), 102 Pac. 850.

See cases cited in note 2, *supra*, and following notes.

<sup>2b</sup> See section 287, *post*.

have been prejudicial unless it affirmatively appears from the record that it was otherwise, or the appellate court is able to see that it could not have materially affected the substantial rights of the appellant. This was the rule prior to the 1897 amendment of the California section under consideration, and continues to be the rule in those states where no such change has taken place, and the language of the section is substantially as it was in California prior to that amendment. The last sentence of the section as amended in 1897 attempted to nullify the rule by providing that "there shall be no presumption that error is prejudicial, or that injury was done if error is shown," thus requiring of the appellant an affirmative showing that "substantial injury" resulted to him from the error complained of, or that a "different result" would have been probable but for the same. The supreme court has never passed directly upon the constitutionality of this provision, but it is possible that when it does pass upon it the conclusion reached will be adverse, or that the provision will be so far limited in effect as to leave the rule of practice practically unchanged. To adopt any other view would be to remove all control of the appellate courts over the procedure of trial courts, and to render practically nugatory the law of procedure and evidence solemnly enacted by the legislature.<sup>20</sup>

<sup>20</sup> In *San Jose Ranch Co. v. San Jose etc. Co.*, 126 Cal. 322, 58 Pac. 824, where the question was incidentally raised, the court holding that it could plainly see that a different result would have followed, the question of unconstitutionality was considered in the following language:

" . . . In this particular case, I think we can see that a different result would have been reached but for the error complained of. The plaintiffs would have had their action tried and the issues disposed of by a judgment which could have been reviewed here, and the rights and liabilities of the parties finally disposed of. But unless some very restricted meaning can be given to the amendment to section 475, it is plainly unconstitutional and void. The 'substantial injury' and 'different result' mentioned must have reference to the final judgment. Ordinarily, we cannot ascertain or determine 'from the record' whether the

appellant has suffered substantial injury or whether a different final result would have been reached, had not some particular error been committed. If the court were erroneously to refuse to receive any evidence for a party, and should arbitrarily determine all issues against him, this court could not determine from the record whether he would have fared better if the evidence had been admitted. So if, in an ordinary action at law, the court were to erroneously deny a jury trial, the record could not disclose that a different result would have been probable if the error had not been committed, although it would plainly enough show that a party had been denied a trial according to the law of the land. A person against whom such a ruling had been made, and who has lost his case, has been deprived of life, liberty, or property without due process of law. And this amendment, if valid, would prevent a reversal of

Even where it is possible to say what errors are and what are not material, each case must, as a matter of course, be governed by its own peculiar circumstances. But it may not be out of place to give some examples of errors which have been held, from time to time, to be immaterial, and which would probably again be so held. The reports furnish many examples. The cases cited in notes 2 and 2a, herein, nearly all furnish examples, and these will often be further referred to in pointing out illustrations.

Where two counts in a complaint are substantially alike, an error in sustaining a demurrer to one of them is immaterial.<sup>3</sup> So where a demurrer to a special defense is erroneously sustained, but evidence in support of it is admissible under the denials, the error is immaterial.<sup>4</sup> So error in overruling a demurrer for misjoinder of causes of action was held to be immaterial where the substantial rights of the appellant were not affected.<sup>4a</sup> So error in overruling

the cause upon that ground. That it might result in preventing the appellate courts from enforcing the fundamental right to a jury trial is not really of greater moment, perhaps not so much, as the fact that it may prevent this court from enforcing uniformity in the administration of the law. Under this rule, any and all trial courts may refuse to be governed by the law of procedure and evidence, solemnly enacted by the legislature, and, unless we can determine from the record, both that the party complaining has suffered substantial injury, and that a different result would have been probable if the law of procedure had been followed, there could be no reversal. . . .

"Uniformity in the administration of justice is a fundamental right, and every litigant may demand that his case shall be tried, so far as practical, by the same established rules of procedure and evidence, as well as upon the same principles which are applied to other like controversies. To secure this uniformity is an important function of an appellate court, and the jurisdiction being derived from the constitution, a co-ordinate branch of the government cannot say that it shall not perform its function or control its use of the power and discretion vested in it.

"A litigant who has been denied a trial according to the law of the land has, in a legal sense, been aggrieved, but courts are not created for the redress of ideal wrongs, and, therefore, when from the record we can see that the injury is not substantial, it is not such a grievance as courts will redress. We therefore say in such a case that the party complaining has not been injured. He is not an aggrieved party in such sense that he needs or can obtain a correction of the error. Further than this the courts should not go even if authorized by the legislature. How serious the departure from established rules must be to require a reversal is generally a judicial question."

<sup>3</sup> Nevada County & S. C. Co. v. Kidd, 37 Cal. 282; and see, also, Consolidated National Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96; Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312; De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045; and see Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137.

<sup>4</sup> Brown v. Kentfield, 50 Cal. 129.

So an error in sustaining a general demurrer to a complaint, which stated a good cause of action, but against one not a party, was held not prejudicial error. Arnold v. Pope (Utah), 108 Pac. 351.

<sup>4a</sup> Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Angell v.

a demurrer for ambiguity is immaterial where it appears that the defendant was not misled.<sup>4b</sup> So where the court below failed to pass upon a demurrer, it was held to have been an immaterial error, it appearing that the demurrer was without merit.<sup>4c</sup> So error in overruling a special demurrer was held immaterial, it appearing that the cause was tried on its merits, and that the defendant was not prejudiced.<sup>4d</sup> So where a demurrer to an affirmative defense is erroneously overruled but no evidence is introduced in its support, the error was held to be immaterial.<sup>5</sup> So an error in striking out denials of the existence of the corporation was held to have been rendered immaterial by permitting the certificate of incorporation to be introduced in evidence.<sup>6</sup> An instruction given to an interpreter in a criminal case that whenever the witness undertakes to state something that somebody else has told him he should so inform the court was held to have been prejudicial injury only when it appeared that the instruction had been acted upon; although it was held that if the interpreter had obeyed the instruction, the error would have warranted reversal.<sup>6a</sup> So where a con-

Hopkins, 79 Cal. 181, 21 Pac. 729; Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; but it must be made to appear that there was no substantial injury, for injury will be presumed in the absence of a contrary showing in the affirmative (Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861), and if it clearly appears that injury has resulted to the appellant from the misjoinder complained of, the judgment will be reversed. Stark v. Wellman, 90 Cal. 400, 31 Pac. 259. In this last-cited case it was suggested that while the classification of causes of action provided for in section 427, Code of Civil Procedure, was somewhat arbitrary, and differed materially from that which prevailed elsewhere, it was intended to be founded upon manifest reason. To permit a different classification, by disregarding the rules as to misjoinder of causes, would, it was suggested, whether that provided is founded upon reason or not, result in the practical repeal of section 427 by means of the provisions of section 475.

<sup>4b</sup> See Gassen v. Bower, 72 Cal. 555, 14 Pac. 206; Alexander v. Central etc. Co., 104 Cal. 532, 38 Pac.

410; Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Holland v. McDade, 125 Cal. 353, 58 Pac. 9; but it would seem that as in the case of demurrer for misjoinder of causes, it must affirmatively appear that the defendant received no injury by the failure of the court to sustain a demurrer for uncertainty. See Mallory v. Inomas, 98 Cal. 644, 33 Pac. 757, where it was held without limitation that the improper overruling of the demurrer for uncertainty must result in a reversal of the judgment; but see the opinion in Holland v. McDade, *supra*, as well as the other cases. But if the substantial rights of appellant are affected, the error will be deemed prejudicial. See Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Jacob v. Lorenz, 98 Cal. 332, 83 Pac. 119; Foerst v. Kelso, 131 Cal. 376, 63 Pac. 681.

<sup>4c</sup> See Hoeft v. Supreme Lodge, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174.

<sup>4d</sup> Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413.

<sup>5</sup> Campbell v. B. R. & A. W. Co., 35 Cal. 679, 10 Morr. Min. Rep. 656.

<sup>6</sup> People v. Hagar, 52 Cal. 171.

<sup>6a</sup> People v. Wong Ah Bang, 65 Cal. 305, 4 Pac. 19.

tinuance to take depositions as to a man's insanity was denied, it was held that the error, if any, was immaterial when it appeared that the fact of the insanity was uncontroverted.<sup>6b</sup> So it has been held that the omission to find upon an issue is immaterial if, upon the evidence, the finding must have been adverse to the appellant.<sup>7</sup> So where the judgment would have been the same if the finding had been in favor of the appellant, failure to find is immaterial, and without prejudice.<sup>7a</sup> So, if the result would be the same, however the issue might be found, failure to make a finding thereon is not reversible error.<sup>7b</sup> Thus, the courts not infrequently hold that if the findings made fully support the judgment based thereon, and are so far conclusive of the rights of the parties with respect to the subject matter of the controversy that further findings upon issues raised by the pleadings could not change the result or affect the judgment, disregarded issues become immaterial. In other words, if the findings made are of such a character that the judgment must necessarily remain the same, as being an ultimate determination of the controversy, it would be mere waste of time to make additional findings, and failure to do so would not be prejudicial error.<sup>7c</sup> Nor would it be prejudicial error to omit a finding

<sup>6b</sup> *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

<sup>7</sup> *Thompson v. Lyon*, 14 Cal. 39; *Hutchings v. Castle*, 48 Cal. 152; *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *California S. R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Gates v. McLean*, 70 Cal. 45; *Demartin v. Demartin*, 85 Cal. 71, 24 Pac. 594; *Gillespie v. Lake*, 85 Cal. 402, 24 Pac. 891; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504; *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. 39; *Southern Pacific Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083; *Reed v. Johnson*, 127 Cal. 538, 59 Pac. 986; and see *Estate of Carpenter*, 127 Cal. 582, 60 Pac. 162; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118; and see *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *Craig v. Gray*, 1 Cal. App. 598, 82 Pac. 699.

<sup>7a</sup> See *Robinson v. Placerville S. V. & P. R. R. Co.*, 65 Cal. 263, 3 Pac. 878; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *White v. Douglass*, 71 Cal. 115, 11 Pac. 860; *Diefendorff v.*

*Hopkins*, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; *Posachane etc. Co. v. Standard*, 97 Cal. 476, 32 Pac. 532; *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142; *Lion v. McClory*, 106 Cal. 623, 40 Pac. 12; *Gould v. Adams*, 108 Cal. 365, 41 Pac. 408; *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569.

<sup>7b</sup> See *Dougherty v. Nevada Bank*, 81 Cal. 162, 22 Pac. 513, and cases cited in following notes.

<sup>7c</sup> See *Roberts v. Haley*, 65 Cal. 397, 4 Pac. 385; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Vollmer v. De Castillo*, 74 Cal. 271, 15 Pac. 834; *Malone v. Del Norte*, 77 Cal. 217, 19 Pac. 422; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47; *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *Hooker v. Thomas*, 86 Cal. 176, 24 Pac. 941; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Miller v. Hicken*, 92 Cal. 229, 28 Pac. 339; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Southern Pacific Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19

which would, if fully supported by evidence, change the result, unless it were made to appear affirmatively that evidence was introduced in relation thereto, and that such evidence was of such weight and character as would justify a finding which would countervail the findings made, and render the judgment based thereon invalid.<sup>74</sup> It is not prejudicial to omit a finding where there is no evidence with reference thereto.<sup>75</sup> The rule under consideration goes further, and requires, not only that there should be evidence,

L. R. A. 92: Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675; Bancroft Co. v. Haslett, 106 Cal. 151, 39 Pac. 602; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Moroney v. Hellings, 110 Cal. 219, 42 Pac. 560; Amador etc. Co. v. Amador etc., 114 Cal. 346, 46 Pac. 80; Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Wheat v. Bank of California, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47; Union Coll. Co. v. Buckman, 150 Cal. 159, 119 Am. St. Rep. 164, 88 Pac. 708, 9 L. R. A., N. S., 568, 11 Am. Cas. 609; Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108; Robinson v. Muir, 151 Cal. 118, 90 Pac. 521; Roney v. Reynolds, 152 Cal. 323, 92 Pac. 847; Fogg v. Perris etc. Dist., 154 Cal. 209, 97 Pac. 316; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Craig v. Gray, 1 Cal. App. 598, 82 Pac. 699; and cases cited in notes 7a and 7b, *supra*, to practically same effect.

<sup>74</sup> Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 509; Dedmon v. Moffitt, 89 Cal. 211, 26 Pac. 800; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Giletti v. Sarocca, 110 Cal. 428, 42 Pac. 918; Marchant v. Hayes, 117 Cal. 669, 49 Pac. 840; Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848; Reed v. Johnson, 127 Cal. 540; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Roebeling's Sons Co. v. Gray, 139 Cal. 607, 73 Pac. 422; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Cutting etc. Co. v. Cauty, 141 Cal. 692, 75 Pac. 564; Damon v. Quinn, 143 Cal. 75, 76 Pac. 818; People v. McCue, 150 Cal. 195, 88

Pac. 899; Estate of Barclay, 152 Cal. 753, 93 Pac. 1012; and see De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045, and Horwege v. Sage, 137 Cal. 539, 70 Pac. 621; and cases cited in note 7c, *supra*.

<sup>75</sup> See Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Wise v. Burton, 73 Cal. 174, 14 Pac. 683; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Hihn v. Fleckner, 106 Cal. 95, 39 Pac. 214; Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113; Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312; Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Cutting etc. Co. v. Cauty, 141 Cal. 692, 75 Pac. 564; Eva v. Symons, 145 Cal. 202, 78 Pac. 648; Ropes v. Rosenfeld's Sons, 145 Cal. 671, 79 Pac. 354; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108; Estate of Barclay, 152 Cal. 753, 93 Pac. 1012; and see Christy v. Spring Valley Water Works Co., 84 Cal. 541, 24 Pac. 307; Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137; Greer v. Greer, 135 Cal. 121, 67 Pac. 20; and see cases cited in note 7d, *supra*.

It is not easy to differentiate the necessity for some evidence from the necessity for evidence sufficient in character and weight to justify a finding that would countervail the findings made, upon which the judgment rests, and no distinction is believed to exist; but, except by indirect intimation, it has never been held that such is the case. The two classes of cases are, therefore, cited in separate notes.

but that a finding is authorized of sufficient scope to overturn the judgment based upon the findings made. Anything short of this would have the effect of an utter want of evidence.<sup>72</sup> Where there is no evidence at all, the finding, if one is made, must be against him upon whom rests the burden of proof.<sup>73</sup> Thus, in the absence of evidence to support affirmative matter of defense, or of cross-complaint, the finding must be against the defendant, and failure to find would not be prejudicial on an appeal by him.<sup>74</sup> And if, notwithstanding the want of evidence, a finding should be made, it could not change the result.<sup>75</sup>

A finding against evidence is not always ground for reversal. Thus, it is not prejudicial error to make a finding against evidence in a case where the appellant could not have recovered judgment even though the finding had been the other way.<sup>76</sup> So a finding against evidence is not prejudicial where it relates to immaterial matters not necessary to the support of the judgment which is fully and sufficiently sustained by findings not inconsistent with the immaterial findings thus assailed.<sup>77</sup>

Errors in the admission or exclusion of evidence are subject to the same rule of law, and in no case will be deemed prejudicial and ground for reversal of the judgment, unless the appellant has received injury therefrom.<sup>78</sup> An error in the admission of evidence

<sup>72</sup> See *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504.

<sup>73</sup> See note 5, section 240, *ante*.

<sup>74</sup> See particularly *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66; *People v. McCue*, 150 Cal. 195, 88 Pac. 899.

<sup>75</sup> See latter part of note 5, section 240, *ante*.

<sup>76</sup> *McCreery v. Wells*, 94 Cal. 485, 29 Pac. 877.

<sup>77</sup> *Costa v. Silva*, 127 Cal. 351, 59 Pac. 695, and see *Chapea Water Co. v. Chapman*, 144 Cal. 366, 77 Pac. 990.

<sup>78</sup> *Arizona*: *Pickthall v. Steinfeld*, 12 Ariz. 230, 100 Pac. 779; *Title Guaranty etc. Co. v. Nichols*, 12 Ariz. 405, 100 Pac. 825; *Southern Pacific Co. v. Richey (Ariz.)*, 108 Pac. 225; *Hughes v. Cadena etc. Co. (Ariz.)*, 108 Pac. 231; *Shannon Copper Co. v. Potter (Ariz.)*, 108 Pac. 486; *Territory v. Copper Queen etc. Co. (Ariz.)*, 108 Pac. 960.

*California*: *Garwood v. Wood*, 34 Cal. 248; and look at *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; and

cases cited in the text and in other notes of this section.

*Colorado*: *Manitou etc. Co. v. Harris*, 45 Colo. 185, 132 Am. St. Rep. 140, 101 Pac. 61; *Fidelity etc. Co. v. Colorado etc. Co.*, 45 Colo. 443, 103 Pac. 383; *Gulldman v. Wilder*, 45 Colo. 551, 101 Pac. 759; *Freeman v. Peterson*, 45 Colo. 102, 100 Pac. 600; *Tuttle v. Welty*, 46 Colo. 25, 102 Pac. 1069; *Temple v. Teller etc. Co.*, 46 Colo. 497, 106 Pac. 8; *Washington etc. Co. v. O'Laughlin*, 46 Colo. 503, 105 Pac. 1092; *Allen v. Swadley*, 46 Colo. 544, 105 Pac. 1097; *Mahler v. Beishline*, 46 Colo. 603, 105 Pac. 874; *Hildreth v. Longmont*, 47 Colo. 79, 105 Pac. 107; *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; *Beach v. Schroeder*, 47 Colo. 312, 107 Pac. 271; *Koch v. Story*, 47 Colo. 335, 107 Pac. 1093; *Denver etc. Co. v. Wright*, 47 Colo. 366, 107 Pac. 1074; *Denver etc. Co. v. Reiter*, 47 Colo. 417, 107 Pac. 1100; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111; *Buckhorn*



etc. Co. v. Consolidated etc. Co., 47 Colo. 516, 108 Pac. 27; Colorado etc. Co. v. Allen, 48 Colo. 4, 108 Pac. 990; Jakway v. Rivers, 48 Colo. 49, 108 Pac. 999; Idaho etc. Co. v. Colorado etc. Co. (Colo.), 111 Pac. 553.

*Idaho*: Wallace v. Oregon etc. Co., 16 Idaho, 103, 100 Pac. 904; Keating v. Keating Mining Co., 18 Idaho, 660, 112 Pac. 206.

*Montana*: Shandy v. McDonald, 38 Mont. 393, 100 Pac. 203; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. 168; McAuley v. Casualty Co., 39 Mont. 185, 102 Pac. 586; Yergy v. Helena etc. Co., 39 Mont. 213, 102 Pac. 310; Golden v. Northern Pacific Co., 39 Mont. 435, 104 Pac. 549; Gordon v. Northern Pacific Co., 39 Mont. 571, 104 Pac. 679; Dreeland v. Pascoe, 39 Mont. 290, 102 Pac. 331; Brian v. Oregon etc. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A., N. S., 459; Rand v. Butte etc. Co., 40 Mont. 398, 107 Pac. 87; Osterholm v. Boston etc. Co., 40 Mont. 508, 107 Pac. 499; Cassidy v. Slemmons, 41 Mont. 426, 109 Pac. 976; Consolidated etc. Co. v. Struthers, 41 Mont. 565, 111 Pac. 152; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70; Isman v. Altenbrand, 42 Mont. 188, 111 Pac. 849; Stewart v. Pittsburg etc. Co., 42 Mont. 200, 112 Pac. 723.

*Nevada*: Murphy v. Southern Pacific Co., 31 Nev. 120, 101 Pac. 322; Turley v. Thomas, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568; Gibson v. Hjul (Nev.), 108 Pac. 759; Hochschultz v. Potosi etc. Co. (Nev.), 110 Pac. 71; Rawhide etc. Co. v. Rawhide etc. Co. (Nev.), 111 Pac. 30; Sherman v. Southern Pacific Co. (Nev.), 111 Pac. 416.

*New Mexico*: Radcliffe v. Chaves, 15 N. M. 258, 110 Pac. 699.

*Oklahoma*: Mullen v. Thaxton, 24 Okl. 643, 104 Pac. 359; Funk v. Hendricks, 24 Okl. 837, 105 Pac. 352; Armstrong etc. Co. v. Crump, 25 Okl. 452, 106 Pac. 855; Moore v. Atchison etc. Co., 26 Okl. 682, 110 Pac. 1059; Bash v. Howald, 27 Okl. 462, 112 Pac. 1125.

*Oregon*: Crosby v. Portland etc. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204; Mahon v. Rankin, 54 Or. 328, 102 Pac. 608, 103 Pac. 53; Dornsife v. Ralston, 55 Or. 254, 97 Pac. 713, 106 Pac. 13; Swank v. El-

wert, 55 Or. 487, 105 Pac. 901; Columbia etc. Co. v. Smith (Or.), 107 Pac. 465; Stowell v. Hall (Or.), 108 Pac. 182; Dibblee v. Astoria etc. Co. (Or.), 111 Pac. 242.

*Utah*: Johnston v. Union Pacific Co., 35 Utah, 285, 100 Pac. 390; Griffiths v. Justice Court, 35 Utah, 443, 100 Pac. 1064; Meyers v. San Pedro etc. Co., 36 Utah, 307, 104 Pac. 736; Madsen v. Utah etc. Co., 36 Utah, 528, 106 Pac. 799; Kurtz v. Ogden etc. Co. (Utah), 108 Pac. 14; Holt v. Nielson (Utah), 109 Pac. 470.

*Washington*: Hogg v. Standard etc. Co., 52 Wash. 8, 100 Pac. 151; Davis v. Lee, 52 Wash. 330, 132 Am. St. Rep. 973, 100 Pac. 752; Carney v. Vogel, 52 Wash. 571, 100 Pac. 1027; Pierce v. Pierce, 52 Wash. 619, 101 Pac. 358; State Bank v. Spokane etc. Co., 53 Wash. 528, 102 Pac. 414; Lawson v. Black Diamond etc. Co., 53 Wash. 614, 102 Pac. 759; Sipes v. Puget Sound etc. Co., 54 Wash. 47, 102 Pac. 1057; Collins v. Hazel etc. Co., 54 Wash. 524, 103 Pac. 798; Quinn v. Review etc. Co., 55 Wash. 69, 133 Am. St. Rep. 1016, 104 Pac. 181; Hoseth v. Preston Mill Co., 55 Wash. 416, 104 Pac. 612; Williams v. Hewitt, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496; Tindall v. Northern Pacific Co., 58 Wash. 118, 107 Pac. 1045; Hase v. Seattle, 57 Wash. 230, 107 Pac. 515; Alkire v. Myers etc. Co., 57 Wash. 300, 106 Pac. 915; Brown v. Seattle, 57 Wash. 314, 106 Pac. 1113; Sanpere v. Sanpair, 57 Wash. 524, 107 Pac. 369; Shaw v. Lobe, 58 Wash. 219, 108 Pac. 450; Luper v. Henry, 59 Wash. 33, 109 Pac. 208; Knust v. Bullock, 59 Wash. 141, 109 Pac. 329; Dickerman v. Reeder, 59 Wash. 405, 109 Pac. 1060; Britton v. Washington etc. Co., 59 Wash. 440, 110 Pac. 20; Singer v. Guy etc. Co., 60 Wash. 674, 111 Pac. 886; Maughlin Mill Co. v. Hamilton, 61 Wash. 66, 111 Pac. 1067; Bluber v. Earles, 61 Wash. 84, 111 Pac. 1057; Silver v. Insurance Co., 61 Wash. 593, 112 Pac. 666; Mrozevich v. Western Steel Corporation, 61 Wash. 668, 112 Pac. 925; Cox v. Wilkeson etc. Co., 61 Wash. 343, 112 Pac. 231; In re Seattle (Wash.), 100 Pac. 330.

*Wyoming*: Yount v. Strickland, 17 Wyo. 526, 101 Pac. 942.

which could by no possibility harm the appellant is not ground for reversal.<sup>8a</sup> Nor is the erroneous rejection of evidence, where the error was fully cured by the subsequent admission of substantially the same evidence, deemed prejudicial.<sup>8b</sup> Nor is the admission of immaterial evidence in a criminal case deemed prejudicial error, unless it affects the substantial rights of the appellant.<sup>8c</sup> So if the record shows that the appellant is not entitled to recover in any event, erroneous rulings upon evidence cannot entitle him to a reversal of the judgment;<sup>8d</sup> nor where it appears that the judgment could not have been different had the erroneous rulings not been made.<sup>8e</sup> So where the plaintiff admits the falsity of essential allegations of the complaint, at the trial, errors in the admission or rejection of evidence relating thereto will be deemed immaterial, and without prejudice to the appellant.<sup>8f</sup> So the erroneous admission of evidence is without prejudice where the respondent's case is fully sustained otherwise.<sup>9</sup> But this is the rule only when it can be clearly seen that the evidence in question was without any substantial effect upon the result; as, where the respondent's case rested upon the weakness of his adversary's case, and the erroneously admitted evidence was pointed at the affirmative, as distinguished from the negative, showing thus made in his behalf. If the erroneously admitted evidence tends directly to establish the respondent's case, it is not possible for the appellate court to say what weight or influence it really had upon the result, and its admission must therefore be regarded as prejudicial error.<sup>8a</sup> So error in admitting evidence is not prejudicial if there is other evidence amply sufficient to sustain the conclusion arrived at, at which the erroneously admitted evidence is pointed.<sup>10</sup> So the admission

<sup>8a</sup> Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154; and also O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

<sup>8b</sup> Wing Chung v. Los Angeles, 47 Cal. 531; Kelley v. Fittell, 65 Cal. 87, 3 Pac. 99; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Consolidated National Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96; People v. Phelan, 123 Cal. 551, 56 Pac. 424.

<sup>8c</sup> People v. Daniels, 105 Cal. 262, 38 Pac. 720.

<sup>8d</sup> McPhaill v. Buell, 87 Cal. 115, 25 Pac. 266.

<sup>8e</sup> In re Spencer, 96 Cal. 448, 31

Pac. 453. And see, to same effect, In re Briswalter, 72 Cal. 107, 13 Pac. 164; Mitchell v. Donohue, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614.

<sup>8f</sup> See Turner v. White, 77 Cal. 392, 19 Pac. 683.

<sup>9</sup> Daughiney etc. Co. v. Red Poll etc. Co., 123 Cal. 548, 56 Pac. 451; and to same effect, see Jory v. Supreme Council, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524, 26 L. R. A. 733.

<sup>8a</sup> See Estate of James, 124 Cal. 653, 57 Pac. 578, 1008.

<sup>10</sup> S. B. L. A. v. Christy, 41 Cal. 501; and see, also, Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136.

of irrelevant evidence will not be deemed prejudicial and ground for reversal of the judgment unless it appears that the trial court rested its decision thereon.<sup>10a</sup> So error in the admission of evidence is unprejudicial if it is afterward stricken out.<sup>10b</sup> So in an action on behalf of dependent heirs for damages for injuries resulting in death, refusal of the court to allow the defendant to show the existence of additional heirs was held to have been without prejudice, since the existence of such additional heirs might have enhanced the amount of the damages awarded, but could not have diminished it.<sup>10c</sup> So where the judge instructed the jury that if they found for the defendants on a certain issue to render a general verdict for them, but otherwise to specify certain things in the verdict, and the jury rendered a general verdict, it was held that errors in rejecting evidence which had no bearing on the issue mentioned were not productive of injury.<sup>11</sup> So where in an action of ejectment the plaintiff introduced evidence of a title which was conclusive in his favor, and then introduced a distinct and separate chain of title, in relation to which errors were committed, it was held that such errors were immaterial.<sup>12</sup> So in an action for the recovery of personal property, where the plaintiff relied exclusively upon the presumption of title arising from possession, and the defendant introduced sufficient evidence to rebut that presumption, and went on to introduce evidence showing that plaintiff claimed under a void judgment, it was held that error in admitting the evidence as to such judgment did not injure the plaintiff.<sup>13</sup> So where the court erred in not permitting a witness to testify that the plaintiff admitted that the land in controversy was public land, but instructed the jury that all land was presumed to be public land until the contrary was shown, and there was no evidence to the contrary, it was held that the error did not injure the defendant.<sup>14</sup> So where the court erred in receiving a will in evidence, it was held that the subsequent admission by the party of the fact which the will was introduced to prove rendered the error immaterial.<sup>15</sup> So where an objection to a question is erroneously overruled, but the witness gives no answer to it,<sup>16</sup> or gives

<sup>10a</sup> *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

<sup>10b</sup> *People v. Borda*, 105 Cal. 636, 38 Pac. 1110.

<sup>10c</sup> *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733.

<sup>11</sup> *Carpenter v. Norris*, 20 Cal. 437.

<sup>12</sup> *Clark v. Lockwood*, 21 Cal. 220.

<sup>13</sup> *Lafontaine v. Green*, 17 Cal. 294.

<sup>14</sup> *Preston v. Keys*, 23 Cal. 193.

<sup>15</sup> *Carpentier v. Gardiner*, 29 Cal. 160.

<sup>16</sup> *Hansen v. Martin*, 54 Cal. 394,

5 *Morr. Min. Rep.* 643; *Shay v.*

an answer which is not responsive,<sup>17</sup> the error is not productive of injury. So where a question on cross-examination was improperly excluded, but the party afterward made the witness his own, and the question was then answered, it was held there was no injury.<sup>18</sup> So where it is apparent that if the evidence claimed to have been erroneously excluded had been admitted, the result would have been the same, the error, if any, is harmless.<sup>19</sup> So an appellant cannot object to the introduction of evidence, the only effect of which is favorable to himself.<sup>19a</sup> So where the plaintiff is not entitled to recover on his own showing, questions as to errors in excluding evidence offered by him to disprove the defendant's case will not be considered.<sup>20</sup> So where it is apparent that a verdict for the defendant would have to be set aside as against the evidence, an instruction which assumes in favor of the plaintiff a question which should have been left to the jury is an immaterial error.<sup>21</sup> So where instructions are conflicting, and the conflicting instruction given at the request of appellant is erroneous, such conflict, or such erroneous instruction, cannot be said to operate injuriously to him, and it will not be ground for reversal.<sup>21a</sup> So, in a trial for murder, an erroneous instruction to the effect that a certain act would constitute murder in the second degree, whereas it might amount to manslaughter only, is immaterial if the defendant is convicted of murder in the first degree.<sup>21b</sup> So where a proper instruction is refused, the error is without prejudice if the pertinent portions thereof are given elsewhere.<sup>21c</sup> Failure to instruct on a point specially found in favor of the

Tuolumne Water Co., 6 Cal. 73, 5 Morr. Min. Rep. 587; *People v. Graham*, 21 Cal. 261; *People v. Williams*, 45 Cal. 25.

<sup>17</sup> *Treat v. Riley*, 35 Cal. 129.

<sup>18</sup> *Hicks v. Whitesides*, 23 Cal. 404.

<sup>19</sup> *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *St. John v. Kidd*, 26 Cal. 263, 4 Morr. Min. Rep. 454; *De Merle v. Mathews*, 26 Cal. 455; *Hoag v. Pierce*, 28 Cal. 187. So, likewise, where the evidence was admitted. *Longfellow v. Huffman* (Or.), 112 Pac. 8.

<sup>19a</sup> *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681.

<sup>20</sup> *Hebrard v. Jefferson G. & S. M. Co.*, 33 Cal. 290, 5 Morr. Min. Rep. 270; and look at *De Merle v. Mathews*, 20 Cal. 467; *Hoag v. Pierce*, 28 Cal. 192.

<sup>21</sup> *Levitzy v. Canning*, 33 Cal. 299.

<sup>21a</sup> See *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Williams v. Southern Pac. Co.*, 110 Cal. 457, 42 Pac. 974.

<sup>21b</sup> *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790; and see *People v. Swift*, 66 Cal. 348, 5 Pac. 505; *People v. Clary*, 72 Cal. 59, 13 Pac. 77, where there was a similar ruling.

<sup>21c</sup> *Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103; *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106. And see *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34, where there was a similar ruling. It is sufficient if all instructions, taken together, fairly and fully state the law. See *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719.

moving party, if erroneous, is error without prejudice.<sup>218</sup> An erroneous instruction is immaterial if the verdict is necessarily correct upon the evidence, and a new trial must have been granted if it had been otherwise.<sup>219</sup> So an appellant cannot be said to be prejudiced by an erroneous instruction where, upon the pleadings and evidence, he was not entitled to judgment under any conditions.<sup>220</sup> So if an erroneous instruction withdraws from the jury a hypothesis which had nothing in the case to support it, the error is harmless.<sup>221</sup> So where the plaintiff is not entitled to recover on his own showing, a judgment for the defendant will not be disturbed for errors in instructions.<sup>222</sup> So where the court might properly have instructed the jury to find a verdict for the plaintiffs, a verdict in their favor will not be disturbed for errors in giving or refusing instructions.<sup>223</sup> So in many other cases erroneous rulings upon instructions have been held without prejudicial effect.<sup>224</sup>

<sup>218</sup> *Scott v. San Bernardino etc. Co.*, 152 Cal. 604, 93 Pac. 677.

<sup>219</sup> *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386.

<sup>220</sup> "Where the court lays down an erroneous principle of law, but it appears that nevertheless the verdict of the jury is necessarily correct upon the evidence before them, or where, as in this case, a new trial should have been granted if the jury had not returned the special verdict, the error is harmless." Quoted in *Greene v. Murdock*, 1 Cal. App. 139, 81 Pac. 993, from *Green v. Ophir etc. Co.*, 45 Cal. 522, 12 Morr. Min. Rep. 140. The principle was applied in criminal cases in *People v. Taggart*, 1 Cal. App. 423, 82 Pac. 396.

<sup>221</sup> *Satterlee v. Bliss*, 36 Cal. 489. As to abstract instructions, see section 122, *ante*.

<sup>222</sup> *Enright v. S. F. & S. J. R. R. Co.*, 33 Cal. 230; *Green v. Ophir etc. Co.*, 45 Cal. 522, 12 Morr. Min. Rep. 140.

<sup>223</sup> *Bruck v. Tucker*, 42 Cal. 346; and see *Robinson v. W. P. R. R. Co.*, 48 Cal. 409.

<sup>224</sup> As to the rule in other states, see the following cases:

*Arizona*: *Pickthall v. Steinfeld*, 12 Ariz. 230, 100 Pac. 779.

*California*: *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952; *Clark*

*v. Child*, 66 Cal. 87, 4 Pac. 1058; *In re Briswalter*, 72 Cal. 107, 13 Pac. 164; *Low v. Warden*, 77 Cal. 94, 19 Pac. 235; *Noone v. Transatlantic etc. Co.*, 88 Cal. 152, 26 Pac. 103; *People v. Gordon*, 88 Cal. 422, 26 Pac. 502; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100, 14 L. R. A. 320; *People v. Winters*, 93 Cal. 277, 28 Pac. 946; *Chapell v. Schmidt*, 104 Cal. 511, 38 Pac. 892; *Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103; *People v. Worthington*, 115 Cal. 242, 46 Pac. 1061; *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517, 47 Pac. 364, 778; *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821; *Chapea Water Co. v. Chapman*, 144 Cal. 366, 77 Pac. 990; *Hamlin v. Pacific Electric Co.*, 150 Cal. 776, 89 Pac. 1109.

*Colorado*: *Colorado etc. Co. v. McGeorge*, 46 Colo. 15, 133 Am. St. Rep. 43, 102 Pac. 747, 17 Ann. Cas. 880; *Denver etc. Co. v. Wright*, 47 Colo. 366, 107 Pac. 1074; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111; *Gutshall v. Cooper*, 48 Colo. 160, 109 Pac. 428; *Mustang etc. Co. v. Hissman (Colo.)*, 112 Pac. 800.

*Idaho*: *Maloney v. Winston etc. Co.*, 18 Idaho, 740, 111 Pac. 1080.

*Montana*: *Ettien v. Drum*, 39 Mont. 34, 101 Pac. 151; *Ross v. Saylor*, 39 Mont. 559, 104 Pac. 864; *Poor v.*

Generally speaking, an appellant cannot complain of errors which result in a determination more favorable to him than the evidence warrants,<sup>24b</sup> or where the result could not have been different if all the rulings complained of had been in appellant's favor.<sup>24c</sup> One who is not aggrieved cannot successfully contend that he has been prejudiced, whether the ruling is erroneous or the contrary.<sup>24d</sup> The reports contain many illustrations of the rule under consideration, which may be profitably studied.<sup>24e</sup>

*Madison etc. Co.*, 41 Mont. 236, 108 Pac. 645; *John v. Northern Pacific Co.*, 42 Mont. 18, 111 Pac. 632; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70.

*Nevada*: *Henningsen v. Tonopah etc. Co. (Nev.)*, 111 Pac. 36.

*New Mexico*: *Corcoran v. Albuquerque Traction Co.*, 15 N. M. 9, 103 Pac. 645; *Neher v. Viviani*, 15 N. M. 460, 110 Pac. 695.

*Oklahoma*: *McConnell v. Holderman*, 24 Okl. 129, 103 Pac. 593; *Shawnee etc. Bank v. Wootten*, 24 Okl. 425, 103 Pac. 714; *Kaufman v. Bois-mier*, 25 Okl. 252, 105 Pac. 326; *Armstrong etc. Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *Chicago etc. Co. v. Johnson*, 25 Okl. 760, 107 Pac. 662; *Commonwealth Bank v. Baughman*, 27 Okl. 175, 111 Pac. 332.

*Oregon*: *Crosby v. Portland etc. Co.*, 53 Or. 496, 100 Pac. 300, 101 Pac. 204; *Ferrari v. Beaver Hill Co.*, 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016; *Mahon v. Rankin*, 54 Or. 328, 102 Pac. 608, 103 Pac. 53; *Shields v. Southern Pacific Co. (Or.)*, 112 Pac. 4.

*Utah*: *Smith v. San Pedro etc. Co.*, 35 Utah, 390, 100 Pac. 673; *Wall etc. Co. v. Continental etc. Co.*, 36 Utah, 121, 103 Pac. 242; *Gibson v. Doyle (Utah)*, 106 Pac. 512; *Evans v. Oregon etc. Co. (Utah)*, 108 Pac. 638.

*Washington*: *Avis v. Insurance Co.*, 54 Wash. 269, 103 Pac. 50; *Pealer v. Gray's Harbor etc. Co.*, 54 Wash. 415, 103 Pac. 451; *Northern Pacific Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453; *Haystead v. Insurance Co.*, 54 Wash. 695, 103 Pac. 53; *Ed-wall v. Insurance Co.*, 54 Wash. 695, 103 Pac. 52; *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Benner v. Wallace etc. Co.*, 55 Wash. 679, 105 Pac. 145; *Auerbuch v. Great Northern*

*Co.*, 55 Wash. 633, 104 Pac. 1103; *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620; *Tacoma v. Nisqually etc. Co.*, 57 Wash. 420, 107 Pac. 199; *Whitlock v. Northern Pacific Co.*, 59 Wash. 15, 109 Pac. 188; *Labee v. Sultan etc. Co.*, 59 Wash. 341, 109 Pac. 1023; *Simons v. Cissna*, 60 Wash. 141, 110 Pac. 1011; *Manvell v. Weaver*, 61 Wash. 23, 111 Pac. 890; *Blucher v. Earles*, 61 Wash. 84, 111 Pac. 1057; *Cook v. Danaher etc. Co.*, 61 Wash. 118, 112 Pac. 245; *Hemmingson v. Carbon Hill Co. (Wash.)*, 112 Pac. 1111.

*Wyoming*: *George v. Emery (Wyo.)*, 107 Pac. 1.

<sup>24b</sup> *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Lowen*, 109 Cal. 381, 42 Pac. 32; *People v. Muhler*, 115 Cal. 303, 47 Pac. 128; *People v. Coulter*, 145 Cal. 66, 78 Pac. 348.

<sup>24c</sup> *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795.

<sup>24d</sup> See *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522; *Dayton v. McAllister*, 129 Cal. 192, 61 Pac. 913; *Foster v. Bowles*, 138 Cal. 449, 71 Pac. 495.

<sup>24e</sup> *Goldstein v. Nunan*, 66 Cal. 542, 6 Pac. 451; *Osment v. McElrath*, 68 Cal. 466, 58 Am. St. Rep. 17, 9 Pac. 731; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672; *People v. Marsailer*, 70 Cal. 98, 11 Pac. 503; *People v. Collins*, 75 Cal. 411, 17 Pac. 430; *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687; *Tivnen v. Monahan*, 76 Cal. 131, 18 Pac. 144; *People v. Brown*, 76 Cal. 573, 18 Pac. 678; *Thomas v. Jameson*, 77 Cal. 91, 19 Pac. 177; *Southern Pac. R. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886; *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719; *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61; *McNee v. Lynch*, 88 Cal. 519, 26 Pac. 508; *Spear v. Lyon*, 89 Cal. 36, 26 Pac. 619; *McDonald v. Taylor*, 89 Cal. 42, 26 Pac.

In all of the cases above cited the supreme court could see from the record that the appellant was not injured by the error complained of. As is shown in the next section, if the record shows that error was committed, and does not show affirmatively that no injury resulted from it, injury will be presumed, and a new trial will be directed. And by "injury" is meant "effect upon the result." It is sometimes said that the supreme court will not disturb a judgment where it is evident that a new trial will be attended with the same result,<sup>25</sup> or where substantial justice has been done. But by this is not meant that the judgment will not be disturbed where the court is of opinion that a new trial *ought* to be or will *probably* be attended with the same result, but only that the judgment will not be disturbed where the result of a new trial can by no legal possibility be different. If the court cannot tell what would have been the result had the error not been committed, a new trial must be granted,<sup>26</sup> whatever the supreme court may think about the merits of the case. In this regard, Bennett, J., delivering the opinion in *Yonge v. P. M. S. S. Co.*,<sup>27</sup> said: "We do not consider the verdict by any means as excessive in amount, but we do not sit to determine what it should have been under proper instructions from the court; and we cannot say what it would have been had the charge excepted to not been given. For this error the judgment must be reversed and a new trial granted." So in *Stevens v. Ross*,<sup>28</sup> the same learned justice said:

"But it is further said that the supreme court is authorized to render such judgment as substantial justice shall require. Substantial justice requires that both parties should be allowed a hearing, and a denial of that can scarcely be termed a formal or

595; *Curran v. Kennedy*, 89 Cal. 98, 26 Pac. 641; *People v. Fick*, 89 Cal. 144, 26 Pac. 759; *Davies v. Oceanic S. S. Co.*, 89 Cal. 280, 26 Pac. 827; *Blakeley v. Blakeley*, 89 Cal. 324, 26 Pac. 1072; *People v. Dollor*, 89 Cal. 513, 26 Pac. 1086; *Jones v. Tallant*, 90 Cal. 386, 27 Pac. 305; *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533; *Salle v. Mayer*, 91 Cal. 165, 27 Pac. 513; *Zumwalt v. Dickey*, 92 Cal. 156, 28 Pac. 212; *Cahill v. Murphy*, 94 Cal. 29, 28 Am. St. Rep. 88, 30 Pac. 195; *People v. Lemperle*, 94 Cal. 45, 29 Pac. 709; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *Steinhart v. National Bank*, 94 Cal.

362, 28 Am. St. Rep. 132, 29 Pac. 717; *Cook v. Sudden*, 94 Cal. 443, 29 Pac. 949; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 323; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Dayton v. McAllister*, 129 Cal. 192, 61 Pac. 913; *Central Pacific Co. v. Feldman*, 152 Cal. 303, 92 Pac. 849.

<sup>25</sup> *Tohler v. Folsom*, 1 Cal. 207; *Smith v. Compton*, 6 Cal. 24.

<sup>26</sup> *Jolley v. Foltz*, 34 Cal. 321; and see cases cited in the next section.

<sup>27</sup> 1 Cal. 353.

<sup>28</sup> 1 Cal. 94.

technical error, defect, or imperfection. It strikes us very forcibly that the defendant has no defense on the merits in this action; but whether he has or not is a question which cannot be tried here—a question which the defendant is entitled to have passed upon in another way and before a different forum; and if the practice contended for by the respondent were to be sanctioned in the present instance it would become the rule for the government of subsequent cases in which it might appear clear to us that there was a good defense. The substantial justice spoken of in the statute is substantial *legal* justice to be ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity which may be entertained by each individual.”

So in *McCreery v. Everding*,<sup>29</sup> where the court below granted a new trial for error in the charge, the supreme court affirmed the order, and Belcher, J., delivering the opinion, said: “We cannot consider the suggestion of counsel that the trial was long and expensive, and there is no probability of a different result in case a new trial should be had. The plaintiffs are entitled to a fair trial without material error committed against them, and until they have that, they have a right to complain.”

For instance of the application of the rule *de minimis*, see section 300a, *post*.

**§ 287. Where Error is Shown, Injury is Presumed Unless the Contrary Appears Affirmatively.**<sup>1</sup>—No rule is better settled than this, it having been announced and acted upon from the earliest history of our supreme court to the present time. Thus in *Santillan v. Moses*,<sup>1a</sup> the supreme court reversed the judgment for the admission of illegal evidence, and Bennett, J., delivering the opinion, said: “In such case the rule is that unless it can be seen that the illegal testimony could have had no influence upon the verdict, we ought to grant a new trial; and it is impossible to tell what weight the jury allowed to the testimony thus improperly elicited.”<sup>1b</sup> So in *Mateer v. Brown*,<sup>2</sup> the same learned justice, delivering the opinion upon rehearing, said: “What weight the improper evidence had on the mind of the district judge in

<sup>29</sup> 44 Cal. 246.

<sup>1</sup> As noted in the preceding section, the constitutionality of the 1897 amendment of section 475, Code of Civil Procedure, was questioned, not to say discredited entirely, in *San Jose*

*Co. v. San Jose etc. Co.*, 126 Cal. 322, 58 Pac. 824, in so far as its provisions nullified the presumption here referred to.

<sup>1a</sup> 1 Cal. 92.

<sup>1b</sup> *Santillan v. Moses*, 1 Cal. 92.

<sup>2</sup> 1 Cal. 321.



coming to the conclusions which he arrived at, we cannot determine; and where a judgment is founded in part on incompetent evidence, unless we can clearly see that it had no effect, the judgment is erroneous." So in *Jackson v. Feather River Co.*,<sup>\*</sup> the judgment was reversed because the defendant was not allowed to ask a certain question on cross-examination of one of the witnesses, and Baldwin, J., delivering the opinion, said: "We cannot see clearly that the defendants were not injured by this error. They might not have been, but the rule is that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none *could have been* or was done by the error. We regret to be obliged to send this case back on so small a point, but so the law as we read it ordains." So in *Busenius v. Coffee*,<sup>4</sup> where an instruction was erroneously refused, the judgment was reversed, and Cope, J., delivering the opinion, said: "We cannot undertake to determine to what extent the plaintiffs were prejudiced, or whether prejudiced at all by the refusal of the court to give the instruction. The record does not, of course, furnish us with a perfect history of the trial, and even if it did, the grossest injustice might be done if we should decline to interfere with the judgment upon the ground that the action of the jury was not influenced by the error of the court." So in *Grimes v. Fall*,<sup>4a</sup> where the record showed an error in admitting evidence, the judgment was reversed, the court, per Baldwin, J., saying: "Error having been shown in the admission of this proof, it rests with the plaintiff to show clearly that no injury accrued from it. The rule is that from error injury is presumed, and this intendment must be clearly rebutted." So in *Kelly v. Taylor*,<sup>5</sup> where the court below erred in its charge, the judgment was reversed, and Crocker, J., delivering the opinion, said: "The respondents insist there was sufficient evidence to sustain the plaintiff's case, independent of these instructions, and that he did not rely upon the doctrine of estoppel in the court below. The case was tried by a jury, and it is impossible for us to tell upon what particular portion of the evidence they founded their verdict, or what instructions controlled them. They may have

\* 14 Cal. 18, 5 Morr. Min. Rep. 594.

4a 15 Cal. 63.

4 14 Cal. 91, 5 Morr. Min. Rep. 214.

5 23 Cal. 11, 5 Morr. Min. Rep. 598.

found for the plaintiff entirely upon these erroneous instructions, or they may have disregarded them entirely. It is sufficient, however, if it appears that they might have been influenced thereby, to make it our duty to send the case back for a new trial." So in *Mason v. Wolff*,<sup>6</sup> the judgment was reversed for the admission of incompetent evidence, and Temple, J., delivering the opinion, said: "We think this evidence inadmissible, and none the less so because the case was tried by the court without a jury. If the court admits incompetent evidence against objection, no other inference can be drawn than that the evidence is considered entitled to some weight in the determination of the issue of fact which is being tried." So in *Leonard v. Kingsley*,<sup>7</sup> the judgment was reversed for the admission in evidence of certain letters. The record contained enough to show that their admission was erroneous, but did not give the contents of the letters. The court said: "It is urged in argument that in the absence of the letters it cannot be presumed that they were injurious to the defendant's case, even though they were improperly admitted in evidence. But the rule long recognized and acted upon by this court is that when the appellant has shown error in the admission of evidence, the error will be presumed to have been injurious to the adverse party, unless the contrary clearly and affirmatively appears. If the production of the letters would have shown that they could not have damaged the defendant, the respondent should have had them incorporated into the record."

So in *People v. Sansome*,<sup>8</sup> where the defendant was charged with robbery and former conviction for burglary, and plead guilty to the last, the court permitted the entire indictment to be read to the jury, together with defendant's plea, and admitted evidence showing such former conviction and a pardon therefor, in direct contravention of subdivision 1 of section 1093, Penal Code. An instruction was afterward given the jury to disregard the whole proceeding, but the appellate court held that the error was prejudicial under the rule:

"The rule is that every error is presumed to work injury to the party against whom it is committed, unless it clearly appears from the record that no injury could have resulted from it."

<sup>6</sup> 40 Cal. 246.

<sup>7</sup> 50 Cal. 628.

<sup>8</sup> 84 Cal. 449, 24 Pac. 143.

So in *People v. Kamaunu*<sup>16</sup> the court said:

"And if it be admitted that there was error, the question then would be, Did the error affect the substantial rights of the defendant? If we cannot determine whether there was injury or not, then, since the defendant has not been tried as the law of the land directs, we must presume injury. For to be so tried is his right. But, if we can see that he has not been injured, the judgment will be allowed to stand."

So in holding error in the admission of evidence prejudicial necessitating a reversal of the judgment, the supreme court, in *Short v. Frink*,<sup>17</sup> said:

"It is impossible for us to say to what extent this objectionable evidence influenced the jury in rendering their verdict. Its direct tendency was to prejudicially affect the defendant by

<sup>16</sup> 110 Cal. 609, 42 Pac. 1090.

<sup>17</sup> 151 Cal. 83, 90 Pac. 200. Respondents cannot be heard to say that error in the admission of improper evidence introduced by them is not prejudicial. Prejudice is presumed from such error. The appellate court cannot say but that the evidence thus erroneously admitted actually influenced the decision of the trial court. If it was not intended and expected to have such influence, the respondents should not have risked insisting upon its admission. If it is plainly apparent that it did not have the influence intended upon the decision, there is no need for the presumption of injury. *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35.

A party cannot insist upon the admission of improper evidence over objection to its admissibility, and then defend his course by contending that the error was harmless. If the court cannot say positively what was the effect upon the court or jury, it will be presumed to have been injurious. *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688; *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008; *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710.

See, also, *San Jose Ranch Co. v. San Jose etc. Co.*, 126 Cal. 322, 58 Pac. 824; *Lathrop v. Flood*, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215.

In *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297, the prosecution was allowed to prove, over repeated objections of defendant, the taking of a loaded pistol from defendant at a meeting between him and the prosecutrix and her brother and uncle, three or four days after the alleged offense; and the pistol was introduced in evidence—the defendant still objecting—as an exhibit in the case. "This evidence was clearly inadmissible, and though it is difficult to imagine how it could have influenced the jury to the prejudice of the defendant, yet they, like the counsel for the prosecution and the court, may have perceived some bearing of the evidence on the case that we cannot discover, and, in the absence of knowing what this was, it is difficult to determine affirmatively from the record that the defendant was not prejudiced."

In *People v. Wong Ah Leong*, 99 Cal. 440, 34 Pac. 105, a prosecution for an assault with a deadly weapon, to wit, a knife, evidence that the defendant had a pistol is, of course, inadmissible, but the prosecution, after having persistently sought all through the trial, and finally with success, got this inadmissible evidence before the jury. The supreme court held that the people could not be heard, on appeal, to say that the evidence was unimportant and the error harmless. See, also, *People v. Yee Fook Din*, 106 Cal. 163, 39 Pac. 530.

placing him in a most unfavorable light, and we must presume that it had that effect."

And the same rule has been laid down in numerous other cases.\*

As a matter of course, the question as to whether prejudicial error has been committed or not must be determined from the record alone, and its determination is governed by the same rules whether trial is by jury or by the court. Thus in *Jones v. Snow*,<sup>sa</sup> which was a trial by the court, the action was on a promissory note for one thousand dollars. The court, after erroneously excluding evidence as to the payment of five hundred dollars, rendered judgment for five hundred dollars. The supreme court reversed the judgment, saying:

"It is said that the court allowed payments amounting to five hundred dollars, and as every intendment must be made to sustain the rulings of the court *a qua*, therefore it must be presumed in this court that the payments were included in the sum allowed. But we are powerless to presume anything which would contradict the record. And as the record shows these payments were excluded from its consideration by the court, we could hardly be justified in presuming that they cut any figure in the conclusion reached by it. We should go far astray to hold that the trial court, in making up its judgment, considered evidence which it excluded."

So in the case of *In re Man Wo Chan*,<sup>sb</sup> it appeared that upon the presentation of the statement on motion for new trial for settlement the attorney for respondent proposed certain amendments

\* *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83; *People v. Furtado*, 57 Cal. 345; *Ponce v. McElvy*, 51 Cal. 222; *Bay View Assn. v. Williams*, 50 Cal. 353; *Sweeny v. Reilly*, 42 Cal. 402; *Norwood v. Kentfield*, 30 Cal. 393; *Lally v. Wise*, 28 Cal. 539; *Roff v. Duane*, 27 Cal. 565; *Wiseman v. McNulty*, 25 Cal. 230, 6 Morr. Min. Rep. 326; *Richardson v. McNulty*, 24 Cal. 339, 1 Morr. Min. Rep. 11; *Rice v. Heath*, 30 Cal. 609; *Carpentier v. Williamson*, 25 Cal. 154; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *MacDougall v. C. P. R. Co.*, 63 Cal. 431; *Cleary v. City R. R. Co.*, 76 Cal. 240, 241, 18 Pac. 269; *Hausman v. Hausling*, 78 Cal. 283, 20 Pac. 570; *In re Carpenter*, 79 Cal. 382, 21 Pac.

835; *People v. Smith*, 93 Cal. 445, 29 Pac. 64; *Salinas Bank v. De Witt*, 97 Cal. 78, 31 Pac. 744; *In re Kennedy*, 104 Cal. 429, 38 Pac. 93; *Bjorman v. Fort Bragg Co.*, 104 Cal. 626, 38 Pac. 451; *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 416; *People v. Marshall*, 112 Cal. 422, 44 Pac. 718; *People v. Richards*, 136 Cal. 127, 68 Pac. 477; *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *People v. Noon*, 1 Cal. App. 44, 88 Pac. 746.

Of course, if it clearly appears that no injury resulted, there is no room for any presumption. See *People v. Carroll*, 92 Cal. 568, 28 Pac. 600.

sa 64 Cal. 456, 2 Pac. 28.

sb 87 Cal. 155, 25 Pac. 271.

of facts that had been previously shown in the case, and were referred to in the argument thereon, but that had not been offered in evidence. The proposed amendments were allowed over appellant's objections. On appeal the cause was reversed because of this error, the court saying:

"If the court had decided the issue upon the evidence before it, and had based its judgment upon a disbelief of the witnesses, we would not disturb it. It is evident, however, that the court considered matters not before it at all. . . . Of course these amendments should not have gone into the statement; for they confessedly contain things which did not occur at the trial. If contestant considered these things relevant and material, he should have offered to prove them, and appellant would have had an opportunity to object, or to disprove or explain them. . . . And as the court put these amendments into the statement, it must be presumed that the court, in coming to its conclusion, considered the things which the amendment contained. It was apparent, therefore, that there was not a fair trial of the case."

The rule governs the court below in passing upon motions for new trial as well as the appellate courts in passing upon appeals, and, as in the latter, the question of error must be determined from the record alone. A judge below will not be heard, any more than a juror, to say that in giving his decision he was influenced by certain portions of the evidence, and not by others. In the case of *Spanagel v. Dellinger*,<sup>9</sup> the judge, in passing upon the motion for new trial, said that he had no doubt but that he had committed an error in admitting certain declarations, but that aside from such declarations there was abundant testimony to support the decision, and that therefore he denied the motion. The supreme court reversed the order denying the motion, and Sprague, J., delivering the opinion, said: "After such incompetent evidence had been at the trial admitted and acted upon by the court in making up its findings and judgment, it was not competent for the judge, on motion for a new trial, to undertake to determine, after admitting error in the admission of this evidence, that it was cumulative only, and that there was sufficient evidence independent of it to justify the findings, and upon that ground deny a new trial. From the admission of improper evidence on

• 38 Cal. 278.

the trial pertinent to any material issue, unless the same be withdrawn before the submission of the cause to the court or jury, injury is presumed to result to the party against whom such evidence is admitted, and he is entitled to a new trial upon proper application therefor, and no distinction can in that respect be made between causes submitted to a jury for a general or special verdict or to the court without the intervention of a jury. (*Osgood v. Manhattan Co.*, 3 Cow. 612; *Marquard v. Webb*, 16 Johns. 89.)” A similar ruling had been made in the previous case of *Carpentier v. Williamson*.<sup>10</sup> And in the subsequent case of *Humphreys v. Harkey*,<sup>11</sup> where evidence was erroneously excluded, Ross, J., delivering the opinion, said: “The circumstance mentioned by the learned judge who tried the cause, to the effect that even if the excluded testimony was admitted and considered he should still have to find that there was a continued change of possession, cannot, it is obvious, avoid the necessity of a reversal of the judgment and order. The evidence ruled out was competent and material, and the defendant had a right to have it admitted and considered. The *effect* to be given to it when admitted is altogether another question.”

As explained in the preceding section, “injury,” as the term is used in the decisions, means “effect upon the result,” without regard to what the court may think of the merits of the case. The rule, therefore, may be stated to be that where error is shown it will be presumed to have had an effect upon the result of the trial unless the record affirmatively shows the contrary.

**§ 288. Where There is a Substantial Conflict in the Evidence the Appellate Court will not Disturb the Decision of the Court Below.**<sup>1</sup>—This rule has been announced more frequently than any other rule of practice. It applies equally where the court below

<sup>10</sup> 25 Cal. 154.

<sup>11</sup> 55 Cal. 283.

<sup>1</sup> Prior to the Code of Civil Procedure the supreme court would not examine the facts unless a motion for new trial on the ground of insufficiency of the evidence to justify the decision was made in the court below. See section 96, *ante*. The rules

governing such an application have already been considered. See chapter 14, herein. Under the code the supreme court may examine the facts on appeal from the judgment without any motion for new trial having been made, provided such appeal was taken within sixty days from the rendition of the judgment. See section 96, *ante*.

granted \* as where it denied \* the motion for new trial. It makes no difference in the operation of the rule that the verdict or

\* In the case of *Irving v. Cunningham*, 58 Cal. 306, Ross, J., delivering the opinion of the department, said: "The established rule forbidding us interfering with the order of the trial court refusing a new trial, in cases where the evidence is substantially conflicting, has no application in a case like this where the court below granted a new trial. Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial." What the learned justice evidently intended to say was merely that the rule as to conflict did not apply in the court below. For it is too well settled to admit of controversy that the rule as to conflict applies in the supreme court to orders granting new trial. See *Downey v. Hellman*, 58 Cal. 62; *Bronner v. Wetzlar*, 55 Cal. 419; *Pierce v. Schaden*, 55 Cal. 406; *DuBrutz v. Jessup*, 54 Cal. 118; *Ehrlich v. Ewald*, 51 Cal. 172; *Sperry v. Spaulding*, 49 Cal. 252; *Marble v. Fay*, 49 Cal. 585; *Thompson v. Thornton*, 47 Cal. 76; *Sherman v. Mitchell*, 46 Cal. 576; *Higuerra v. Bernal*, 46 Cal. 580; *Green v. L. S. & P. F. Co.*, 46 Cal. 408; *Simpson v. P. M. L. Ins. Co.*, 44 Cal. 139; *Lorenzana v. Camarillo*, 41 Cal. 467; *Hall v. Bark Emily Banning*, 33 Cal. 522; *Mauge v. Heringhi*, 26 Cal. 577; *Phelps v. Union C. M. Co.*, 39 Cal. 407; *O'Brien v. Brady*, 23 Cal. 243; *Quinn v. Kenyon*, 22 Cal. 82; *Oullahan v. Starbuck*, 21 Cal. 413; *Walton v. Maguire*, 17 Cal. 92; *Peters v. Foss*, 16 Cal. 357; *Weddle v. Stark*, 10 Cal. 301; and see *Mullins v. Wieland*, 68 Cal. 231, 9 Pac. 92; *Curtiss v. Starr & Co.*, 85 Cal. 376, 24 Pac. 806; *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024; and see cases cited in note 39, below.

\* *McKeever v. Market St. R. R. Co.*, 59 Cal. 294; *Wilson v. S. P. R. R. Co.*, 62 Cal. 164; *Graves v. Moore*, 58 Cal. 435; *Beckman v. Wilson*, 61 Cal. 355; *Olivas v. Olivas*, 61 Cal. 382; *Bernal v. O'Hanlon*, 59 Cal. 284; *Helm v. Martin*, 59 Cal. 57; *Emerson v. Weeks*, 58 Cal. 439; *Fay v. McKeever*, 59 Cal. 307; *Zuck v. Culo*, 59 Cal. 142; *Bensley v. Whipple*, 57

Cal. 267; *Carpenteria School Dist. v. Heath*, 56 Cal. 478; *Glenn v. Arnold*, 56 Cal. 631; *Myers v. Spooner*, 55 Cal. 257, 9 Morr. Min. Rep. 519; *Nathan v. Doane*, 55 Cal. 348; *Fitz v. Bynum*, 55 Cal. 459, 13 Morr. Min. Rep. 612; *Smith v. Silaby*, 55 Cal. 470; *Butler v. Beech*, 55 Cal. 28; *Wakefield v. Bouton*, 55 Cal. 109; *Fitzgerald v. Union Ins. Co.*, 54 Cal. 599; *Williams v. Hill*, 54 Cal. 390; *Witherby v. Thomas*, 55 Cal. 9; *Hill v. Gwinn*, 51 Cal. 47; *Doherty v. Enterprise Mining Co.*, 50 Cal. 187; *Brown v. Olmsted*, 50 Cal. 162; *Trenor v. C. P. R. B. Co.*, 50 Cal. 222; *Naglee v. Palmer*, 50 Cal. 641; *N. P. R. B. Co. v. Reynolds*, 50 Cal. 90; *Roper v. McFadden*, 48 Cal. 346; *Fratt v. Toomes*, 48 Cal. 28; *Simpson v. P. M. L. Ins. Co.*, 47 Cal. 585; *Iburg v. Suaner*, 47 Cal. 265; *Goodrich v. Van Landigham*, 46 Cal. 601; *Gale v. T. C. Water Co.*, 44 Cal. 43; *Smith v. Moynihan*, 44 Cal. 53; *Price v. Sturgis*, 44 Cal. 591; *Leroy v. Cunningham*, 44 Cal. 599; *Hellman v. Howard*, 44 Cal. 100; *Blethen v. Blake*, 44 Cal. 117; *Livermore v. Stine*, 43 Cal. 274; *Brewster v. Sime*, 42 Cal. 139; *Farmer v. Grose*, 42 Cal. 169; *Phelps v. McGloan*, 42 Cal. 298; *White v. Lyons*, 42 Cal. 279; *Child v. Hugg*, 41 Cal. 519, 13 Morr. Min. Rep. 512; *Wilson v. Fitch*, 41 Cal. 363, 9 Morr. Min. Rep. 155; *Walsworth v. Johnson*, 41 Cal. 61; *Frost v. Harford*, 40 Cal. 165; *Carroll v. Benicia*, 40 Cal. 386; *Hawkins v. Abbott*, 40 Cal. 639; *Kline v. C. P. R. B. Co.*, 39 Cal. 587; *Doyle v. Sturia*, 38 Cal. 456; *Garrison v. McGlockly*, 38 Cal. 78; *Morgan v. Higgins*, 37 Cal. 59; *Satterlee v. Bliss*, 36 Cal. 489; *Lick v. Madden*, 36 Cal. 208, 95 Am. Dec. 175; *Hastings v. Stark*, 36 Cal. 122; *Arnold v. Skaggs*, 35 Cal. 684; *King v. Myer*, 35 Cal. 646; *Treat v. Riley*, 35 Cal. 129; *McNeil v. Shirley*, 33 Cal. 202; *Kile v. Tubbs*, 32 Cal. 332; *Hill v. Smith*, 32 Cal. 166; *Crook v. Foreyth*, 30 Cal. 662; *Carpentier v. Gardiner*, 29 Cal. 160; *Coleman v. Woodworth*, 28 Cal. 567; *Franklin v. Derland*, 28 Cal. 175, 87 Am. Dec. 111; *Zeigler v. Wells, Fargo*

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84 Pac. 122; *Bone v. Ophir Co.*, 149 Cal. 293, 86 Pac. 685; *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178; *Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507; *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276; *Edwards v. Lechleiter*, 149 Cal. 677, 87 Pac. 194; *Estate of Hayden*, 149 Cal. 680, 87 Pac. 275; *Bundy v. Sierra Lumber Co.*, 149 Cal. 772, 87 Pac. 622; *Kataoka v. Hanselman*, 150 Cal. 673, 89 Pac. 1082; *Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908; *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *People v. Clark*, 151 Cal. 200; *Reeve v. Colusa etc. Co.*, 152 Cal. 99, 90 Pac. 549; *Roney v. Reynolds*, 152 Cal. 323, 92 Pac. 847; *Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015; *Schell v. Gamble*, 153 Cal. 448, 95 Pac. 870; *Laurence v. Kilgore*, 154 Cal. 310, 97 Pac. 760; *Madison v. Octave Oil Co.*, 154 Cal. 768, 99 Pac. 176; *Sierra Co. v. Nevada Co.*, 155 Cal. 1, 99 Pac. 371; *Miller & Lux v. Madera Canal Co.*, 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; *De Gottardi v. Donati*, 155 Cal. 109, 99 Pac. 492; *People v. Moore*, 155 Cal. 237, 100 Pac. 688; *Arroyo etc. Co. v. Baldwin*, 155 Cal. 280, 100 Pac. 874; *Boin v. Spreckels*, 155 Cal. 612, 102 Pac. 937; *Idol v. San Francisco Const. Co.*, 1 Cal. App. 92, 81 Pac. 665; *Perrin v. Carbone*, 1 Cal. App. 295, 82 Pac. 222; *People v. Hill*, 1 Cal. App. 414, 82 Pac. 398; *Baldwin v. Napa Wine Co.*, 1 Cal. App. 215, 81 Pac. 1037; *Doe v. Allen*, 1 Cal. App. 560, 82 Pac. 568; *Houghton v. Market St. Ry. Co.*, 1 Cal. App. 576, 82 Pac. 972; *Parsons v. Silva*, 1 Cal. App. 602, 82 Pac. 685; *Grunsky v. Field*, 1 Cal. App. 623, 82 Pac. 979; *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. 1073; *Ennis, Brown & Co. v. Hurst & Co.*, 1 Cal. App. 752, 82 Pac. 1056; *McNeill v. Stitt*, 2 Cal. App. 13, 82 Pac. 1121; *Frutig v. Trafton*, 2 Cal. App. 47, 83 Pac. 70; *Baker v. Baker*, 9 Cal. App. 737, 100 Pac. 892; *Thorpe v. North Moneta etc. Co.*, 12 Cal. App. 186, 106 Pac. 1107.

The rule here stated is so well understood, and so universally accepted as definitely settled, that citations in its support would seem to be unnecessary. To the above California cases might be added many pages of citations from other states. The

editors have contented themselves with a reference to the more recent decisions: *Harrill v. Parkinson*, 27 Okl. 528, 112 Pac. 970; *Merrill v. Stevens*, 61 Wash. 28, 112 Pac. 353; *Heckert v. Hilscher*, 61 Wash. 269, 112 Pac. 365; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *Barnum v. Seattle etc. Co.*, 61 Wash. 157, 112 Pac. 85; *Nelson v. Western etc. Co.*, 61 Wash. 672, 112 Pac. 924; *White v. Nuckolls (Colo.)*, 112 Pac. 329; *J. I. Case etc. Co. v. Oates*, 27 Okl. 412, 112 Pac. 980; *Jaggy v. Rooney*, 61 Wash. 381, 112 Pac. 367; *Hughes v. Flint*, 61 Wash. 460, 112 Pac. 633; *Halverson v. Walker (Utah)*, 112 Pac. 804; *Doty v. Heiser*, 48 Colo. 490, 111 Pac. 67; *Waldorf v. Phillips*, 42 Mont. 80, 111 Pac. 546; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Rawhide etc. Co. v. Rawhide etc. Co. (Nev.)*, 111 Pac. 30; *Leitch v. Young*, 60 Wash. 446, 111 Pac. 449; *Murray v. Osborne (Nev.)*, 111 Pac. 31; *Donley v. Bailey*, 48 Colo. 373, 110 Pac. 65; *Wirt v. Kutz*, 15 N. M. 500, 110 Pac. 575; *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62; *Swanson v. Pacific etc. Co.*, 60 Wash. 87, 110 Pac. 795; *Roff Oil etc. Co. v. Winn*, 27 Okl. 22, 110 Pac. 652; *McRae v. Cassan*, 15 N. M. 496, 110 Pac. 574; *Amarillo etc. Co. v. McMurray*, 15 N. M. 562, 110 Pac. 833; *Thomas v. Gavin*, 15 N. M. 660, 110 Pac. 841; *McClelland v. Schmidt*, 26 Okl. 585, 110 Pac. 901; *Board v. Dill*, 26 Okl. 104, 110 Pac. 1107; *Loeb v. Loeb*, 24 Okl. 384, 103 Pac. 570; *Bird v. Webber*, 23 Okl. 583, 101 Pac. 1052; *Cassell v. Warneke*, 48 Colo. 373, 109 Pac. 862; *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60; *Money v. Seattle etc. Co.*, 59 Wash. 120, 109 Pac. 307; *Roberts v. Markham*, 26 Okl. 387, 109 Pac. 127; *Rochester etc. Co. v. State*, 26 Okl. 309, 109 Pac. 298; *Roberts v. Larson*, 48 Colo. 120, 109 Pac. 261; *Hakansen v. Hakansen*, 48 Colo. 190, 109 Pac. 427; *Flynn etc. Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851; *Burke v. Hindman (Or.)*, 109 Pac. 380; *Hamlin v. Hamlin*, 59 Wash. 182, 109 Pac. 362; *Hackett v. Scott*, 59 Wash. 390, 109 Pac. 1030; *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798; *Southern Pacific Co. v. Hogan (Ariz.)*, 108 Pac. 240;

*Greely etc. Co. v. Von Trotha*, 48 Colo. 12, 108 Pac. 985; *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436; *Heert v. Ridenour etc. Co.*, 48 Colo. 42, 139 Am. St. Rep. 259, 108 Pac. 968; *Murphy v. Cooper*, 41 Mont. 72, 108 Pac. 576; *Poor v. Madison etc. Co.*, 41 Mont. 236, 108 Pac. 645; *Tritch v. Perry*, 48 Colo. 339, 108 Pac. 981; *Jakway v. Rivers*, 48 Colo. 49, 108 Pac. 999; *Tomsche v. Hummel*, 18 Idaho, 23, 108 Pac. 343; *White v. Barling*, 41 Mont. 138, 108 Pac. 654; *Kelly v. Granite etc. Min. Co.*, 41 Mont. 1, 108 Pac. 785; *Paulter v. Manuel*, 25 Okl. 59, 108 Pac. 749; *Beach v. Schroeder*, 47 Colo. 312, 107 Pac. 271; *Hanson v. Spokane etc. Co.*, 53 Wash. 6, 107 Pac. 863; *Brown v. Colorado etc. Co.*, 47 Colo. 294, 107 Pac. 258; *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; *De Witt v. Williams*, 47 Colo. 475, 107 Pac. 1080; *Bragdon v. McShea (Okl.)*, 107 Pac. 916; *Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991; *Armstrong etc. Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *McKean v. Chappell*, 56 Wash. 690, 106 Pac. 184; *Haines etc. Co. v. Kelley*, 57 Wash. 219, 106 Pac. 776; *Heinemann v. Sullivan*, 57 Wash. 346, 106 Pac. 911; *Indian etc. Co. v. Taylor*, 25 Okl. 542, 106 Pac. 863; *Judson v. Los Angeles etc. Co.*, 157 Cal. 168, 106 Pac. 581; *In re Seattle*, 57 Wash. 178, 106 Pac. 755; *Eaves v. Sheppard*, 17 Idaho, 268, 134 Am. St. Rep. 256, 105 Pac. 407; *Wiggins v. Pradere (Nev.)*, 105 Pac. 1024; *Kaufman v. Boismier*, 25 Okl. 252, 105 Pac. 326; *Van Dyke v. Seattle etc. Co.*, 55 Wash. 687, 105 Pac. 137; *Alcorn v. Dennis*, 25 Okl. 135, 105 Pac. 1012; *Courtney v. Bridal Veil etc. Co.*, 55 Or. 210, 105 Pac. 896; *Catlin v. Sheldon*, 56 Wash. 423, 105 Pac. 828; *Hoseth v. Preston Mill Co.*, 55 Wash. 416, 104 Pac. 612; *Burch v. Southern Pacific Co. (Nev.)*, 104 Pac. 225; *Wolfe v. Ridley*, 17 Idaho, 173, 104 Pac. 1014; *Well v. Moran Bros.*, 55 Wash. 102, 104 Pac. 172; *Waddell v. Waddell*, 36 Utah, 435, 104 Pac. 743; *Del Notaro v. Douglas*, 55 Wash. 493, 104 Pac. 774; *In re Seattle*, 55 Wash. 519, 104 Pac. 799; *Collins v. Hazel etc. Co.*, 54 Wash. 524, 103 Pac. 798; *Welch v. Brown*, 46 Colo. 129, 103

decision is against the weight of the evidence, or that the supreme court is not satisfied with it, and would have found the facts differently had it occupied the place of the jury or judge as the case may have been. Thus in *Kile v. Tubbs*,<sup>4</sup> Shafter, J., delivering the opinion, said: "While we think the verdict against the weight of the evidence, still when tested by the settled doctrines of this court the case is not one that would justify an assertion of our own views in opposition to the verdict of the jury and the ruling of the court before which the cause was tried." So in *Lick v. Madden*,<sup>5</sup> Sanderson, J., delivering the opinion, said: "It may be as claimed by the learned counsel for the appellant that the finding of the court is contrary to the weight of this testimony, but it cannot be denied but that there was some evidence which sustains the finding. Of the credibility of this evidence the

Pac. 296; *Dailey v. Aspen etc. Co.*, 46 Colo. 145, 103 Pac. 303; *Patton v. Washington*, 54 Or. 479, 103 Pac. 60; *Lowman v. Bank*, 31 Nev. 306, 102 Pac. 967; *State Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692; *Tuttle v. Welty*, 46 Colo. 25, 102 Pac. 1069; *Bock v. Sorenson*, 53 Wash. 558, 102 Pac. 428; *Horton v. Haines*, 23 Okl. 878, 102 Pac. 121; *Stearns v. Hazen*, 45 Colo. 67, 101 Pac. 339; *Masterson v. Monk*, 45 Colo. 362, 101 Pac. 341; *Gillette v. Young*, 45 Colo. 562, 101 Pac. 766; *Murphy v. Southern Pacific Co.*, 31 Nev. 120, 101 Pac. 322; *Bird v. Webber*, 23 Okl. 583, 101 Pac. 1052; *Georg v. Peterson*, 53 Wash. 183, 101 Pac. 829; *McMaster v. Bank*, 23 Okl. 550, 138 Am. St. Rep. 831, 101 Pac. 1103; *Fleming v. Wells*, 45 Colo. 255, 101 Pac. 66; *Mackey v. Willson*, 45 Colo. 316, 101 Pac. 334; *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397; *Bank of Bisbee v. Graf*, 12 Ariz. 156, 100 Pac. 452; *Stewart v. Davies*, 52 Wash. 96, 100 Pac. 176; *Smyth v. Lance*, 52 Wash. 560, 100 Pac. 995; *Smith v. Gray*, 52 Wash. 255, 100 Pac. 339; *Lehman v. Knapp*, 33 Mont. 133, 82 Pac. 798; *Shaw v. Seattle*, 39 Wash. 590, 81 Pac. 1057; *Neander v. Neander*, 35 Colo. 495, 84 Pac. 69; *Patrick v. Brown*, 36 Colo. 298, 85 Pac. 325; *Shulze v. Shea*, 37 Colo. 337, 86 Pac. 117; *Taylor v. Barnett*, 39 Colo. 469, 90 Pac. 74; *Stratton etc. Co. v. Ellison*, 42 Colo. 298, 94 Pac. 303;

*Hansen v. Haley*, 11 Idaho, 278, 81 Pac. 935; *Noyes v. Clifford*, 37 Mont. 138, 94 Pac. 842; *Harrington v. Butte etc. Co.*, 37 Mont. 169, 95 Pac. 8, 16 L. R. A., N. S., 395; *Tonopah etc. Co. v. Riley*, 30 Nev. 312, 95 Pac. 1001; *Stringfellow & Tannehill v. Patty*, 14 N. M. 14, 98 Pac. 258; *Irwin v. Buffalo etc. Co.*, 39 Wash. 346, 81 Pac. 849; *Goupille v. Chaput*, 43 Wash. 702, 86 Pac. 1058; *Waldron v. Lynn*, 46 Wash. 69, 89 Pac. 153; *Gauthier v. Wood*, 49 Wash. 8, 94 Pac. 654; *In re Abel's Estate*, 30 Nev. 93, 93 Pac. 227; *Hartford etc. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686; *Liverpool etc. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686; *Foley v. Coon*, 41 Colo. 432, 93 Pac. 13; *Vollmer v. Rogers*, 13 Idaho, 564, 92 Pac. 579; *Kroeger v. Passmore*, 36 Mont. 504, 93 Pac. 805, 14 L. R. A., N. S., 988; *Parnell v. Davenport*, 36 Mont. 571, 93 Pac. 939; *Gates v. Settler's etc. Co.*, 19 Okl. 83, 91 Pac. 856; *Brown v. Salt Lake City*, 33 Utah, 222, 126 Am. St. Rep. 828, 93 Pac. 570, 14 L. R. A., N. S., 619, 14 Ann. Cas. 1004; *Cook v. Chehalis etc. Co.*, 48 Wash. 619, 94 Pac. 189; *Chicago etc. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664; *Conrey v. Nichols*, 35 Colo. 473, 84 Pac. 470; *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558; *Smith v. Michigan etc. Co.*, 43 Wash. 402, 86 Pac. 652.

<sup>4</sup> 32 Cal. 332.

<sup>5</sup> 36 Cal. 213.

court below, acting as a jury, was the sole judge. To set aside his finding because we might have found the other way had we occupied his place would be to substitute our judgment for his upon a question of fact, which as this court has uniformly held we are not allowed to do." So in *Hill v. Smith*,<sup>6</sup> Sawyer, J., delivering the opinion, said: "Upon this testimony there is room for doubt. . . . We are not very well satisfied with the verdict, yet it is not so clearly against the evidence as to justify us in setting it aside." So in *Wilson v. Fitch*,<sup>7</sup> Crockett, J., delivering the opinion, said:

"There was some evidence tending to support the plaintiff's case, and it was the province of the jury to weigh the testimony. We never disturb the verdict on the ground that it was not justified by the evidence when there was a substantial conflict in the testimony, even though we consider it to be greatly against the weight of the evidence." So in *Heinlen v. Heilbron*<sup>8a</sup> the court said:

"Upon this controverted fact there was testimony upon both sides before the court, and it is a sufficient answer to the appeal that the court has heard the evidence and rendered its decision thereon. Upon an appeal from that decision no inquiry can be made respecting the preponderance of the evidence. If there be any evidence in support of a finding, the action of the court must be affirmed. It is only when there is no evidence in the record in support of a finding that a decision of the trial court will be reversed upon the ground that it is unsupported by the evidence."

So in *Meyer v. Great Western Ins. Co.*<sup>9b</sup> the court said:

"It is not sufficient thereafter upon an appeal to point out, or even demonstrate to this court, that the verdict is against the preponderance of evidence, or that upon the same evidence other persons would come to a different conclusion. If there is any evidence upon which the jury could have found its verdict it must be upheld."

So in *Fogg v. Perris Irrigation District*<sup>10</sup> the supreme court held that a finding based upon conflicting evidence is conclusive upon the appellate court. And in *Ernest v. McCauley*,<sup>11a</sup> it was said by the same court that the weight of testimony and the credibility of witnesses are matters for the exclusive determination of the trial court in any case where there is a substantial conflict.

<sup>6</sup> 32 Cal. 167.

<sup>7</sup> 41 Cal. 385.

<sup>8a</sup> 97 Cal. 101, 31 Pac. 838.

<sup>9b</sup> 104 Cal. 381, 38 Pac. 82.

<sup>10</sup> 154 Cal. 209, 97 Pac. 316.

<sup>11a</sup> 155 Cal. 739, 102 Pac. 924.

But if there be no substantial conflict in the evidence upon any material point, and the verdict or decision be against such evidence, the judgment based thereon will be reversed, and a new trial directed.<sup>a</sup> The verdict or decision must in all cases have some meritorious support, and the conflict must be substantial.<sup>aa</sup> This principle is as well established as that of conflict itself, and is, in fact, a necessary element of the guiding rule so often enunciated. Thus in *Driscoll v. Market St. Cable Ry. Co.*<sup>ab</sup> the court said:

"The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial. Where a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to another without legal cause, the trial judge should, without hesitation, set the verdict aside; and in the event of his not doing so, this court will grant a new trial."

So in *Houghton v. Loma Prieta Lumber Co.*,<sup>ac</sup> the supreme court said with reference to the same point:

"The rule that the finding of a jury on an issue of fact will not be disturbed where there is a conflict of evidence applies only to cases where there is a real and not a mere pretense of conflict. A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of 'conflict' only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other

<sup>a</sup> *Fresno Land Co. v. McCarthy*, 8 Pac. C. L. J. 810; *Hawley v. McCredy*, 54 Cal. 388; *Seymour v. Wood*, 53 Cal. 303, 4 Morr. Min. Rep. 62; *De Celis v. Brunson*, 53 Cal. 372; *Henderson v. Grammar*, 53 Cal. 649; *National Gold Bank v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697; *Regli v. McClure*, 47 Cal. 612; *Walsh v. Hill*, 41 Cal. 571; *Moss v. Atkinson*, 44 Cal. 3; *Wilbur v. Cherry*, 39 Cal. 660; *Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251; *Maine Boys T. Co. v. Boston T. Co.*, 37 Cal. 40, 12 Morr. Min. Rep. 247; *Smith v. Athearn*, 34 Cal. 506; *Branson v. Caruthers*, 49 Cal. 374; *Franklin v. Dorland*, 28 Cal. 175, 87

Am. Dec. 111; *Hill v. Smith*, 27 Cal. 476, 4 Morr. Min. Rep. 597; *Lyle v. Rollins*, 25 Cal. 437; *Minturn v. Burr*, 20 Cal. 48; *Cummins v. Scott*, 20 Cal. 83; *Easterling v. Power*, 12 Cal. 88; *Bagley v. Eaton*, 8 Cal. 159; *O'Keiffe v. Cunningham*, 9 Cal. 589, 9 Morr. Min. Rep. 451; *Whitney v. Stark*, 8 Cal. 514, 68 Am. Dec. 360; *Speck v. Hoyt*, 3 Cal. 413; *Guerrero v. Ballerino*, 48 Cal. 118. And see cases cited in following notes.

<sup>aa</sup> See *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834.

<sup>ab</sup> 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591.

<sup>ac</sup> 152 Cal. 574, 93 Pac. 377.

side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find the fact the other way."

So in *Estate of Wilson*,<sup>84</sup> which was a will contest, a class of cases where juries seem most inclined to draw away from the practical treatment of evidence,<sup>85</sup> the court said:

"Where one side of an issue is clearly, amply, and firmly established by an unbroken line of evidence, and the jury find the other way upon no evidence that is 'really and substantially conflicting,' or upon a mere pretense of such evidence, or upon evidence so slight as to leave no room to doubt that the verdict was the result of passion or prejudice—there the finding should not be allowed to stand."

So in other cases of similar import.<sup>86</sup>

Although the rule is as well settled as anything can be, practitioners have, from time to time, raised various questions as to its real scope. Thus it has been contended that it did not apply to evidence presented in a written form, as documents, depositions, affidavits, transcripts of records, etc. It was said that the appellate court possessed the same opportunity to examine the evidence in its presentation at first hand as the trial court, and the reason of the rule being absent, the rule itself ought not to apply. But this contention has been repeatedly discredited.<sup>87</sup> So it was argued

<sup>84</sup> 117 Cal. 262, 268, 49 Pac. 172, 711.

<sup>85</sup> See *Estate of McDewitt*, 95 Cal. 17, 30 Pac. 101; *Estate of Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman*, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192.

<sup>86</sup> See *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522; *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

<sup>87</sup> In the earlier cases the court recognized the distinction between oral and documentary evidence in the application of the rule as to conflict. The history of the law in this regard is interesting as illustrating the principle of the rule. For this reason extended quotations from the cases are believed to be especially appropriate. The point was first seriously considered in the case of *Wilson v. Cross*, 33 Cal. 60, where the court said: "At the very threshold of this question the objection is made that this court cannot reverse a judgment

on account of the insufficiency of the evidence to support it, if there is any conflict in the testimony material to the issue, for the reason that we have no jurisdiction in such case to pass upon the facts in issue. On the other hand, it is maintained that, as the testimony produced to make out the plaintiff's case consisted of depositions, the court which rendered the decision and judgment had no better opportunity to determine from the manner, bearing, conduct and character of the witnesses, the credit and weight to be given to their testimony, than this court has, and that therefore the reason of the rule which ordinarily governs the subject cannot be applied in this case. Where there is a conflict of evidence upon a material fact in issue, courts of appeal are not in the habit of reversing judgments depending upon the finding of the issue either the one way or the other. Where the testimony of the witnesses is conflicting, the result depends mainly upon the degree



that a judge who did not preside at the trial of a case possessed no better opportunity to see the witnesses and observe their manner of

of credibility to which they may respectively be entitled, and of that the jury and the court before which such witnesses appear have an opportunity to judge, while this court has not, in so far as it may depend upon the conduct and bearing and upon the character of the witnesses for intelligence and integrity exhibited on the witness-stand." Citing *Kimball v. Gearhart*, 12 Cal. 27, 1 Morr. Min. Rep. 615; *Bitter v. Stock*, 12 Cal. 402, and *Rice v. Cunningham*, 29 Cal. 492. From the last-mentioned case the following excerpt was quoted:

"It is proper to remark that the expression, which has become very common, that this court will not look into the evidence, if it is conflicting, for the purpose of determining whether the verdict ought to stand, is not very exact. On the contrary, we always look into the evidence whenever the point is made; but if, upon careful examination, it appears that there is a substantial conflict, in view of which, as presented to us, the jury might find either way without becoming obnoxious to the charge of passion, prejudice, misconception or caprice, we do not disturb the verdict, although we might, if sitting as a jury, find a different verdict; and we do this because we are cut off from those important aids to the attainment of a correct conclusion which the jury and the court below find in the appearance and general bearing of the witnesses. The rule in question is applied only when there is a real and substantial conflict upon material points, and has no application when the conflict is more apparent than real, or does not relate to controlling issues."

Continuing, the court, in *Wilson v. Cross*, said:

"These authorities show very clearly the ground on which this court has placed its refusal to disturb verdicts and judgments in cases where the testimony in support of the respective sides of the issue joined is in conflict, and at the same time inculcate it as the right and duty of the court to do so when there is a substantial conflict, and the ends of justice upon

the clear weight of the evidence require a judgment and verdict different from that rendered.

"In the examination of this case the value and weight of the testimony of the witnesses whose depositions were read in evidence is to be estimated by its worth as it appears upon the face of the depositions, as the circumstances of manner, bearing and conduct of the witnesses in the presence of the officer who heard them testify, and observed their deportment were not apparent to the court that determined the case upon the testimony of such witnesses, except from the face of the depositions themselves; and in respect to what so appears this court has the same opportunities of judging as had the court below."

The conclusion reached in this case was approved and followed in *Lander v. Beers*, 48 Cal. 546, and *Tuller v. Arnold*, 93 Cal. 166, 28 Pac. 863. In *Canning v. C. P. R. R. Co.*, 50 Cal. 166, the correctness of the conclusion was conceded but not decided, and in *Parrott v. Floyd*, 54 Cal. 534, the point was raised in the argument, but ignored in the opinion of the court. In *Blum v. Sunol*, 63 Cal. 341, in answer to the contention of counsel that the doctrine was the correct one, the court said:

"Where a finding has been made upon a conflict of evidence, or without evidence, this court does not interfere with the action of the lower court in granting a new trial although the evidence upon which it has acted may consist, as it does in this case, of depositions and documentary and oral evidence." The two last above cited cases were cited in support of this conclusion.

It thus appears that this case, as well as the cases cited therein, based as it was upon the doctrine of discretion in the granting of a new trial (see next section), is more in accord with the modern view.

In *Tuller v. Arnold*, above cited, the court thus dealt with the proposition:

"The rule that this court will not pass upon the evidence when conflict-

testifying than the appellate court, and for that reason when such a judge was called upon to pass upon a motion for a new trial he

in<sup>o</sup> does not apply where the evidence is all documentary. It is true, this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of discretion. But where, in a matter in reference to which this court has equal advantages with the lower court it is beyond doubt that error has been committed to the prejudice of the appellant, it is the duty of the court to correct the error. Such error must be held to be an abuse of discretion. Every reversal goes upon this theory, and it should make no difference whether the mistake be as to a conclusion from the evidence or in construing the law, provided it be made equally clear that error has occurred."

The heresy here lies in the statement "in a matter in reference to which this court has equal advantages with the lower court," for, no matter whether equal advantages exist or not, it is a fundamental rule that if "it is beyond doubt that error has been committed," "it is the duty of the court to correct error."

In *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208, the court again considered the point in *extenso*:

"At the trial, by consent of the parties, a large part of the testimony taken at the first trial was read without recalling the witnesses, and two or three depositions were introduced; and appellant contends that when a case has been decided by the lower court upon this kind of evidence, the rule that this court will not disturb a finding when there is a conflict of evidence does not apply, and that this court should sit practically as a *nisi prius* court, and draw its own conclusions from the evidence, regardless of the conclusions arrived at by the jury or the judge in the trial court. While, for the reasons hereafter stated, the determination of this point is not absolutely essential to the decision of this appeal, it may be well for the benefit of future litigants to intimate that the doctrine contended for has not, thus far at least, become the settled law of this

state. It has been held here in more than a hundred cases, commencing with *Payne v. Jacob*, 1 Cal. 39, in the first published books of reports of this court, and ending with *Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098, in the last volume of such reports, that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court; and so the general rule is clearly established. It was said, however, in the opinion of the court in two or three cases, notably in *Wilson v. Cross*, 33 Cal. 60, that the reason of the rule is, that the court below has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain when the witnesses do not appear personally in court. But it may be well argued that such is not the only reason of the rule; that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only when there is no evidence to support it, or where the supporting evidence is so slight as to show an abuse of discretion. Indeed, there are numerous cases in which the decisions of this court have been directly contrary to the doctrine contended for by appellant. For instance, it has been held directly in several cases that the rule as to conflicting evidence applies to a case where the trial was before one judge, and the motion for a new trial passed upon by his successor, and where the latter saw none of the witnesses; or where the trial was before the old district court, and the motion before the succeeding superior court. (*Bauder v. Tyrrell*, 59 Cal. 99; *Altschul v. Doyle*, 48 Cal. 535; *Macy v. Davilla*, 48 Cal. 646.) The same rule has been applied on appeal from an order dissolving an injunction, where all the evidence in the lower

ought to be governed by the rule of conflict in the same manner as is the appellate court. But this has also been held to be untenable.<sup>5b</sup> But the idea that has been oftenest advanced and most strongly

court was upon affidavits. (Parrott v. Floyd, 54 Cal. 534.) In Bauder v. Tyrrell, 59 Cal. 99, the court says: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only." The appellate court will, no doubt, look a little more closely into the evidence when it consists entirely of depositions or affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply."

This determination was approved and followed in Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433, and Knox v. Moses, 104 Cal. 502, 38 Pac. 318. In the latter case the court said:

"This action was tried and submitted upon testimony taken in two other cases, and it is now insisted that for such reason this court should take a first and original view of the evidence introduced, and weigh and measure it by the same standard and test that the trial court was required to apply. In other words, it is contended that the evidence should be examined and gauged the same as though the question here presented arose by an original proceeding pending in this court. The position of appellant is unsound. The court has declared the rule contrary to the principle sought to be invoked. (Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433.)"

In the recent case of Bradley v. Davis, 156 Cal. 267, 104 Pac. 302, the court seems to have placed the matter beyond peradventure. Referring to the decision in Tuller v. Arnold, it was said:

"... While there is some force in the contention that the reasons for the rule are not as strong and apparent in cases where the evidence is entirely documentary as in cases where witnesses have testified orally before the lower court, in view of the many decisions on the subject it must be taken as settled in this

state that the rule is applicable in both classes of cases."

The rule was applied in the following cases where the evidence under consideration was either wholly or partially in writing: Creditors v. Welch, 55 Cal. 469; Hastings v. Keller, 69 Cal. 606, 11 Pac. 218; Daniels v. Church, 96 Cal. 13, 30 Pac. 798; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Lakeshore etc. Co. v. Modoc etc. Co., 108 Cal. 261, 41 Pac. 472; Bowers v. Modoc etc. Co., 117 Cal. 50, 48 Pac. 979; Brown v. San Francisco Savings Union, 122 Cal. 648, 55 Pac. 598; Ludwig v. Harry, 126 Cal. 377, 58 Pac. 858; Sheehan v. Osborn, 138 Cal. 512, 71 Pac. 622; Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001.

In the case of Reynolds v. Snow, 67 Cal. 497, 8 Pac. 27, which was an election contest, where there was a finding as to the intention of certain electors in casting their ballots, based upon an inspection of the ballots cast, the supreme court seemed to have disregarded the rule on the ground that it had the same opportunity to determine the facts possessed by the trial court. It said:

"In a case where there was a conflict in the evidence in the sense that witnesses in the presence of the court had sworn contrary to each other as to facts, we should not feel warranted in entering our dissent, but where as in this case, the ballots themselves were on that point the only evidence before the court, and as photographic copies of them are before us, it is clear that there was no such conflict in the evidence as should prevent us from exercising a judgment contrary to that of the learned judge below." And "The reason why a court of appeals declines ordinarily to interfere upon a conflict of evidence is because the trial court has an advantage over the former in that it can both hear the witness and observe his deportment when before it and delivering his testimony."

<sup>5b</sup> See note 40, below, and see note 8g, *supra*.

argued is that it is not the function of the appellate court to pass upon anything but pure questions of law, and that the meaning of the rule as to conflict is that the court will not disturb a verdict or other decision of fact unless there is an entire absence of evidence upon some material point; in other words, that the supreme court must pass upon a question of the insufficiency of the evidence in the same way as it would pass upon a ruling on motion for nonsuit, or as the old common-law courts passed upon a demurrer to evidence. And this idea seems to receive some countenance from the language of department two of the supreme court in the case of *Bauder v. Tyrrell*.<sup>\*</sup> In that case the department, in ap-

<sup>\*</sup> 59 Cal. 99.

The following illustrate the rule as outlined in other states: The supreme court will not grant a new trial upon the ground of insufficiency of the evidence, where there is any evidence in substantial support of the verdict or decision. *Mayhew v. Brislin* (Ariz.), 108 Pac. 253, and cases there cited. A finding on the evidence is conclusive on appeal. *Ingersoll v. Scott* (Ariz.), 108 Pac. 460. A finding substantially supported, though the evidence preponderates against it, will not be disturbed on appeal. *Hughes v. Cadena etc. Co.* (Ariz.), 108 Pac. 231. Where a verdict is substantially supported by evidence it will not be disturbed on appeal. *Olmstead v. Olympia*, 59 Wash. 147, 109 Pac. 602. Where a jury might have found for defendant, and might also have found a larger verdict for plaintiff than it did find, the verdict will not be disturbed on appeal, even though the appellate court might have found differently. *Holt v. Nielson* (Utah), 109 Pac. 470. Where the evidence was contradictory, the trial judge's acceptance of the testimony of one party to the exclusion of the other will be followed by the supreme court. *Hackett v. Scott*, 59 Wash. 390, 109 Pac. 1030. The supreme court will not disturb a verdict supported by any substantial evidence. *Wirt v. Kutz*, 15 N. M. 500, 100 Pac. 575. To the same effect, *Great Western etc. Co. v. Davidson etc. Co.*, 26 Okl. 626, 110 Pac. 1096. Where there is sufficient evidence to support a finding for defendant, it will not be dis-

turbed on appeal, though there was evidence conflicting therewith. *Swanson v. Pacific etc. Co.*, 60 Wash. 87, 110 Pac. 795. If the findings of the court are substantially supported, they will not be disturbed on appeal on the weight of the evidence. *Western etc. Co. v. Caldwell*, 18 Idaho, 463, 110 Pac. 533; *Botsford v. Van Riper* (Nev.), 110 Pac. 705; *Freeman v. Eldridge* 26 Okl. 601, 110 Pac. 1057; *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7. If there is some evidence to sustain the amount awarded by the court upon an action in tort, it will not be disturbed on appeal. *United States etc. Co. v. O'Connor*, 48 Colo. 354, 110 Pac. 74. The trial court is the sole judge of the credibility of the witnesses and the weight of the evidence given, and if there is any evidence at all to support its determination therefrom, such determination will not be disturbed. *Consolidated etc. Co. v. Struthers*, 41 Mont. 551, 111 Pac. 150. A finding sustained by evidence will not be disturbed. *Victor M. Cox & Co. v. Borstadt* (Colo.), 111 Pac. 64. Where the evidence, though disputed, sustains the verdict, it will not be disturbed on appeal. *Berger v. Metropolitan etc. Co.*, 61 Wash. 35, 111 Pac. 872. It is otherwise if the verdict is not reasonably sustained. *Gergens v. McCollum*, 27 Okl. 155, 111 Pac. 208; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Edwards v. King*, 27 Okl. 403, 112 Pac. 961; *Hassell v. Morgan*, 27 Okl. 453, 112 Pac. 969. A finding will not be disturbed if there is evidence substantially supporting the same. *Paul v.*

plying the rule as to conflict, said: "The trial court decides as to facts, the court of review (in this state) *as to questions of law only.*"

This, however, is not a correct exposition of the rule. The supreme court, in passing upon questions of the insufficiency of the evidence, is not to be governed by the rules relating to the review of rulings on motion for nonsuit; but has a more extended function. The idea that the function of an appellate court is to pass upon questions of law only is without foundation. Strictly speaking, the only thing essential to the exercise of appellate power is that the evidence or other matter passed upon by the appellate court should have first been passed upon by a lower court. The appellate court is to *review* the action of the lower court. But no such limitation, as that the review is to be confined to questions of law, is involved in the notion of appellate jurisdiction. It will not be disputed that the court of chancery in England exercised appellate jurisdiction. And an appeal to that court took up the whole case, and the chancellor examined the pleadings and evidence, without reference to the findings of the lower court, and directed such decree as seemed proper.<sup>9a</sup> But although, in strict-

McPherrin, 48 Colo. 522, 111 Pac. 59; Farrell v. Garfield etc. Co. (Colo.), 111 Pac. 839; More v. O'Dell, 27 Okl. 194, 111 Pac. 308; German Ina. Co. v. Herbertson (Colo.), 112 Pac. 690. If there is some evidence to support the verdict, it will not be disturbed on appeal, even though there is conflicting evidence. Harrill v. Parkinson, 27 Okl. 528, 112 Pac. 970; Merrill v. Stevens, 61 Wash. 28, 112 Pac. 353; Heckert v. Hilscher, 61 Wash. 269, 112 Pac. 365; White v. Ratliff, 61 Wash. 383, 112 Pac. 502. A verdict is conclusive on appeal if there was any evidence introduced by the successful party reasonably tending to support it. Slade v. Utah etc. Co., (Or.), 112 Pac. 433. If the evidence is sufficient to support the findings, they will not be disturbed on appeal. Pease v. Clayton (Wash.), 112 Pac. 943. A verdict will not be set aside on appeal if supported by substantial evidence. Geier v. Howells, 47 Colo. 345, 107 Pac. 255, 27 L. R. A., N. S., 786. If there is evidence to support the verdict, it will not be weighed

by the trial court to ascertain whether it is sufficient. Graves v. Davenport, 45 Colo. 270, 100 Pac. 429. If there is evidence to support the verdict it will not be disturbed.

So, in the following cases, similar principles are upheld: Nichols v. Williams, 38 Mont. 552, 100 Pac. 969; Cornelius v. Washington etc. Co., 52 Wash. 272, 100 Pac. 727; King Co. v. Whittlesey, 52 Wash. 206, 100 Pac. 320.

<sup>9a</sup> 2 Daniell's Chancery Practice (Perkins), p. 1562 et seq. Our system furnishes an instance still more extreme. On appeal from a justice's court to the superior court the whole case is tried *de novo*. The superior court in this respect takes the place of the county court. But in Townsend v. Brooks, 5 Cal. 52, the supreme court said: "The argument that because the county court is authorized to try these cases *de novo* on appeal, such a trial or examination is an exercise of original and not appellate jurisdiction, involves a contradiction of terms, and is not warranted by reason or authority."

ness, it is not inconsistent with the functions of an appellate court to make findings upon evidence sent up from the court below, our supreme court has decided that it cannot do this. And the above-mentioned interpretation of the rule as to conflict is founded upon a misapprehension of the decisions in this regard. It has been decided that under our system the findings of fact must, in all cases, be made in the court below; that such findings are conclusive if not attacked in the manner pointed out by the statute; and that the supreme court will never examine the evidence *for the purpose of making findings thereon*.<sup>10</sup> But this is a very different thing from examining the evidence for the purpose of determining whether the court below erred in its findings thereon. Examining the evidence for the latter purpose is certainly not an exercise of original jurisdiction even if there be some conflict. For all the evidence was before the court below, and the supreme court determines nothing save that the decision of the court below is erroneous. And if such a course be not an exercise of original, it must be of appellate, jurisdiction. It is true that the old common-law courts never examined the evidence as is done under our system. But our practice is as much unlike the common-law practice as it is unlike that prevailing in the court of chancery.<sup>10a</sup> The system is *sui generis*, and (so far at least as the power of the supreme court is concerned) nothing is gained by resorting to the analogies of bygone systems. The powers of the supreme court are determined by the Constitution from which it derives its being. And there is nothing in the Constitution to the effect that the appellate jurisdiction of the supreme court, in civil cases, is confined to mere questions of law. The implication from the language used is the other way. The provision is that "the supreme court

<sup>10</sup> See section 296, *post*. And see *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799, where the supreme court said:

"The jurisdiction of this court is appellate, and not original, and it is the function of a court of original jurisdiction to determine in the first instance whether the evidence offered in support of an issue is sufficient to sustain that issue. This court cannot pass upon that question until after the trial court has determined it, and then only in a proceeding to set aside such determination. When an appeal

from a judgment is heard upon the judgment-roll alone, the only question to be considered is, whether the findings of fact sustain the judgment. Whether the evidence is sufficient to sustain the findings cannot be considered upon such appeal, except in the single instance when it is brought here upon a bill of exceptions on an appeal taken within sixty days after the rendition of the judgment."

<sup>10a</sup> Which as above stated allowed the appellate court to decree upon the evidence brought up from the lower court.

shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts; also in all cases at law which involve, etc., also in *all criminal cases* . . . on questions of law alone."<sup>11</sup> And under the maxim *expressio unius*, etc., it would seem that the restriction of the appellate jurisdiction, in criminal cases, to questions of law, implies that in civil cases the jurisdiction is more extensive.

The implication of the Constitution, therefore, is that in civil cases the supreme court shall review questions of fact as well as questions of law. But however this may be, the Constitution certainly contains no *prohibition* upon the review of questions of fact. Nor is there anything in the statutes which prohibits the review of such questions. Turning to the decisions, it appears that, for the purposes of the rule as to conflict, there is no distinction between cases in which there is no evidence of a material fact, and cases in which there is some, but not enough, evidence of such fact. Even in criminal cases, although the jurisdiction of the court is limited by the Constitution to "questions of law alone," the rule as to conflict does not prevent the setting aside of a verdict although there is some evidence in its support.<sup>12</sup> In this regard Sanderson, J., in his concurring opinion in *People v. Jones*,<sup>13</sup> said: "I concur in the judgment and what is said in the opinion, except so far as it implies, in respect to the jurisdiction of this court, a distinction between cases where there is no evidence of a material fact, and cases where there is some evidence, but not enough to sustain the verdict. I think this court has jurisdiction on appeal in criminal cases over the question whether the verdict is contrary to the evidence in the latter class of cases as well as in the former." And this language is supported by the decisions. Thus in *People v. Hamilton*<sup>14</sup> the supreme court set aside the verdict, although it was supported by the direct testimony of the prosecutrix. And this case is in accordance with others, decided both before and afterward.<sup>15</sup>

<sup>11</sup> California Constitution 1879, art. 6, sec. 4. The old Constitution contained similar language.

<sup>12</sup> The rule as to conflict applies in criminal as well as in civil cases. See *People v. Ashnauer*, 47 Cal. 98; *People v. Manning*, 48 Cal. 335; *People v. Gill*, 45 Cal. 285; *People v. Simpson*, 50 Cal. 304; *People v. Montgomery*, 53 Cal. 576.

<sup>13</sup> 31 Cal. 565; Currey, C. J., concurred with Sanderson, J. There does not seem to be any implication to the contrary in the opinion of the court. The concurring opinion was probably merely to guard against a misconception.

<sup>14</sup> 46 Cal. 540.

<sup>15</sup> See *People v. Ardaga*, 51 Cal. 371; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

Now, if the court may set aside a verdict in a criminal case, although there be some evidence in its support, notwithstanding the restriction in the Constitution *a fortiori*, it can do so in civil cases where there is no such restriction. And that it may do so is shown by the decisions. Although there are loose *dicta* to the contrary, there are many decisions in which the court has set aside the findings of fact, as not sustained by the evidence, although there was some evidence in their support. Thus in *Branson v. Caruthers*,<sup>16</sup> where the question was whether the plaintiff was in the employ of the defendant in a certain capacity at the time of the purchase by plaintiff of a tax title to defendant's property, *and the plaintiff explicitly denied the employment*, although he admitted a different employment, but the defendant contradicted this testimony, and two other persons testified to admissions of the plaintiff that he was in the defendant's employment in the capacity and at the time in question, and the plaintiff in the course of his testimony contradicted a material fact which he had sworn to in his pleading, and the court below found that there was no such employment as claimed by the defendant, the supreme court reversed the judgment, saying: "We do not think the evidence given under the circumstances can safely be relied upon, as the basis of the judgment given below in favor of the plaintiff, or that the finding of the court below is to be upheld here under the rule in respect to findings where there is a substantial conflict in the evidence." So in *Guerrero v. Ballerino*,<sup>17</sup> where the question was whether the defendant Ballerino was the person for whose benefit real estate sold by him as administrator was purchased, *and he testified that he was not interested in the purchase*, but had bought the property from one Yarrow, who bought at the administrator's sale, and the finding was in favor of the defendant, the supreme court set it aside as not sustained by the evidence, and McKinstry, J., delivering the opinion, said: "Many of the statements of the defendant are, in themselves, highly improbable; when his narrative brings him to events which, according to ordinary experience should be known to others, he is uncorroborated; in an important respect he contradicts an allegation of his verified answer; in one matter of consequence he is contradicted by the witness Cohen; and, if we can attach any credibility to the testimony of the plaintiff Dolores Guerrero (not directly denied), the defend-

<sup>16</sup> 49 Cal. 374.<sup>17</sup> 48 Cal. 118.



ant seemed anxious to affirm the sale to Yarrow, when it was suggested that a larger sum could be realized."

So in *Hutchinson v. Ainsworth*,<sup>17a</sup> which was an action to reform a written instrument, the court thus expressed the doctrine:

"The conclusion from the sum of all the authorities on the subject is, not that relief must necessarily be denied because there is a conflict of testimony, for that would result in a denial of justice in some of the plainest cases calling for such relief, but that upon all the proofs, taking the facts as they appear to the court after eliminating testimony unworthy of credence, or based upon mistake or uncertainty, as in other cases, the mistake must be established in a clear and convincing manner, to the entire satisfaction of the court."

So in *Lind v. Closs*,<sup>17b</sup> which was an action for damages for criminal assault, the supreme court held that where the facts and circumstances militated strongly against the truth of the evidence on one side or the other, the court would disregard the rule as to conflict. The court cited a number of cases where judgments of conviction in trials for rape had been reversed under like circumstances, the court saying that "a conviction upon such evidence would be a blot upon the jurisprudence of the country and a libel upon jury trials," and that "the ends of justice demand that the cause shall be tried anew."<sup>18</sup>

So similar decisions have been made in other cases.<sup>19</sup>

In order to reach the results arrived at in the foregoing decisions, the court must have weighed the testimony, and decided to some extent upon its credibility. And it follows from these cases, as well as from the reasons above adduced, that the rule as to conflict is not founded upon any limitation upon the power of the court. The reason of the rule is that the supreme court has no opportunity to see the witnesses, or observe their manner of testifying. And

<sup>17a</sup> 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82.

<sup>17b</sup> 88 Cal. 6, 25 Pac. 972.

<sup>18</sup> See *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371; *People v. Castro*, 60 Cal. 118; *People v. Fleming*, 94 Cal. 308, 29 Pac. 647; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702.

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<sup>19</sup> See *Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111; *Carpentier v. Gardiner*, 29 Cal. 160; *Walsh v. Hill*, 41 Cal. 571; *Sullivan v. Moorehead*, 99 Cal. 157, 33 Pac. 796; and see cases cited in notes 8 to 8f, *supra*, to like effect.

A judgment wrong on any hypothesis, and without any basis under the evidence, must be reversed. *Lenander v. Graves*, 45 Colo. 246, 100 Pac. 403.

since the judge and jury have these advantages, it can easily be seen that their decision ought not to be disturbed unless the case is reasonably clear. That such is the foundation of the rule has often been stated. Thus in *Kimball v. Gearheart*,<sup>20</sup> Baldwin, J., delivering the opinion, said: "It is almost impossible for an appellate court to satisfy itself in a decision upon such matters. So much depends upon the manner, bearing, character of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony." So in *Ritter v. Stock*,<sup>21</sup> Terry, C. J., delivering the opinion, said: "The evidence on the questions submitted was conflicting, and the verdict depended on the weight which the jury attached to the testimony of each witness. Upon this point the jury, having heard the testimony, and observed the manner of the various witnesses produced before them, had better opportunities of forming a correct judgment than the appellate court from merely reading the statement of the evidence." So in *Keane v. Canovan*,<sup>22</sup> Field, C. J., delivering the opinion, said: "A verdict is not to be disturbed where the evidence is merely conflicting. The jury having the witnesses before them are the most competent judges of the weight to be attached to their testimony; and it is not sufficient that an appellate court, looking at the testimony as it is written down, would have come to a different conclusion." So in *Rice v. Cunningham*,<sup>23</sup> Sanderson, J., after laying down the rule, said: "We do this because we are cut off from those important aids to the attainment of a correct conclusion, which the jury and the court below find in the appearance and general bearing of the witnesses." So in *Wilson v. Cross*,<sup>24</sup> where the subject was thoroughly considered, Currey, C. J., delivering the opinion, said:

"Where the testimony of the witnesses is conflicting, the result depends mainly upon the degree of credibility to which they may respectively be entitled, and of that the jury and the court before which such witnesses appear have an opportunity to judge, while this court has not, in so far as it may depend upon the conduct and bearing and upon the character of the witnesses for intelligence and integrity exhibited on the witness-stand." So in *Dickey v. Davis*,<sup>25</sup> Crockett, J., delivering the opinion, said: "In this

<sup>20</sup> 12 Cal. 27, 1 Morr. Min. Rep. 615.

<sup>21</sup> 12 Cal. 402.

<sup>22</sup> 21 Cal. 291, 82 Am. Dec. 738.

<sup>23</sup> 29 Cal. 492.

<sup>24</sup> 33 Cal. 60.

<sup>25</sup> 39 Cal. 565.

court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of the evidence, solely because we have had no opportunity to observe the manner of the witnesses, and to decide upon their credibility."

Nor does this position depend wholly for its support upon early cases. Late ones are to be found in which similar views were adopted by the court. Thus in *Andrus v. Smith* <sup>25a</sup> the court said:

"The evidence was to some extent conflicting, but the judge of the court below heard it as it fell from the lips of the witnesses. He observed their conduct and manner while testifying, and was therefore much better able to pass upon their credibility and arrive at the truth than we can possibly be from the written record."

So in *Reynier v. Elton*, <sup>25b</sup> where the question of fact under consideration was the identity of a certain witness-tree described in surveyor's notes, it was said:

"The court below was in a better position than this court can be placed in to determine whether the witness-tree claimed was genuine or not. It appears that the surveyor's mark was covered by a subsequent growth of several inches in thickness, and was only discovered by cutting in and removing a chip or chips from the tree. The chip showing the surveyor's marks was submitted to the inspection of the trial court, and by this inspection the court was no doubt aided in determining the question of the genuineness of the alleged witness-tree. This court has only a description of these things before it, and from this we cannot say that the court was wrong in its finding as to the corner, but, so far as we can see, the finding was correctly based on the preponderance of the evidence."

So in *Spitler v. Kaeding*, <sup>25c</sup> the court said:

<sup>25a</sup> 133 Cal. 78, 65 Pac. 320.

<sup>25b</sup> 133 Cal. 304, 65 Pac. 743.

<sup>25c</sup> 133 Cal. 500, 65 Pac. 1040.

The following language made use of in the recent Washington case of *Hughes v. Flint*, 61 Wash. 460, 112 Pac. 633, is clearly in accord with the California decisions: "The finding of the trial judge being thus sustained by competent testimony, we could not overrule it without doing violence to a rule so frequently announced by this court to need no citation of authority; that is, that the findings of the trial judge, when

sitting without a jury, will not be reversed because of a conflict in the testimony, or because the greater number of the witnesses have testified to the contrary. *There is a personal equation in all trials which appellate courts cannot measure*, and verdicts and judgments would indeed be insecure should they attempt it." And see *Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88, where it was held that the opportunity of the trial judge to see and hear the witness was an advantage sufficient to justify turning the scale in support of its findings.

"The judge of the trial court before whom the witnesses testify has the opportunity of noting their manner and appearance while under examination, and therefore is in a better position to judge of their credibility than the appellate court. Hence the rule that wherever there is a substantial conflict in the testimony, the finding of the trial court will not be disturbed."

So in *Howard v. Howard*,<sup>25d</sup> it was said:

"On the face of the testimony there is enough to justify the court in its conclusion. If there was anything in the manner of plaintiff, or of his other witnesses, which would show that he was merely preparing the way to bring this action, and was not sincerely seeking a reconciliation, the trial court could better judge the fact than we can here."

So in *Estate of Gianelli*,<sup>25e</sup> the court said:

"The judge of the court below, with the witnesses giving their testimony before him, and observing their demeanor while testifying, is better able to give proper weight and credibility to such evidence than is the appellate tribunal. This fact is the reason of the rule that where there is a substantial conflict in the evidence, the finding or judgment of the trial court will not be disturbed."

In no case that has been noted has the supreme court specifically held that there was any question of jurisdiction involved.<sup>25f</sup> It

<sup>25d</sup> 134 Cal. 346.

<sup>25e</sup> 146 Cal. 139, 79 Pac. 841. And see cases cited in note 8g, *supra*.

And see *Estate of Hayden*, 149 Cal. 680, 87 Pac. 275.

See note 25p, below.

<sup>25f</sup> The following will illustrate the various modes of stating the rule: "There was material evidence in support of all the findings, . . . and while the testimony of defendant contradicts that of plaintiff, . . . still there was . . . only that material conflict of evidence which placed the determination of the fact entirely within the province of the trial court." *Edwards v. Lechleiter*, 149 Cal. 677, 87 Pac. 194. "There can be no real question here (upon the point in issue) for there was a clear conflict in the evidence." *Emerson v. Yosemite etc. Co.*, 149 Cal. 50, 85 Pac. 122. "The evidence on the subject of the existence of the mistake was conflicting. There was evidence of a sub-

stantial character to support a finding . . . this evidence is conclusive upon this court." *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000. "We cannot say that there was no reasonable ground for the conclusion reached by the trial court, and therefore cannot hold the conclusion erroneous." *Estate of Walker*, 148 Cal. 162, 82 Pac. 770. "The evidence upon the question being conflicting, the finding of the trial court . . . is conclusive upon this appeal." *Anglo-California Bank v. Cerf*, 147 Cal. 384, 81 Pac. 1077." "As the evidence was conflicting on the material points in issue, it was for the jury to determine what credit should be given it. They determined that the evidence in support of respondent's position was the more convincing, and as that was sufficient to support their verdict we cannot disturb it." *Patterson v. San Francisco etc. Co.*, 147 Cal. 178, 81 Pac. 531. The evidence being squarely conflict-

is true, the court sometimes makes use of expressions which may be said to suggest a want of power to interfere with the conclusions of the trial court with respect to issues of fact, such as "the finding of the jury under the conflict is conclusive, and not subject to review here,"<sup>25g</sup> "the verdict of a jury or the finding of a trial court on conflicting testimony cannot be reviewed,"<sup>25h</sup> "with the conclusion of the lower court on conflicting evidence we cannot

ing, the court below was justified in finding as it did, and would have been equally justified if the evidence had been more equally balanced. *Doble v. McDonald*, 145 Cal. 641, 79 Pac. 369.

Different conclusions might have been drawn, but it cannot be said that there was no material evidence to support the conclusion of the jury. *Mernin v. Cory*, 145 Cal. 573, 79 Pac. 174. The finding upon conflicting evidence is conclusive upon the appellate court. *Schou v. Sotoyome Trice*, 140 Cal. 254, 73 Pac. 996; *Ambrose v. Hyde*, 145 Cal. 555, 79 Pac. 64. Upon conflicting evidence the finding of the trial court must be accepted as correct. *Boland v. Oil Co.*, 145 Cal. 405, 78 Pac. 871. We cannot interfere with a finding upon conflicting evidence. *Gabriel v. Bank of Suisun*, 145 Cal. 266, 78 Pac. 736; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; *Humboldt etc. Soc. v. Dowd*, 137 Cal. 408, 70 Pac. 274; *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46. "This court is warranted in interfering with the findings only when it cannot be seen that they are contrary to all the evidence, and that there is no substantial evidence in support of them." *Schroder v. Aden etc. Co.*, 144 Cal. 628, 78 Pac. 20. "Under the well-settled and oft-repeated rule that the trial court is the final arbiter of all questions of fact upon which there is a conflict of evidence, we cannot disturb the findings if there is substantial evidence in support of them." *Vail v. Freeman*, 144 Cal. 356, 77 Pac. 974. The evidence is sharply conflicting, but there is evidence sufficient to support the finding. *Continental etc. Assn. v. Wilson*, 144 Cal. 776, 78 Pac. 254. The superior court accepted the testimony and we are not at liberty to disregard it. *Betts*

*v. Southern California etc. Exchange*, 144 Cal. 402, 77 Pac. 993. The evidence is in irreconcilable conflict and on these matters cannot be reviewed. *Peterson v. Mineral King etc. Co.*, 140 Cal. 624, 74 Pac. 162. There is evidence contrary thereto sufficient to support the finding. *Bryant v. Broadwell*, 140 Cal. 490, 74 Pac. 33. The appellate court will not disturb the action of the trial court based upon a substantial conflict in the evidence. *Sullivan v. Market Street Ry Co.*, 136 Cal. 479, 69 Pac. 143. There is such a conflict here as to preclude us from disturbing the finding of the jury. *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591. The finding of the trial court will not be disturbed where there is a substantial conflict. *Quackenbush v. Swortfiguer*, 136 Cal. 149, 68 Pac. 590; *Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; *Welby v. South San Francisco etc. Co.*, 135 Cal. 187, 67 Pac. 46; *Fender v. Robinson*, 135 Cal. 26, 66 Pac. 969; *Goodwin v. Perkins*, 134 Cal. 564, 66 Pac. 793; *Bone v. Ophir Co.*, 149 Cal. 293, 86 Pac. 685. Where there is a conflict of evidence the findings must be allowed to stand. *Bernardis v. Allen*, 136 Cal. 7, 68 Pac. 110. The evidence was highly conflicting, and the decision of the trial court must be accepted as correct. *Fitzhugh v. Baird*, 134 Cal. 570, 66 Pac. 723. The evidence is conflicting and the findings must be allowed to stand. *Moore v. Douglas*, 132 Cal. 399, 64 Pac. 705. Where there is conflict in the evidence it is beyond the province of the appellate court to reconcile it. *Shafer v. Willis*, 124 Cal. 36, 56 Pac. 635.

<sup>25g</sup> *Bundy v. Sierra etc. Lumber Co.*, 149 Cal. 772, 87 Pac. 622.

<sup>25h</sup> *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276.

interfere,"<sup>25k</sup> "we cannot interfere with a finding upon conflicting evidence,"<sup>25l</sup> "we have no power to interfere with the finding on conflict of testimony,"<sup>25m</sup> and similar phraseology;<sup>25n</sup> but such language cannot be accepted as a correct statement of the true principle of law under consideration. It cannot be said that the appellate court cannot *review* a finding made upon conflicting evidence, for it is well settled that it is always the duty of the court to ascertain whether there is really a conflict, and if so, whether there is substantial support to the finding itself, and this process necessarily involves a review of the evidence. Nor, as above clearly set forth, is there any real foundation for the statement that the appellate court lacks *power* to interfere with a finding even though there be a conflict, for this has been often done, and the existence of the power never seriously questioned.<sup>26</sup>

<sup>25k</sup> *Riverside etc. Co. v. Riverside Trust Co.*, 140 Cal. 457, 83 Pac. 1003.

<sup>25l</sup> *Gabriel v. Bank of Suisun*, 145 Cal. 266, 78 Pac. 736; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; *Humboldt etc. Soc. v. Dowd*, 137 Cal. 408, 70 Pac. 274; *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46.

<sup>25m</sup> *Humboldt etc. Soc. v. Dowd*, 137 Cal. 408, 70 Pac. 274.

<sup>25n</sup> See cases cited in note 25f, *supra*.

<sup>26</sup> In some of the more recent cases it has been said, *obiter*, in outlining the distinction between the province of the trial court and that of the appellate court, that the reason of the rule was jurisdictional, as well as resting in the difference in the opportunity of determining the truth. In *Baker v. Baker*, 9 Cal. App. 737, 100 Pac. 892, the court intimated that the review of the questions of law alone by the Constitution, thus apparently sustaining the *dictum* of *Bauder v. Tyrrell*, quoted above; and in *Whitaker v. California Door Co.*, 7 Cal. App. 757, 95 Pac. 910, quoting from *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208, made use of similar language. It is true, when the appeal is from a new trial order and the ground is insufficiency of the evidence, the question for review is one of an exercise of discretion, and that is a question of law; but when the appeal is from the judg-

ment, taken within sixty days, and the ground for reversal is insufficiency of the evidence, the appellate court is called upon to consider a question of fact. In the end the same thing is done in both cases. An exercise of discretion cannot be reviewed otherwise than by considering it from the standpoint of the trial court, and this is what the appellate court does. In both cases, therefore, the appellate court considers only the evidence in support of the findings. This evidence it assumes to be true. It either disregards altogether the conflicting evidence, or it assumes as the trial court did, that it is false. If the evidence in support of the findings substantially supports them—if the findings are such as a reasonable mind of average intelligence would make, they will not be disturbed. But the same thing would happen if there were no conflicting evidence. It is obvious, therefore, that while it cannot be said that the question is always one of law, in this sense the rule of conflict is strictly jurisdictional. But, in this sense, also, there would be no rule of conflict at all. It would be simply a rule which limits the appellate court, in all questions of fact, to the consideration of the single question, Is there any substantial support in the evidence for the finding made? and demands the acceptance by the appellate court of the conclusions of the trial court as to the credibility of

From a careful examination of all the cases, and from the considerations above suggested, it is believed that the following is a correct statement of the rule, viz., that where there is a substantial conflict in the evidence the supreme court will not disturb the verdict or other decision of fact although it may be against the weight of the evidence; but that, if it appear to a reasonable certainty that the verdict or decision was wrong upon the evidence, it will be set aside, although there be direct testimony in its support. Perhaps as good a statement of the rule as can be given (so far as motions for new trial are concerned) is that a motion for new trial, on the ground of the insufficiency of the evidence, is addressed to the discretion of the court below, and that the ruling thereupon will not be disturbed except for an abuse of discretion.<sup>27</sup>

the witnesses and the truth of the facts sworn to, and this rule would not be affected in the slightest degree by the fact that there was a substantial conflict in the evidence. It would be assumed, as above suggested, that the evidence in support of the findings is true, and that in conflict therewith false.

The conclusion would seem, therefore, to be a proper one, that if a rule of conflict is to be recognized, other than to say that the appellate court will disregard all evidence in conflict with the findings made, or assume that the same is false, ample reason for it is to be found in that outlined in the text. But a reason is hardly an essential, where the rule itself is so well established and widely understood.

It is to be noted that even if the findings are held to be without adequate support, the conflicting evidence does not, in any event, enter into the consideration of the court.

<sup>27</sup> See *Bronner v. Wetzlar*, 55 Cal. 419; *Pierce v. Schaden*, 55 Cal. 406; *Simpson v. P. M. L. Ins. Co.*, 44 Cal. 139; *Phelps v. Union C. M. Co.*, 39 Cal. 407; *Hall v. Bark Emily Banning*, 33 Cal. 522; *Hawkins v. Reichert*, 28 Cal. 534; *O'Brien v. Brady*, 23 Cal. 243; *Quinn v. Kenyon*, 22 Cal. 82; *Walton v. Maguire*, 17 Cal. 92; *Peters v. Foss*, 16 Cal. 357; *Burnett v. Whitesides*, 15 Cal. 35; *Weddle v. Stark*, 10 Cal. 301; *Savage v. Sweeney*, 63 Cal. 340; *Gerold v. Brunswick-Balke Co.*, 67 Cal. 124, 7 Pac. 306;

*Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680; *Breckinridge v. Crocker*, 68 Cal. 403, 9 Pac. 426; *Tide Land Reclamation etc. Dist. v. Cunningham*, 71 Cal. 221, 16 Pac. 711; *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473; *Pacific Rolling Mill Co. v. Tel. Hill Co.*, 79 Cal. 340, 21 Pac. 840; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *Grigsby v. Schwarz*, 82 Cal. 278, 22 Pac. 1041; *Crooks v. Miller*, 89 Cal. 35, 26 Pac. 615; *Bjorman v. Fort Bragg etc. Co.*, 92 Cal. 500, 28 Pac. 591; *Domico v. Cassasa*, 101 Cal. 411, 35 Pac. 1024; *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649; *Mills v. Oregon etc. Co.*, 102 Cal. 357, 36 Pac. 772; *In re Carriger*, 104 Cal. 81, 37 Pac. 785; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715; *Warner v. Thomas*, 105 Cal. 409, 38 Pac. 960; *Fraze v. Brown*, 117 Cal. 324, 49 Pac. 213; *Garton v. Stern*, 121 Cal. 347, 53 Pac. 904; *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Byrbee v. Dewey*, 128 Cal. 322, 60 Pac. 847; *Bledsoe v. Decrow*, 132 Cal. 312, 64 Pac. 397; *Blood v. La Serena etc. Co.*, 134 Cal. 361, 66 Pac. 317; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Holtum v. Germania Life Ins. Co.*, 139 Cal. 645, 73 Pac. 591; *Cooper v. S. V. W. Works*, 145 Cal. 207, 78 Pac. 654; *Cutten v. Pearsall*, 146 Cal. 690, 81 Pac. 25; *Reeve v. Colusa etc. Co.*, 152 Cal. 99, 92 Pac. 89; *Baldwin v. Napa Wine Co.*, 1 Cal. App. 215, 81 Pac. 1037. The cases cited in note 39 below are based upon the same principle, for it is not easy to differentiate

But whatever may be its reason, or precise application and limitation, the rule is itself, as above stated, as well settled as anything can be. It applies to cases in equity, as well as actions in law.<sup>28</sup> It applies to cases tried by a referee,<sup>29</sup> and to special pro-

discretion and duty when acted upon. And see the following criminal cases: *People v. Hotz*, 73 Cal. 241, 14 Pac. 856; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; and cases cited in note 21, above, and see, also, section 97, *ante*.

<sup>28</sup> *Doe v. Vallejo*, 29 Cal. 385; *Ritter v. Stock*, 12 Cal. 402. And see *Bemmerly v. Smith*, 136 Cal. 5, 68 Pac. 97, where it was held that an advisory verdict (which was apparently accepted and incorporated in the findings of the court), would not be disturbed on appeal, where the evidence is conflicting, and the evidence upon which it is based is in direct line therewith.

The rule in Montana was thus expressed: "... It is the rule in this state, now too well established to be open to further controversy, that on appeal in an equity case the findings of the trial court will be sustained, unless it appears that the evidence preponderates against such findings. *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860. ... Furthermore, the trial court had the advantage over the members of this court in seeing the witnesses on the stand, hearing them give their testimony orally and observing their demeanor, and was therefore in a much more advantageous position in weighing the evidence and in giving credit where credit was apparently due." *Kift v. Mason*, 42 Mont. 232, 112 Pac. 392.

Obviously, a distinction is here recognized, in applying the rule, between law and equity; unless the use of the phrase, "unless it appears that the evidence preponderates against such findings," is an inadvertence. The language carries with it an intimation that the appellate court may weigh the evidence. That it cannot

do, unless it preponderates so sharply against the verdict or the finding made as to take the case out of the operation of the rule.

In *Consolidated etc. Co. v. Struthers*, 41 Mont. 551, 111 Pac. 150, the same language was made use of as that quoted above from *Kift v. Mason*. After referring to the well-known argument as to the more advantageous position of the trial judge to weigh the evidence and determine the credibility of witnesses, the court said: "Under such circumstances this court has repeatedly refused to interfere. Not only so, but it is the rule now too well established in this state to be longer open to dispute, that this court will accept the findings of the trial court in equity proceedings, unless the appealing party can show that the evidence preponderates against such findings. *Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821. ...."

This would seem to settle the question so far as Montana is concerned. The rule is not materially different in Washington. There it has been held that the appellate court tries an equity case *de novo*. *Pacific Lumber etc. Co. v. Dailey*, 60 Wash. 566, 111 Pac. 869. In this case, where the respondents sought to apply the rule of conflict, the court said: "If this statement [that conflict applied] were true, appeals in equity cases would be useless. Such cases are tried here *de novo*. While it is true that this court will give due and proper weight to the findings of the trial court upon questions of fact, it is likewise true that it has an independent duty devolved upon it by law to review and weigh the evidence. If the judgment in this case depended upon oral testimony alone, we would be loath to disturb the conclusion of the trial court."

In this case the court disregarded the decision of the trial judge on the ground that the latter was in error as to its finding of fact, or "conclusion," etc. In *Holden v. Romamo*, 61 Wash. 458, 112 Pac. 489, the court



ceedings;<sup>30</sup> and, as heretofore intimated, it makes no difference in the application of the rule that the new trial motion was passed upon by the judge who tried the case, or by his successor.<sup>31</sup> So it has been applied to the determination of the facts arising in proceedings under sections 652, Code of Civil Procedure, and 1174, Penal Code, for proving exceptions;<sup>32</sup> to a decision of the trial court upon a charge of irregularity of the adverse party,<sup>33</sup> of misconduct of jurors,<sup>34</sup> and of district attorney and judge;<sup>35</sup> to

said: "... Furthermore, in the absence of a statement of facts, we must presume that the testimony supports the findings, and would deem the complaint amended, if need be. We are further of opinion that the findings support the decree, but if they do not, that fact of itself affords no ground for reversal. This is an equity case and no findings were necessary. In such cases it is only where the findings are complete in themselves, and show affirmatively that a different judgment should have been rendered, that this court will interfere or reverse the judgment of the trial court. *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031, and cases there cited."

In Oregon, equity causes are tried anew in the supreme court, without reference to the findings of the trial court, which are regarded, if considered at all, as merely advisory. *Edmunds v. Welling (Or.)*, 110 Pac. 533. The practice is outlined in *Southerlin v. Bloomer*, 50 Or. 398, 93 Pac. 135; and see *Gentry v. Pacific etc. Co.*, 45 Or. 233, 77 Pac. 115; *Powers v. Powers*, 46 Or. 479, 80 Pac. 1058; *Wollenberg v. Minard*, 37 Or. 621, 62 Pac. 532; *Baines v. Coos Bay etc. Co.*, 41 Or. 135, 68 Pac. 397.

To the extent suggested, therefore, the statement of the text, that the rule applies to appeals in equity causes, must be regarded as subject to a slight modification.

<sup>29</sup> *Ritchie v. Bradshaw*, 5 Cal. 228; *Knowles v. Joost*, 13 Cal. 620; *Brady v. Brown*, 20 Cal. 520; *Noonan v. Hood*, 49 Cal. 293; *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788.

Also, *Miller v. Caughren*, 59 Wash. 554, 110 Pac. 32; *New Cache etc.*

*Co. v. Water etc. Co. (Colo.)*, 111 Pac. 610.

A report of a master upon conflicting evidence will not be set aside unless it clearly appears that he has fallen into error. *Paulter v. Manuel*, 25 Okl. 59, 108 Pac. 749.

<sup>30</sup> *Appeal of Piper*, 32 Cal. 530.

<sup>31</sup> *Rice v. Cunningham*, 29 Cal. 492; *Hawkins v. Reichert*, 28 Cal. 534; *Altschul v. Doyle*, 48 Cal. 535; *Macy v. Davila*, 48 Cal. 646; *Blum v. Sunol*, 63 Cal. 341; *Wilson v. Cal. C. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208; *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649; *Garton v. Stern*, 121 Cal. 347, 53 Pac. 904; *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; *Hausmann v. Sutter St. Ry. Co.*, 139 Cal. 174, 72 Pac. 905; *Whitaker v. California Door Co.*, 7 Cal. App. 757, 95 Pac. 910; *Wendling etc. Co. v. Glenwood etc. Co.*, 153 Cal. 411, 95 Pac. 1029.

With respect to this proposition, it would seem to indicate that the rule is not based upon the reason so often given, and advanced in the text. But it is to be remembered that the question in the case of an appeal from a new trial order is not one of insufficiency of the evidence, primarily, but is one of exercise of discretion, and as intimated in note 25p, above, the rule of conflict may be said to have a secondary application.

<sup>32</sup> *In re Howard*, 108 Cal. 31, 40 Pac. 1043.

<sup>33</sup> *Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507.

<sup>34</sup> *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101.

<sup>35</sup> *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742. In *Johnston v. Brown*, 115 Cal. 694, 47 Pac. 686, it was held that the

the determination of a question as to the bias of the sheriff who summoned the trial panel;<sup>31a</sup> to the determination of a question as to the date of service of a notice of appeal;<sup>31b</sup> and to many other matters collateral to the main course of the litigation.<sup>31c</sup> It applies to expert testimony,<sup>31d</sup> and to legal presumptions when they take the place of and are treated as evidence of facts the ascertainment of which is the object of legal procedure.<sup>32</sup>

rule as to conflict would be applied to the disqualification of a judge to sit at the trial of a case under the provisions of section 170 of the California Code of Civil Procedure.

<sup>31a</sup> *People v. Hartman*, 130 Cal. 487, 62 Pac. 823.

<sup>31b</sup> Where there was a motion to dismiss because the notice of appeal was not served until after the undertaking on appeal had been filed. *Cooman v. Loewenthal*, 122 Cal. 72, 54 Pac. 388. And as to the service of the summons on a motion to vacate a default for failure of service. *Mott Iron Works v. Plumbing Supply Co.*, 113 Cal. 341, 45 Pac. 683. And it has been applied in other cases of applications for relief from the effect of defaults. *Morton v. Morton*, 117 Cal. 443, 49 Pac. 557; *Merchants' etc. Co. v. Los Angeles etc. Co.*, 128 Cal. 619, 61 Pac. 277.

<sup>31c</sup> The rule has been applied to a finding of an ultimate fact from a stipulated statement of evidentiary facts, where the statement would support a reasonable inference either way, and the finding is supported by a reasonable inference from the evidentiary facts recited in the statement. *Crisman v. Lanterman*, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89. It has been applied to the determination of questions of fact arising out of motion to change the place of trial. *Creditors v. Welch*, 55 Cal. 469; *Hastings v. Keller*, 69 Cal. 606, 11 Pac. 218; *Daniels v. Church*, 96 Cal. 13, 30 Pac. 798; *Ludwig v. Harry*, 126 Cal. 377, 58 Pac. 858; also see *Lakeshore etc. Co. v. Modoc etc. Co.*, 108 Cal. 261, 41 Pac. 472; *Bowers v. Modoc etc. Co.*, 117 Cal. 50, 48 Pac. 979; *Brown v. San Francisco Sav. Union*, 122 Cal. 648, 55 Pac. 598. It has been applied in many will contests. See particularly, *In re Wilson*, 117 Cal. 262, 49 Pac.

172, 711; *Estate of Olmstead*, 122 Cal. 224, 54 Pac. 745; *Estate of Doolittle*, 153 Cal. 29, 94 Pac. 240. It has been applied to the decision of the trial court upon the question of fact as to whether an order holding a defendant on a murder charge to answer, under section 872 of the Penal Code, was duly made as a prerequisite to the valid filing of an information. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863. It has been applied to a question of the value of the services of an attorney of an estate in probate proceedings. *In re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479. Referring to the clerk as a tribunal provided by statute for the justification of sureties on appeal and other undertakings, the supreme court in *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383, said: "It is a general rule that where a fact to be determined rests upon conflicting testimony, or the weight of evidence or the credibility of witnesses, the decision of the tribunal to whom it has been intrusted will be accepted as correct." But this language must be accepted as *obiter* in this connection, since no provision was ever made for the review of the clerk's action in this respect, either by the trial or appellate court. See *Boyer v. Superior Court*, 110 Cal. 401, 42 Pac. 892.

<sup>31d</sup> *Barker v. Gould*, 122 Cal. 240, 54 Pac. 845.

<sup>32</sup> Legal presumptions constitute evidence, and may support findings notwithstanding evidence to the contrary, and such findings will be sustained upon appeal under the rule as to conflict of evidence. See *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Moore v. Gould*, 151 Cal. 723, 91 Pac. 616; *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863.

As above stated, where there is no substantial conflict in the testimony upon any material point, and the verdict or finding is against the evidence upon such point, it will be set aside by the supreme court. This is upon the presumption that the witness told the truth. But this presumption may be rebutted by the improbability of what is testified to, or by contradictions in the testimony. This was clearly stated by Baldwin, J., in *Blankman v. Vallejo*.<sup>33</sup> In that case the only testimony upon one of the material points was the deposition of one Adler. The court below found against his testimony, and the supreme court sustained the finding, saying: "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to credibility." So in *Crook v. Forsyth*,<sup>34</sup> where the burden of proof was upon the defendant, and his testimony contained discrepancies, and the finding was against his testimony, the supreme court sustained the finding, saying: "There was a conflict in the testimony, and it was all the more fatal for being intestine." The mere fact, therefore, that the testimony in a record is all one way, and the finding is against the testimony, is not sufficient of itself to require a reversal; for it may be so im-

But disputable inferences, while evidence, constitute evidence of the weakest and least satisfactory kind, and are allowed to stand, not against the facts they represent, but in lieu of proof thereof, and proof of facts contrary to the presumption does not raise a conflict of evidence but simply overcomes and dispels the presumption. *Savings & Loan Society v. Burnett*, 106 Cal. 514, 39 Pac. 922; *People v. Milner*, 122 Cal. 171, 54 Pac. 833.

Thus where the question was as to whether a deed absolute on its face was what it purported to be, or whether it was in fact intended as a mortgage, it was held that although the evidence should be entirely plain and convincing to be allowed to prevail over the presumption of law, the question as to whether it was really of this character or sufficiently strong to produce conviction was a question for

the determination of the trial court, and that where there was a substantial conflict on this point, the finding of the trial court would not be disturbed on appeal. See *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; and see *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Penney v. Simmons*, 99 Cal. 380, 33 Pac. 1121; *Sherman v. Sandell*, 106 Cal. 373, 39 Pac. 797; *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357.

In *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863, the presumption was that official duty had been performed, and that a writing was truly dated, and this presumption was held to establish a substantial conflict.

<sup>33</sup> 15 Cal. 638.

<sup>34</sup> 30 Cal. 662; approved in *Bernal v. Wade*, 46 Cal. 663; *Brock v. Pearson*, 87 Cal. 581, 25 Pac. 963.

probable as to be unworthy of belief.<sup>35</sup> But where the evidence appears to be unworthy of belief, and was *sustained* by the finding, the supreme court may direct a new trial.<sup>36</sup> And it has been held that the rule as to conflict has no application to a case where the findings point to facts, which, even if true and uncontradicted, or even if admitted without a conflict, are not sufficient to sustain the same. It applies, as has often been said, only to cases where the finding is properly sustained by the facts which point to it.<sup>36a</sup>

Where there is no conflict, but the judge or jury has drawn an erroneous deduction from the evidence, it would seem, upon principle, that such deduction ought not to be protected by the rule, but it is probable it would be so. The cases are not entirely in harmony,<sup>36b</sup> but the more recently decided hold that "when the facts necessary to sustain the judgment do not naturally follow as a necessary sequence from the probative facts, but must depend upon inferences to be deduced therefrom, it is exclusively the province of the trial court to make those deductions and find the facts, as to where the evidence itself is conflicting."<sup>36c</sup>

Where the testimony of witnesses is opposed to a recital in a written instrument not amounting to an estoppel, no general rule can be laid down,—sometimes the testimony will be sustained,<sup>37</sup> and sometimes the recital.<sup>38</sup>

It is said that excessive damages as a ground for a new trial is practically included in that of insufficiency of the evidence.<sup>38a</sup> The

<sup>35</sup> Even in such case, therefore, the court must weigh the testimony as against the finding, and to some extent decide as to its credibility. And this would seem to make in favor of the conclusions with respect to the application of the rule which have above been announced. The cases of *Sonoma v. Stofen*, 125 Cal. 32, 57 Pac. 681, and in a minor degree, *People v. Milner*, 122 Cal. 171, 54 Pac. 833, and *Savings etc. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922, illustrate this position; and see, also, cases cited in note 8 et seq., above.

<sup>36</sup> As was done in *Guerrero v. Ballerino*, 48 Cal. 118; and in *Branson v. Caruthers*, 49 Cal. 374.

<sup>36a</sup> See *People v. O'Brien*, 106 Cal. 104, 39 Pac. 325. As above stated, the facts which point to the finding will be assumed to be true,

and those in conflict therewith, false.

<sup>36b</sup> In *National Gold Bank v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697, such an erroneous deduction was made the ground for a new trial. The cases of *McKeever v. Market St. Ry. Co.*, 59 Cal. 294; and *Porter v. Pico*, 55 Cal. 165, seem to be the other way.

<sup>36c</sup> *Cauhape v. Security Savings Bank*, 118 Cal. 82, 50 Pac. 310; and see *Nevills v. Moore Mining Co.*, 135 Cal. 561, 67 Pac. 1054; and see section 285, *ante*.

<sup>37</sup> *Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111.

<sup>38</sup> *French Bank v. Beard*, 54 Cal. 480. In this case the recital was corroborated to some extent, however.

<sup>38a</sup> See section 94, *ante*.

rule is well settled that both grounds rest in the discretion of the trial court, and an exercise of that discretion will not be disturbed except for its manifest abuse.<sup>38b</sup> It would seem, therefore, that the test of abuse of discretion would depend as much upon the rule of conflict in the one case as in the other. It has been held that in neither case will the appellate court consider what its own decision would have been as such a test,<sup>38c</sup> and that, as to the question of excessive damages, the appellate court would not disturb an order of the trial court on a motion for a new trial for a mere difference of opinion as to whether the verdict was or was not the result of passion or prejudice any more than the trial court would feel called upon to disturb the verdict of the jury because of a like difference of opinion, in the absence of manifest passion or prejudice.<sup>38d</sup> The appellate court might be disposed to regard a verdict as eminently reasonable and proper, but would not for this reason feel impelled to reverse an order of the trial court granting a new trial on the ground of excessive damages. As to what should be regarded as a fair test of abuse of discretion no definite expression is available; but in this connection it may be noted that the appellate court is naturally loath to disturb orders granting motions for new trial, and unless such an order is based upon some legal proposition, which may be considered in itself, a stronger showing is required to justify the court in interfering with it than with an order refusing the motion.<sup>38e</sup>

The question of substantial conflict in the evidence is in no way dependent upon the greater number of witnesses on one side and the limited number on the other.<sup>38f</sup>

The rule as to conflict does not apply in the court below. The judge of such court should set aside the verdict whenever it is against the weight of the evidence, notwithstanding the fact that there is a substantial conflict in the testimony.<sup>39</sup> And this has been

<sup>38b</sup> See note 27, *supra*. And see *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774.

<sup>38c</sup> See *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074; and see section 289, *post*, as to the general test of abuse of discretion.

<sup>38d</sup> See *Lee v. Southern Pacific Co.*, 101 Cal. 118, 35 Pac. 572.

<sup>38e</sup> See *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. 388.

<sup>38f</sup> See *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699; and also *Grant v.*

*McPherson*, 104 Cal. 165, 37 Pac. 864.

<sup>39</sup> *Dickey v. Davis*, 39 Cal. 565; *Sherman v. Mitchell*, 46 Cal. 576; *Irving v. Cunningham*, 58 Cal. 306; *Mason v. Austin*, 46 Cal. 385; *Hawkins v. Abbott*, 40 Cal. 639; *Curtiss v. Starr & Co.*, 85 Cal. 376, 24 Pac. 806; *Bjorman v. Fort Bragg etc. Co.*, 92 Cal. 500, 28 Pac. 591; *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444; *Domico v. Cassasa*, 101 Cal. 411, 35 Pac. 1024; *Jones v. Sanders*,

held to apply even where the judge who passes upon the motion did not preside at the trial.<sup>40</sup>

§ 289. **An Exercise of the Discretion of the Court Below will be Disturbed Only for an Abuse of Discretion.**—There are many matters that are wisely left to the discretion of the court below unregulated by precise rules. Some of these matters are thus placed within the discretion of the trial court by express enactment,<sup>1</sup> but by far the larger number have become “discretion-

103 Cal. 678, 37 Pac. 649; *In re Carriger*, 104 Cal. 81, 37 Pac. 785; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715; *Warner v. Thomas*, 105 Cal. 409, 39 Pac. 960; *McQueen v. Mechanics' Institute*, 107 Cal. 163, 40 Pac. 114; *Garton v. Stern*, 121 Cal. 347, 53 Pac. 904; *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315; *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847; *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. 361; *Newman v. Overland etc. Ry. Co.*, 132 Cal. 73, 64 Pac. 110; *Blood v. La Serena etc. Co.*, 134 Cal. 361, 66 Pac. 317; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Cooper v. Spring Valley Water Works*, 145 Cal. 207, 78 Pac. 654; *Powden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Wendling etc. Co. v. Glenwood etc. Co.*, 153 Cal. 411, 95 Pac. 1029; and see the following which decide practically the same thing: *Hall v. Bark Emily Banning*, 33 Cal. 522; *Gerold v. Brunswick-Balke Co.*, 67 Cal. 124, 7 Pac. 306; *Breckinridge v. Crocker*, 68 Cal. 403, 9 Pac. 426; *Tide Land Reclamation Co. v. Cunningham*, 71 Cal. 221, 16 Pac. 711; *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *Harnett v. Railroad Co.*, 78 Cal. 31, 20 Pac. 154; *Pacific Rolling Mill Co. v. Tel. Hill Co.*, 79 Cal. 340, 21 Pac. 840; *Sharp v. Hoofman*, 79 Cal. 404, 21 Pac. 846; *Grigsby v. Schwarz*, 82 Cal. 278, 22 Pac. 1041; *Mills v. Railway Co.*, 102 Cal. 357, 36 Pac. 772; *In re Martin*, 113 Cal. 479, 45 Pac. 813; *Bledsoe v. Decrow*, 132 Cal. 312, 64 Pac. 397; *Hausmann*

*v. Sutter St. Ry. Co.*, 139 Cal. 174, 72 Pac. 905; *Holtum v. Germania etc. Co.*, 139 Cal. 645, 73 Pac. 591; *Cutten v. Pearsall*, 146 Cal. 690, 81 Pac. 25; and the following criminal cases: *People v. Baker*, 39 Cal. 686; *People v. Hotz*, 73 Cal. 241, 14 Pac. 856; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001.

As to the duty of the trial judge in this respect, see the opinion of Justice Sweeney in the case of *Goldfield Mohawk Mining Co. v. Frances etc. Co. (Nev.)*, 112 Pac. 42, where the subject is treated in detail, and the arguments *pro* and *con* collected, along with the leading cases of many states. See, also, note 8, section 97, *ante*.

<sup>40</sup> *Altschul v. Doyle*, 48 Cal. 535; and see cases cited in note 31, *supra*.

<sup>1</sup> Reference to a committee to take depositions in disbarment proceedings, section 298, Code of Civil Procedure; order of trial, section 607, *Id.*; fees of referees and assistants in partition, section 768, *Id.*; costs in certain cases, sections 1025, 1027, 1029, and 1255, *Id.*; insertion of stay in writ of review, section 1072, *Id.*; trial of issues of fact in proceedings for writ of mandate, section 1090, *Id.*; inquiry into collateral facts, section 1868, *Id.*; view and inspection of object relating to dispute, section 1954, *Id.*; order of proof, section 2042, *Id.*; mode of swearing witness and form of oath, section 2095, *Id.*

In addition to these are a large number of cases where the legislature has, by the use of appropriate phrase-

ary," so to speak, by reason of judicial precedent. In the earlier period of the common law this last list was necessarily far more numerous than at present, but it has been materially curtailed by the gradual expansion of procedure under the code.<sup>1a</sup> The rule has always been, whether the discretionary act was authorized by judicial precedent or by act of legislature, that an exercise of discretion on the part of the trial court would be disturbed only for an abuse thereof.<sup>1b</sup> It is therefore important to know when discre-

ology, left matters to the discretion of the trial court. These cannot be conveniently tabulated, even if it were necessary. It is sufficient to say that in practically every case where the subjunctive "may" is used in outlining a judicial duty such duty is within the discretion of the court.

Section 148 of the Civil Code seems to provide an exception to the rule that an abuse of discretion must be shown or must appear before the appellate court will interfere with an exercise thereof. It provides that the discretionary division of the community property and homestead of a couple by the court in rendering judgment of divorce is "subject to revision on appeal in all particulars." See the following cases in illustration of the exception: *Brown v. Brown*, 60 Cal. 579; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 131; *Kimple v. Conway*, 75 Cal. 413, 17 Pac. 546; *Strozyński v. Strozyński*, 97 Cal. 189, 31 Pac. 1130; *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *Gorman v. Gorman*, 134 Cal. 378, 66 Pac. 313; *Nelson v. Nelson*, 7 Cal. App. 76, 93 Pac. 399.

<sup>1a</sup> A historical view of the development of this branch of practice is to be found in *Spelling's New Trial and Appeal*, section 19 et seq.

<sup>1b</sup> *Drake v. Palmer*, 2 Cal. 177; *Bartlett v. Hodgden*, 3 Cal. 55; *Sloan v. Smith*, 3 Cal. 410; *Speck v. Hoyt*, 3 Cal. 413; *Taylor v. McKinley*, 4 Cal. 104; *Watson v. McClay*, 4 Cal. 288; *Wood v. Fobes*, 5 Cal. 62; *Smith v. Brown*, 5 Cal. 118; *People v. Fisher*, 6 Cal. 154; *Weddle v. Stark*, 10 Cal. 301; *Hanson v. Barnishel*, 11 Cal. 340; *Pacheco v. Hunsacker*, 14 Cal. 120; *Robinson v. Smith*, 14 Cal. 254; *Smith v. Billett*, 15 Cal. 23; *Burnett v. Whitesides*, 15 Cal. 35; *Smith v. Richmond*, 15 Cal.

501; *Broadus v. Nelson*, 16 Cal. 79; *Peters v. Foss*, 16 Cal. 357; *Walton v. Maguire*, 17 Cal. 92; *Slade v. Sullivan*, 17 Cal. 102, 7 Morr. Min. Rep. 419; *Comerford v. Dupuy*, 17 Cal. 308; *Howe v. Briggs*, 17 Cal. 385; *Roland v. Kreyenhagen*, 18 Cal. 455; *Woodward v. Backus*, 20 Cal. 137; *Oullahan v. Starbuck*, 21 Cal. 413; *Gilman v. Cosgrove*, 22 Cal. 356; *Howe v. Independence Co.*, 29 Cal. 72; *Bailey v. Taafe*, 29 Cal. 422; *Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213; *Coleman v. Rankin*, 37 Cal. 247; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Phelps v. Union M. C. Co.*, 39 Cal. 407; *Kohler v. Los Angeles*, 39 Cal. 510; *Sweet v. Burdett*, 40 Cal. 97; *Lorenzana v. Camarillo*, 41 Cal. 467; *Foote v. Richmond*, 42 Cal. 439; *Simpson v. P. M. L. S. Co.*, 44 Cal. 139; *Crosett v. Whelan*, 44 Cal. 200; *Hopkins v. W. P. R. R. Co.*, 44 Cal. 389; *Mariani v. Dougherty*, 46 Cal. 26; *Santa Barbara v. Thompson*, 46 Cal. 63; *Bowers v. Cherokee Bob*, 46 Cal. 279; *Sherman v. Mitchell*, 46 Cal. 576; *Rogers v. Tennant*, 45 Cal. 184; *Hanchett v. Finch*, 47 Cal. 192; *Chipman v. Hibberd*, 47 Cal. 638; *Miller v. Sharp*, 49 Cal. 233; *Tormey v. Pierce*, 49 Cal. 306; *Moore v. L. A. Infirmary*, 49 Cal. 669; *Simmons v. Keller*, 50 Cal. 38; *Patterson v. Supervisors*, 50 Cal. 344; *Coolott v. S. P. R. R. Co.*, 52 Cal. 65; *Efford v. C. P. C. R. R. Co.*, 52 Cal. 277; *Estate of Morgan*, 53 Cal. 243; *Parrott v. Floyd*, 54 Cal. 534; *Payne v. McKinlay*, 54 Cal. 532; *Davis v. Rock Creek*, 55 Cal. 359, 36 Am. Rep. 40; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, 55 Cal. 419; *Reavis v. Cowell*, 56 Cal. 588; *Hall v. Lonkey*, 57 Cal. 80; *Irving v. Cunningham*, 58 Cal. 306; *Moore v. Kellogg*, 58 Cal. 385; *White v.*

tion has been abused. This is not always easy to determine, but the task is greatly simplified when it is remembered that the discre-

Nunan, 60 Cal. 406; *People v. Ross*, 65 Cal. 104, 3 Pac. 491; *Graham v. Stewart*, 68 Cal. 374, 9 Pac. 555; *Avila v. Meherin*, 68 Cal. 478, 9 Pac. 428; *Tide Land Reclamation Dist. v. Cunningham*, 71 Cal. 221, 16 Pac. 711; *White v. White*, 73 Cal. 105, 14 Pac. 393; *People v. Hotz*, 73 Cal. 241, 14 Pac. 856; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Sharon v. Sharon*, 77 Cal. 102, 19 Pac. 230; *People v. Fine*, 77 Cal. 147, 19 Pac. 269; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888; *In re Moore*, 88 Cal. 1, 25 Pac. 915; *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *People v. Merkle*, 89 Cal. 82, 26 Pac. 642; *Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965; *Langan v. Langan*, 91 Cal. 654, 27 Pac. 1092; *In re Schmidt*, 94 Cal. 334, 29 Pac. 714; *Grannis v. Lorden*, 103 Cal. 472, 37 Pac. 375; *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *Marks v. Weinstein*, 121 Cal. 53, 53 Pac. 362; *Moore v. Kendall*, 121 Cal. 145, 53 Pac. 647; *People v. Jeffers*, 126 Cal. 296, 58 Pac. 704; *Grant v. Bannister*, 145 Cal. 219, 78 Pac. 653; *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *Estate of Bump*, 152 Cal. 274, 92 Pac. 643.

The following are illustrations of the rule herein stated: *Peterson v. Standard Oil Co.*, 55 Or. 511, 106 Pac. 337; *Fee v. National Bank (Utah)*, 106 Pac. 517; *Greenlaw etc. Co. v. Chambers*, 46 Colo. 587, 105 Pac. 1091; *Farmers' etc. Bank v. School District*, 25 Okl. 284, 105 Pac. 641; *Lindsey v. Scott*, 56 Wash. 206, 105 Pac. 462; *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141; *McClain v. Lewiston etc. Co.*, 17 Idaho, 63, 104 Pac. 1015, 25 L. R. A., N. S., 691; *Sudden & Christensen v. Morse*, 55 Wash. 372, 104 Pac. 645; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135; *In re Davis' Estate*, 39 Mont. 433, 104 Pac. 521; *State Savings Bank v. Albertson (Mont.)*, 102 Pac. 692; *Hoskins v. Northern Pacific Co.*, 39 Mont. 394, 102 Pac. 988; *Horton v.*

*Haines*, 23 Okl. 878, 102 Pac. 121; *Meza v. Pfister Co.*, 54 Wash. 7, 103 Pac. 871; *Severns v. English (Okl.)*, 101 Pac. 750; *Pappe v. Post*, 23 Okl. 581, 101 Pac. 1055; *Kirkwood v. School District*, 45 Colo. 368, 101 Pac. 343; *Murphy v. Southern Pacific Co.*, 31 Nev. 120, 101 Pac. 322; *Spencer v. Alki etc. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843; *Anderson v. Salt Lake etc. Co.*, 35 Utah, 509, 101 Pac. 579; *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091; *Jaggy v. Rooney*, 61 Wash. 381, 112 Pac. 367.

These citations might be almost indefinitely multiplied, if all cases involving an application of the rule should be set down. Thus, motions for new trial are addressed to the discretion of the trial judge, in all cases except where the ground of the motion is an error of law, or, perhaps, an irregularity of the court itself; and the action of the trial court in granting or denying the motion will not be disturbed, except for abuse: *See Gila etc. Co. v. Hall (Ariz.)*, 112 Pac. 845; *Duncan v. Holder*, 15 N. M. 323, 107 Pac. 685; *Duncan v. McAlester etc. Co.*, 27 Okl. 427, 112 Pac. 982; *Hogan v. Bailey*, 27 Okl. 10, 110 Pac. 890; *Merritt v. Hibberd*, 61 Wash. 368, 112 Pac. 350; *Coffer v. Erickson*, 61 Wash. 559, 112 Pac. 643; and see the several chapters in which the various grounds for new trial are considered. So, applications to vacate defaults are addressed to the discretion of the trial court, and are subject to the same rule. *See* section 311, *post*. So, as to the allowance of amendments. *See* section 54, *ante*; and see Commissioners of Gunnison Co. v. Hider, 47 Colo. 443, 107 Pac. 1068; *Alcorn v. Dennis*, 25 Okl. 135, 105 Pac. 1012; *Lawson v. Black Diamond Co.*, 53 Wash. 614, 102 Pac. 759. So as to continuances. *See* section 60, *ante*; *Koch v. Story*, 47 Colo. 335, 107 Pac. 1093; *Storer v. Heidfeld*, 17 Idaho, 113, 105 Pac. 55; *Lancino v. Smith*, 36 Utah, 462, 105 Pac. 914; *McFadden v. Pyne*, 46 Colo. 319, 104 Pac.



tion referred to is legal and never arbitrary.<sup>2</sup> There must be a legal ground or excuse for every act of the court, and not a mere arbitrary exercise of power by the will of the individual who happens to occupy the position of judge.<sup>2a</sup> Not only must there be a

491; *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694; *Luke v. Coffey*, 31 Nev. 165, 101 Pac. 555. So as to the refusal of a referee and trial court to reopen a case for additional evidence. *Seay v. Ellison* (Okl.), 107 Pac. 656.

The trial court's discretion in dealing with motions for new trial is oftenest exercised, perhaps, in connection with motions made upon the ground of insufficiency of the evidence, and its function in that respect was thus expressed in *Hogan v. Bailey*, 27 Okl. 15, 112 Pac. 890, the leading Oklahoma case upon the point:

"The trial court has a higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause and to have the facts weighed in the light of proper instructions declaring the law relative thereto, but it is the imperative, assuming duty of the court after the jury has returned its verdict and awarded to one or the other success in the controversy, where the justness of the same is challenged as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court, it should not, where challenged, be permitted to stand. *Yarnell v. Kilgore*, 15 Okl. 591, 82 Pac. 990; *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113; *Ten Cate v. Sharp*, 8 Okl. 300, 57 Pac. 645; . . . *Citizens' State Bank of Lawton v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 118, and cases therein cited."

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The rule in Oklahoma is that unless error is shown in a matter of law in granting a new trial motion, the appellate court will not interfere except for clear abuse of discretion. See *Citizens' State Bank of Lawton v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 1118, and cases cited.

See, also, as to rule of discretion on motions for new trial, *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *Lancino v. Smith*, 36 Utah, 462, 105 Pac. 914; *Columbia etc. Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636; *Wolfe v. Redley*, 17 Idaho, 173, 104 Pac. 1014; *Galena Nat. Bank v. Ripley*, 55 Wash. 615, 104 Pac. 807, 26 L. R. A., N. S., 993; *Tucker v. Wyoming etc. Co. (Wyo.)*, 104 Pac. 529; *Anderson v. Salt Lake Co.*, 35 Utah, 509; 101 Pac. 579.

<sup>2</sup> *Bailey v. Taaffe*, 29 Cal. 422; *Stringer v. Davis*, 30 Cal. 318; *Lybecker v. Murray*, 58 Cal. 186; *January v. Superior Court*, 73 Cal. 537, 15 Pac. 108.

<sup>2a</sup> In *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, the court said: "Under such circumstances, the refusal of the court to postpone the trial was error, and not within the limits of that judicial discretion which the law intends shall govern and restrain courts in their rulings upon such questions, and which discretion is never capricious, arbitrary, or unjust, but is always 'exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice.'"

See, also, *Miller v. Carr*, 116 Cal. 378, 58 Am. St. Rep. 180, 48 Pac. 324; *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932, where it was said: "The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve rather than impede or defeat the ends of justice, regarding mere technicalities as obstacles to be avoided rather than as

legal ground or excuse in support of the exercise of discretionary power, but there must be some fact or reason against same, otherwise there would be no basis for an exercise of discretion.<sup>2b</sup> Moreover, the discretion of the court must always be exercised in behalf of justice and fair dealing in the abstract and manifestly must not be contrary to the principles of justice, or productive of hardship and inconvenience. If this should be the case there would be, in the language of the authorities, an abuse of discretion, and the appellate court would reverse the judgment or order.<sup>3</sup> This is not a very precise rule; but when interpreted by the light of the circumstances of each case, it is of practical value, and prevails in all courts where the common law is the rule of decision.

A failure to exercise a discretion which is within the power of the court is error, equally with its wrongful exercise, and is always ground for reversal.<sup>4</sup> A test of what is within the discretion of a court has been suggested by the question, May the court properly decide the point either way? If not, then there is no discretion to exercise. If there is no latitude for the exercise of the power, it cannot be said that the power is discretionary.<sup>5</sup>

The only limitation upon the exercise of discretionary power is that it must not be abused.<sup>6</sup>

It is sometimes said that the appellate court will not, in reviewing an exercise of discretion by a *nisi prius* court, consider as a test of abuse the question as to what its own decision would have been.<sup>7</sup>

principles to which effect is to be given in derogation of substantial right."

Also *Estate of Kasson*, 141 Cal. 33, 74 Pac. 536; *Ferris v. Wood*, 144 Cal. 426, 77 Pac. 1037.

<sup>2b</sup> See *Thompson v. Brandt*, 98 Cal. 155, 32 Pac. 890.

<sup>3</sup> *Pinkham v. McFarland*, 5 Cal. 137; *Ritchie v. Davis*, 5 Cal. 453; *Arrington v. Tupper*, 10 Cal. 464; *Bailey v. Taaffe*, 29 Cal. 422; *Kirstein v. Mauden*, 38 Cal. 158; *Wade v. Thayer*, 40 Cal. 578; *Barry v. Bennett*, 45 Cal. 80; *Tyler v. Healy*, 51 Cal. 191; *Thompson v. Thornton*, 41 Cal. 626; *Seehorn v. Big Meadows Mining Co.*, 60 Cal. 240; *Grady v. Bramlett*, 59 Cal. 105; and see cases cited in note 2, *supra*.

Also see *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493, where the court

said: "While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is, that it must plainly appear to affect injustice."

<sup>4</sup> See *Tyler v. Healy*, 51 Cal. 191; *Dickey v. Davis*, 39 Cal. 565; *Heinlen v. Cross*, 63 Cal. 44; and see *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337.

<sup>5</sup> *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493; *Kreiss v. Hotaling*, 99 Cal. 383, 33 Pac. 1125.

<sup>6</sup> *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493; *Kreiss v. Hotaling*, 99 Cal. 383, 33 Pac. 1125.

<sup>7</sup> *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074.

§ 290. **Stare Decisis.**—This rule is that which binds a court to follow its previous decisions. It is based upon the principle that the certainty of a rule is of more importance than the reason of it. The rule is one of policy and is not unbending. It seems to be settled that a decision, or course of decisions, should be overruled if they are clearly erroneous, and rights of property have not grown up under them to any considerable extent; but if such rights have grown up, and are dependent upon the decision, it should not be overruled although clearly erroneous. The rule is by some courts relaxed, and by others strictly adhered to, according to the conservative or radical tendencies of the particular justices. Nothing more will be attempted here than to indicate how the rule has been applied in California.

In *Hart v. Burnett*,<sup>1</sup> where the supreme court overruled several of its prior decisions in relation to the establishment of a pueblo in San Francisco, the rule was ably expounded by Mr. Justice Baldwin. The learned justice, delivering the opinion of the majority of the court, said:

“Originally the obligation of the courts is to declare the law as it exists. They have no right to substitute their own dogmas or assumptions for the law. It would seem, therefore, that the mere fact that an error has been committed is no reason or even apology for repeating it, much less perpetuating it. But even in the correcting or removal of such errors the law is reasonable, and looks to the welfare and repose of society, and the protection of the public interests. Accordingly, it sometimes happens that the reversal of an erroneous ruling would prove of greater evil consequences than to suffer it to remain. It becomes, then, a matter of policy to refuse to overrule it. Among the more general reasons for this refusal are the importance of consistency and stability in the decisions, and the uneasiness and uncertainty which changes of them produce in the public mind; but this consideration is not of overruling weight, for it applies to all decisions, especially of courts of last resort, whether they create or do not create rules of property; and it is not pretended that as to these last, it is not the duty of the court to reform clear and admitted error in a previous decision. The reason given for the rule of *stare decisis* is that rights vest by decisions which affirm a title under a given state of facts, and therefore it would be unjust to deprive a party of prop-

<sup>1</sup> 15 Cal. 530.

erty acquired under such circumstances. This rule unquestionably applies to cases where particular modes have been declared effectual for passing property, and where technical or formal objections to such modes are interposed, the effect of which objections would be to make a mere legal claim prevail over justice and right. But it is not so clear if two men claim property, one under a statute and the other under a decision, that the man claiming under a wrong decision, which destroyed the good title under the statute, is entitled as a matter of justice to the property as against the first. Again, that this matter, the vesting of a right, is not the conclusive thing, which gives effect to the principle, is seen from the fact that a single decision is not necessarily or usually protected by the rule. The rule itself is stated in vaguer terms than almost any other principle of law. [The learned justice here makes an elaborate review of the authorities, and continues:] And apart from all express authority, reason must convince us that no such inexorable rule could exist. The rule itself implies that the doctrine protected by *stare decisis* cannot stand of itself. But it is a solecism to say that causes should be tried upon wrong principles—be decided against the law—whether it be for the purpose of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it is so necessary or not, is for the court to decide, as a matter of legal discretion, whenever the rule is invoked. For as this rule of *stare decisis* is avowedly put upon the ground of policy we cannot conceive that the application of the rule could be rightly so made as to overthrow the paramount public policy of deciding causes by the rules of law, when those rules work justice and do equity in the major part of the cases to which they apply, and protect the rights of the many against the claim of the few.”

And in *Alferitz v. Borgwardt*,<sup>1a</sup> Mr. Justice Temple, for the court, in overruling the decision in *Berson v. Nunan*,<sup>1b</sup> said:

“Laws are not made by judicial decisions. The court simply determines the rights of the parties to the action in that particular controversy. It is no part of its purpose even to declare the law.”

<sup>1a</sup> 126 Cal. 201, 58 Pac. 460.

<sup>1b</sup> 63 Cal. 550.

<sup>1c</sup> In *Re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, the supreme court seemed to

take a different view when it said that courts are not to decide cases alone, but to settle principles first and decide cases according to those principles as applied to the facts.

It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law except in that special controversy. In other suits it is authority more or less persuasive according to the reasonableness of the rule. Courts have never thought themselves bound by it as they are by a valid statute. And if it is manifestly wrong the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson case in making a loan would show his incapacity.

"No doubt an appellate court assumes a grave responsibility when it reverses a former decision which has become a rule of property, or the law of contracts, and, whenever this is done, it must be understood that the court has not only considered the objections to the former decision, but the evils which may follow from its reversal. The matter is ably discussed in *Hart v. Burnett*, 15 Cal. 530, and the views there expressed have been frequently affirmed.

"The mere fact that an error has been made in a decision of the supreme court is no reason for perpetuating it, but, in a given case, to correct it may be productive of more evil than to permit it to stand. And, as stated in the above case, justice is not always on the side of him who claims under the erroneous decision. Why should one who has honestly acquired property according to the law of the land lose it because a judge, relying upon imperfect presentation, has erred? Or why should the policy of the government, adopted upon great deliberation, be so defeated? And especially so under a system where a decision was never deemed to have the force and effect of an absolute law. Kent says that a decision solemnly and deliberately made should not be set aside, 'except for very cogent reasons, and upon a clear manifestation of error.' (1 Kent's Commentaries, 476.) And, we may add, the rule should not then be changed unless the court, after due deliberation, shall conclude that in the interest of justice and of the public the error should be corrected. And as the court can only determine the law as applicable to existing or past contracts and rights, this is a conclusion that existing controversies and rights under past transactions should be governed by the law as declared in the later decision."

The other side of the question was presented by Sawyer, J., delivering the opinion in *Hihn v. Courtis*,<sup>2</sup> as follows:

<sup>2</sup> 31 Cal. 398.

“It is now about eight years since it was judicially determined upon an elaborate and thorough consideration by the court of last resort that the instrument in question is a valid conveyance of the lands in controversy, and the determination depended upon a construction of the provisions of our own statute. That decision has become a rule of property with reference to this land, and many parties may have purchased portions of it during the last eight years on the faith of the adjudication. Certain it is, from the number of parties to this and the other suit referred to, decided at this term, that many persons are interested in the lands in controversy. To overturn the former decisions under such circumstances, because a majority of the present court might arrive at a different conclusion from that attained by their predecessors—men equally well qualified to discern, and equally conscientious in the pursuit of the right—would be to trifle with the rights of litigants, and bring merited obloquy upon the administration of justice. The remarks of the distinguished author of the standard work on contingent remainders, Mr. Fearn, upon the case of *Perin v. Blake*, are very forcible and in point. He says: ‘If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times, if the decisions of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature, I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase. No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security; the principles on which it was founded might, in the course of a few years, become antiquated; the same title might be drawn into dispute; the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not, consider it his duty) to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him.’ (Fearn on Cont. Remain. Lond. Ed. 1801, p. 264; Dublin Ed. 1794, p. 264, sec. 134.) There is a class of cases undoubtedly which the same or a subsequent court would be fully justified in overruling, and which often

are overruled—cases hastily and clearly erroneously decided, under which no valuable rights can have grown up, and the overruling of which would produce no inconvenience—recent cases under which valuable rights have not yet been acquired, which stand alone or nearly alone, and which are manifestly erroneous, and are themselves departures from the law as before settled, and others not necessary to mention. But many, if not most of them, are overruled in some sense upon the very doctrine of *stare decisis*. It is very true that a single decision upon a point recently made does not necessarily fall within the principle of *stare decisis*. But the case under consideration, in our opinion, is clearly within it. . . . For these reasons we decline to re-examine the grounds of the decision in *Ingoldsby v. Juan*, and without intimating any opinion as to the correctness or incorrectness of the conclusions attained, adhere to it in this case on the principles of *stare decisis*.”

The foregoing extracts give a good idea of the reasons upon which the rule is founded. Instances of the application of the rule,<sup>3</sup> and of its relaxation,<sup>4</sup> will be found in the cases cited below.

\* *Smith v. McDonald*, 42 Cal. 484; *England v. Lewis*, 25 Cal. 337; *Winter v. Belmont Mining Co.*, 53 Cal. 428, 13 Morr. Min. Rep. 595; *Vassault v. Austin*, 36 Cal. 691; *Lent v. Shear*, 26 Cal. 361; *Wright v. Carrillo*, 22 Cal. 595; *Pioche v. Paul*, 22 Cal. 105. See *In re Dorris*, 93 Cal. 611, 29 Pac. 244, where a decision of twelve years' standing was upheld on the principle of *stare decisis*; *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97; *People v. Shea*, 125 Cal. 151, 57 Pac. 885; *Miller v. Enterprise Co.*, 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770, where the rule was invoked to uphold the constitutionality of section 653, Code of Civil Procedure, and Rule XXIX of the supreme court, adopted under its provisions; *Schoonover v. Brinbaum*, 148 Cal. 548, 83 Pac. 999, where it was invoked to uphold the settled decisions of the supreme court that no homestead can be selected or claimed upon lands owned by the claimant as a tenant in common or joint tenant. In *Southern Pacific Co. v. Robinson*, 132 Cal. 408, 64 Pac. 572, 12 L. R. A., N. S., 497, the supreme court held that a prior decision under the conditions stated entered into subsequent contracts of

the same kind. In *Giant Powder Co. v. San Diego etc. Co.*, 78 Cal. 193, 20 Pac. 419, and in *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187, it was suggested that the constant and long-continued practice was strongly persuasive of its correctness, particularly if not attacked. In *Re Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379, it was held that a decision of long standing, without challenge, would be followed, though apparently illogical. In *City of Oakland v. Oakland etc. Co.*, 118 Cal. 160, 50 Pac. 277, it was held that rules which would upset innumerable judgments which have stood for years will not be declared ineffective unless required by inexorable mandate of law.

As to decisions upon property rights, see *Kohl v. Lilienthal*, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700; *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813.

In *Irving etc. Co. v. Portland (Or.)*, 107 Pac. 955, the court's decision was held to be foreclosed under the rule of *stare decisis*. In *Runyan v. Winstock*, 55 Or. 202, 104 Pac. 417, 105

The authorities seem to agree that where a rule established by a decision, or course of decisions, has become a rule of property, and it is probable that rights have become vested under it to a considerable extent, it should not be disturbed, although clearly erroneous; but that where the decision is clearly erroneous, and it is improbable that rights have grown up under it to any considerable extent, it should be overruled. The lower courts, however, have no power to overrule decisions of the court of last resort.<sup>5</sup>

The rule applies only to decisions, and not to mere *dicta*,<sup>6</sup> nor to points which are assumed for the purposes of the particular

Pac. 895, a decision as to the estate by curtesy of a surviving husband was followed in accordance with the rule of *stare decisis*.

In *Bonds-Foster etc. Co. v. Northern Pacific Co.*, 53 Wash. 302, 101 Pac. 877, it was held that a decision announcing a rule on which the title and security of property and large business transactions depend will be adhered to.

In *Ex parte Woodburn* (Nev.), 104 Pac. 245, it was said that courts are only justified in overruling former decisions where the same are clearly erroneous.

<sup>4</sup> *Hart v. Burnett*, 15 Cal. 530; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People v. Provines*, 34 Cal. 520; *San Francisco v. S. V. W. W. Co.*, 48 Cal. 493; *Appeal of S. O. Houghton*, 42 Cal. 35; *Hughes v. Davis*, 40 Cal. 117; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Gagliardo v. Hoberlin*, 18 Cal. 394; *Duff v. Fisher*, 15 Cal. 375; *Gee v. Moore*, 14 Cal. 472; *And v. Magruder*, 10 Cal. 282; *Hickman v. O'Neill*, 10 Cal. 292; *Belcher v. Chambers*, 53 Cal. 635; *Ferris v. Coover*, 10 Cal. 589; *Gamble v. Voll*, 15 Cal. 507; *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37.

In *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, it was said that there is no constitutional provision precluding courts from reversing their decisions upon matters pertaining to property rights. In *Cagle v. State*, 3 Okl. Cr. 72, 104 Pac. 493, it was said that the supreme court would give full consideration to authorities founded upon living principles, but would not recognize or follow precedents which have outlived their usefulness.

<sup>5</sup> *People v. McGuire*, 45 Cal. 56; *Leese v. Clark*, 20 Cal. 387.

<sup>6</sup> *Hart v. Burnett*, 15 Cal. 530; *Banks v. Moreno*, 39 Cal. 233; *Jolley v. Foltz*, 34 Cal. 321; *Chater v. S. F. S. R. Co.*, 19 Cal. 219; *Uhlfelder v. Levy*, 9 Cal. 607; *People v. Winkler*, 9 Cal. 234.

A definition of "*dictum*" appears in the syllabus of *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472, as follows:

"The expression of opinion in the decision of a cause which is not necessary to a determination of the case is a mere *dictum*."

But this was a definition limited to the particular case. The word has a much wider signification, as will appear from an inspection of the law dictionaries. The case itself is very much in point, however, since it gives expression to the principle that the announcement, in an opinion, of a doctrine inconsistent with the plain meaning and effect of a statute, in the decision of a case, to the determination of which it is not necessary, is a mere *dictum* of the court, and cannot affect a subsequent decision, in accordance with the statute, in a case where it is necessary to its determination.

In *Urton v. Wilson*, 65 Cal. 11, 2 Pac. 411, it was held that a point decided was not *obiter dictum* when the judgment turned upon it. In *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. 212, it was held that a decision upon a point which arose in the case, and was decided, was not *dictum*, but that was with reference to the law of the case, where the same point arose on the second appeal. It certainly would be *dictum* under the



case.<sup>7</sup> But where a decision is rested upon several distinct grounds, it is authority upon all of such grounds.<sup>8</sup> And where the supreme court, at the request of counsel, decides a question not strictly involved in the cause, the counsel will not be permitted afterward to treat the decision as a mere *dictum*.<sup>9</sup>

A rehearing sets aside the decision as authority.<sup>10</sup>

§ 291. The Law of the Case.—Under the rule of *stare decisis*, as shown in the preceding section, if a decision be clearly erroneous and rights have not grown up under it to any great extent, it may

rule of *stare decisis*. In *Magee v. N. P. etc. Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114, is to be found a definition of *dictum* as an expression of opinion upon a point not before the court for decision. And see *United Land Assn. v. Knight*, 85 Cal. 448, 23 Pac. 267, 24 Pac. 818, and *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472.

In *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224, the supreme court said that a *dictum* elaborately considered, and concurred in by the whole court in bank, was entitled to great weight.

See, also, *Kiernan v. Portland (Or.)*, 112 Pac. 402, where the definition and effect of a *dictum* with respect to the rule of *stare decisis* was stated (and the cases collected), and the court said, in effect, that where certain propositions were presented in briefs of the parties to an appeal, and at the oral argument, and were considered and decided, the decisions would not be rejected as mere *dictum*, and unnecessary to a determination of the case.

And see, as to "*obiter*," *Shires v. Allen*, 47 Colo. 440, 107 Pac. 1072, 24 L. R. A., N. S., 891.

<sup>7</sup> *Donner v. Palmer*, 31 Cal. 500. In *Hart v. Burnett*, 15 Cal. 530, the court said:

"A decision is not even authority except upon the point actually passed upon by the court and directly involved in the case. But even then, the mere reasoning of the court is not authority."

In *Cohens v. Virginia*, 6 Wheat. 399, 6 L. ed. 290, Chief Justice Marshall said:

"It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which these expressions are used; if they go beyond the case, they may be respected, but they ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom investigated." Again, Chief Justice Best, in *Richardson v. Mellish*, 2 Bing. 248, on the same subject, said:

"The expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion." These cases were cited with approval in *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37.

And see *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, where it was held that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and cannot be safely applied in their largest and most universal sense to dissimilar cases.

<sup>8</sup> *Olney v. Sawyer*, 54 Cal. 379; *Camron v. Kenfield*, 57 Cal. 550; *Clary v. Rolland*, 24 Cal. 147.

<sup>9</sup> *San Francisco v. S. V. W. W. Co.*, 53 Cal. 608.

<sup>10</sup> *Argente v. San Francisco*, 16 Cal. 255.

be overruled. But this is not true of a subsequent appeal in the same cause. However erroneous a decision of the supreme court may be, it must be adhered to in all subsequent stages of the same case. It becomes the law of the case and cannot be disregarded either by the trial court or by the supreme court. This rule is firmly established. It was first announced in *Dewey v. Gray*.<sup>1</sup> In that case, with reference to its decision upon a former appeal, the court, per Heydenfeldt, J., said: "The latter portion of the decision is in abrogation of one of the plainest principles of law, and if this case was a new one I should not hesitate to overrule it. But legal rules deprive us of the power to do so. The decision having been made in this case it has become the law of the case, and it is not now the subject of revision." The doctrine of *Dewey v. Gray* was approved and followed in subsequent cases,<sup>2</sup> and in *Leese v. Clark*,<sup>3</sup> Field, C. J., delivering the opinion, said:

"The decision of this court on the first appeal became the law of the case, and fixed the right of the parties in this action under their respective grants. 'A previous ruling of the appellate court,' as we held in *Phelan v. San Francisco*, 'upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than authority—it is a final adjudication from the consequences of which the court cannot depart nor the parties relieve themselves.' (20 Cal. 11.) Such has been the uniform doctrine of this court for years, and after repeated examinations and affirmations it cannot be considered as open to further discussion. (See *Dewey v. Gray*, 2 Cal. 374; *Clary v. Hoagland*, 6 Cal. 685; *Gunter v. Laffan*, 7 Cal. 588; and *Davidson v. Dallas*, 15 Cal. 75.) Nor is the doctrine peculiar to this court. It is the established doctrine of the supreme court of the United States and of the supreme courts of several of the states. (Ex parte *Sibbald*, 12 Pet. (U. S.) 491, 9 L. ed. 1168; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413, 11 L. ed. 658; and *Russell v. La Rogue & Hatch*, 13 Ala. 149.) And the

<sup>1</sup> 2 Cal. 374.

<sup>2</sup> *Clary v. Hoagland*, 6 Cal. 685; *Gunter v. Laffan*, 7 Cal. 588; *Cordier v. Schloss*, 18 Cal. 576; *Phelan v. San Francisco*, 20 Cal. 39; *Haynes v. Meeks*, 20 Cal. 288; *Davidson v. Dallas*, 15 Cal. 75; *Ritter v. Stevenson*, 11 Cal. 27; *Learned v. Castle*,

78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356, and see cases cited in note 5, below.

<sup>3</sup> 20 Cal. 387, and see the very able opinion of Baldwin, J., in *Davidson v. Dallas*, 15 Cal. 75.

reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed by the issuance of the *remittitur* from its control. It construes for example a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration; whether right or wrong it has become the law of the case. This will not be controverted.

"So, on the other hand, if upon the construction of the contract supposed this court reverses the judgment of the court below and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial; it is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case and reverse its decision after the *remittitur* is issued. It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below. (*Young v. Frost*, 1 Md. 377; *McClellan v. Crook*, 7 Gill, 333.)"

So, in the case of *Jaffe v. Skae*,<sup>4</sup> Wallace, C. J., delivering the opinion, said: "It has always been the settled rule in this court that a decision rendered here upon facts appearing in the record, in which the legal effect of those facts is declared, is, in all subsequent proceedings in the case, and so long as the facts themselves appear without material qualification, a final adjudication of the rights of the parties from which the court cannot depart nor the parties relieve themselves. This rule was laid down here in the early case of *Dewey v. Gray*, 2 Cal. 374, which in this respect adopted the views of the supreme court of the United States enunciated in *Washington Bridge Co. v. Stewart et al.*, 3 How. (U. S.) 413, 11 L. ed. 658, and the rule itself has been since uniformly maintained in this court."

Similar expressions are to be found in *Sharpstein v. Friedlander*,<sup>4a</sup> and in *Klauber v. San Diego etc. Co.*,<sup>4b</sup> it was held that such a judgment constituted an estoppel of record of the highest

<sup>4</sup> 48 Cal. 540.

<sup>4a</sup> 63 Cal. 78.

<sup>4b</sup> 98 Cal. 105, 32 Pac. 876.

character, and was conclusive between the parties to the matter adjudged.<sup>4c</sup>

As stated in the foregoing opinions, the rule as to the law of the case has been uniformly maintained ever since the case of *Dewey v. Gray*,<sup>5</sup> and it is therefore firmly established. The rule

<sup>4c</sup> But not between those, or against those, who were not parties to the former appeal. *March v. Barnett*, 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933. And see *Robinson v. Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705.

The rule was thus expressed in *Stager v. Troy Laundry Co.*, 41 Or. 141, 68 Pac. 405, the leading Oregon case: "The rule has been long established, and is uniformly adhered to, that an appellate court will not revise or reverse its former decisions made in the same cause, and upon the same state of fact, and this for two reasons: (1) They stand as precedents and authority, as if made in any other case upon a like state of facts, and (2) as adjudications between the same parties. The policy of the law and the practical administration of justice require that there should be an end of litigation, and the rule has grown up to meet this requirement. If parties were permitted to present the same issues in the same case as often as they feel aggrieved by the result, litigation would descend into a contest of perseverance and persistence, rather than of legal rights, and it could not be brought to a determination so long as human ingenuity could prevent it."

In *Wright v. Carson etc. Co.*, 22 Nev. 304, 39 Pac. 872, it was said: "A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart. The supreme court has no power to review its own judgments in the same case, except upon petition for rehearing, in accordance with the rules established for that purpose. Such are the decisions of more than two hundred cases, decided in more than thirty states of the Union, besides

a great number of federal courts, including the supreme court of the United States. A list of these cases is too extended to be given here, but they may be found in *Herman on Estoppel and Res Adjudicata* (page 118 et seq.)."

<sup>5</sup> See cases cited in note 2 above, and also the following, viz., *Lucas v. San Francisco*, 28 Cal. 591; *Kile v. Tubbs*, 32 Cal. 332; *Page v. Fowler*, 37 Cal. 100; *Yates v. Smith*, 40 Cal. 662; *Poorman v. Mills*, 43 Cal. 323; *Hobbs v. Duff*, 43 Cal. 485; *Lick v. Diaz*, 44 Cal. 479; *Russell v. Harris*, 44 Cal. 489; *Stone v. Bumpus*, 46 Cal. 218, 4 Morr. Min. Rep. 278; *Gates v. Salmon*, 46 Cal. 361; *Jaffe v. Skae*, 48 Cal. 540; *Pico v. Cuyas*, 48 Cal. 639; *Thompson v. Felton*, 54 Cal. 547; *Carpentier v. Brenham*, 50 Cal. 549; *Martin v. Parsons*, 50 Cal. 498; *Lassing v. Paige*, 56 Cal. 139; *Estate of Pacheco*, 29 Cal. 224; *Polack v. McGrath*, 38 Cal. 666; *Donner v. Palmer*, 51 Cal. 629; *Heinlen v. Martin*, 59 Cal. 181; *Wilkinson v. Merrill*, 56 Cal. 559; *Sharpstein v. Friedlander*, 63 Cal. 78; *Taylor v. McLain*, 64 Cal. 513, 2 Pac. 399; *Reclamation Dist. v. Goldman*, 65 Cal. 635, 4 Pac. 676; *Haggin v. Clark*, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478; *Johnston v. San Francisco etc.*, 75 Cal. 134, 7 Am. St. Rep. 129, 16 Pac. 753; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127; *Christy v. Water Works*, 84 Cal. 541, 24 Pac. 307; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064; *Moulton v. Knapp*, 88 Cal. 446, 26 Pac. 210; *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Stanton v. French*, 91 Cal. 274, 27 Pac. 657; *Brusie v. Gates*, 96 Cal. 265, 31 Pac. 111; *In re Coutts*, 100 Cal. 400, 34 Pac. 865; *Merrill v. Merrill*, 102 Cal. 317, 36 Pac. 675; *Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950; *People v. Holladay*, 102 Cal. 661, 36 Pac.

927; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Churchill v. Baumann*, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; *Mahan v. Wood*, 105 Cal. 12, 38 Pac. 507; *Mills v. Home Benefit Assn.*, 105 Cal. 232, 38 Pac. 723; *Krumbick v. White*, 107 Cal. 37, 39 Pac. 1066; *Gould v. Adams*, 108 Cal. 365, 41 Pac. 408; *Little v. Caldwell*, 112 Cal. 27, 44 Pac. 340; *Porter v. Muller*, 112 Cal. 355, 44 Pac. 729; *Auburn etc. Assn. v. Hill*, 113 Cal. 382, 45 Pac. 695; *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000; *In re Lux*, 114 Cal. 73, 45 Pac. 1023; *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920; *Balfour v. Fresno Canal Co.*, 123 Cal. 395, 55 Pac. 1062; *Faulkner v. Hendy*, 123 Cal. 467, 56 Pac. 99; *Kent v. San Francisco Sav. Union*, 130 Cal. 401, 62 Pac. 620; *McGraw v. Friend etc. Co.*, 133 Cal. 589, 65 Pac. 1051; *Turner v. Hearst*, 137 Cal. 232; *Cranes etc. Co. v. Scherrer*, 137 Cal. 606, 70 Pac. 1128; *Senior v. Anderson*, 138 Cal. 716, 72 Pac. 349; *Snyder v. Jack*, 140 Cal. 584, 74 Pac. 339, 355; *Blankenship v. Whaley*, 142 Cal. 566, 76 Pac. 235; *Franz v. Mendonca*, 146 Cal. 640, 80 Pac. 1078; *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767; *Ellis v. Wittmer*, 148 Cal. 528, 83 Pac. 800; *Emerson v. Yosemite etc. Co.*, 149 Cal. 50, 85 Pac. 122; *Reeve v. Colusa etc. Co.*, 151 Cal. 29, 91 Pac. 802.

In the following cases the principle was sustained, but the rule was held inapplicable in the particular case: *Anderson v. Hancock*, 64 Cal. 455, 2 Pac. 31; *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635; *Klauber v. San Diego etc. Co.*, 98 Cal. 105, 32 Pac. 876; *Esrey v. Southern Pacific Co.*, 103 Cal. 541, 37 Pac. 500; *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; *Greenburg v. California B. R. Co.*, 107 Cal. 667, 40 Pac. 1063; *Robinson v. Thornton*, 114 Cal. 275, 46 Pac. 79; *Goodsell v. Ashworth*, 115 Cal. 222, 46 Pac. 1066.

And see cases cited in following notes for more detailed illustration of the rule.

Look at *United States v. Four Hundred and Twenty-two Casks of Wine*, 1 Pet. (U. S.) 547, 7 L. ed. 257; *Roberts v. Cooper*, 20 How. (U.

S.) 467, 15 L. ed. 969; *Supervisors v. Kennicott*, 4 Otto (U. S.), 498, 24 L. ed. 260; *The Lady Pike*, 6 Otto (U. S.), 462, 24 L. ed. 673.

Also, *Berger v. Metropolitan Press Printing Co.*, 61 Wash. 35, 111 Pac. 872; *State Bank v. City National Bank*, 26 Okl. 801, 110 Pac. 910; *Oklahoma etc. Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758; *Dalgarno v. Trumbull*, 61 Wash. 659, 112 Pac. 928; *Plymouth etc. Bank v. Gilman*, 3 S. D. 170, 44 Am. St. Rep. 782, 52 N. W. 869; *S. C.*, 6 Dak. 304, 50 N. W. 194; *St. Croix etc. Co. v. Mitchell*, 4 S. D. 487, 57 N. W. 236; *Silva v. Pickard*, 14 Utah, 245, 47 Pac. 144; *Krantz v. Railway Co.*, 13 Utah, 1, 43 Pac. 623, 32 L. R. A. 828; *Brimm v. Jones*, 13 Utah, 440, 45 Pac. 46, 352; *Venard v. Green*, 4 Utah, 456, 11 Pac. 337; *Cowles v. Hagerman*, 15 N. M. 600, 110 Pac. 843; *Crary v. Field*, 10 N. M. 257, 61 Pac. 118; *Oliver v. Synhorst (Or.)*, 109 Pac. 762; *Starr v. Long Jim*, 59 Wash. 190, 109 Pac. 810; *Buckhorn etc. Co. v. Consolidated etc. Co.*, 47 Colo. 516, 108 Pac. 27; *Treat v. Grand Canyon etc. Co.*, 12 Ariz. 117, 100 Pac. 438; *Menasha etc. Co. v. Nelson*, 53 Wash. 160, 101 Pac. 720; *Wittler-Corbin Machinery Co. v. Martin*, 53 Wash. 65, 101 Pac. 494; *Creighton v. Hershfield*, 2 Mont. 169; *Yellowstone National Bank v. Gagnon*, 25 Mont. 268, 64 Pac. 664; *O'Rourke v. Schultz*, 23 Mont. 285, 58 Pac. 712; *Wright v. Carson etc. Co.*, 22 Nev. 304, 39 Pac. 872; *Union etc. Co. v. Atchison etc. Co.*, 8 N. M. 159, 42 Pac. 89; *Scottish etc. Co. v. Reeve*, 7 N. D. 552, 75 N. W. 910; *Powell v. Railroad Co.*, 14 Or. 22, 12 Pac. 83; *Applegate v. Dowell*, 17 Or. 299, 20 Pac. 429; *Trust Co. v. Coulter*, 23 Or. 131, 31 Pac. 280; *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073; *First National Bank v. Lewis*, 13 Utah, 507, 45 Pac. 890; *Dennis v. Kass*, 13 Wash. 137, 42 Pac. 540; *Tibbals v. Mt. Olympus etc. Co.*, 16 Wash. 480, 48 Pac. 236; *Smith v. Seattle*, 20 Wash. 613, 56 Pac. 389; *Sherman v. Port Huron etc. Co.*, 13 S. D. 95, 82 N. W. 413; *Sound etc. Co. v. Bellingham etc. Co.*, 53 Wash. 470, 102 Pac. 234; *Great Northern Ry. Co. v. Snohomish Co.*, 54 Wash.

applies to decisions as to the jurisdiction of the court,<sup>6</sup> and to decisions upon questions of public importance,<sup>7</sup> as well as to decisions upon other questions. And the rule does not depend in any manner upon the general direction sometimes placed at the end of opinions that the court below is to proceed in accordance with the principles announced. Such direction "is a mere formality, which of itself neither gives authority nor limits the power of the inferior tribunal."<sup>8</sup>

It has been said that the rule as to the law of the case applies "only to principles of law announced in a case and not to mere questions of fact."<sup>9</sup> In a certain sense this is now, and has always been, the correct rule of law. The appellate courts, under the decisions, have no power to make findings of fact;<sup>10</sup> and even if they should attempt to do so, their decision would be nugatory, and the rule of the law of the case would have no power to vitalize it. The trial courts alone may make findings of fact from the evidence; but the rule of the law of the case has no application to any decision, whether of law or of fact, of the *nisi prius* courts.<sup>11</sup> That rule applies solely to decisions of appellate courts. The conclusion is obvious, therefore, that the rule of the law of the case is not applicable to verdicts or findings of fact.

Not only does the rule apply to decisions of the appellate courts, but, upon principle, it would seem that it applies to all such decisions alike; and such was unquestionably the view of the courts themselves until a period comparatively recent in the history of California jurisprudence. More recent decisions, however, tend not only to limit the application of the rule by excepting therefrom a class of cases formerly recognized as being subject thereto, but even to support such limitation by reasons not found in the earlier definitions of the rule itself.

23, 102 Pac. 881; *Flournoy v. Bullock*, 11 N. M. 87, 66 Pac. 547, 55 L. R. A. 745; *Dye v. Crary*, 13 N. M. 439, 85 Pac. 1038, 9 L. R. A., N. S., 1136; *De Palma v. Weinman*, 15 N. M. 68, 103 Pac. 782; *Baker Co. v. Huntington*, 48 Or. 593, 87 Pac. 1036, 89 Pac. 144; *Taylor v. Taylor*, 54 Or. 560, 103 Pac. 524; *Grand Central etc. Co. v. Mammoth etc. Co.*, 36 Utah, 364, 104 Pac. 573; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665.

<sup>6</sup> *Clary v. Hoagland*, 6 Cal. 685.

<sup>7</sup> *Leese v. Clark*, 20 Cal. 387.

<sup>8</sup> *Raun v. Reynolds*, 15 Cal. 459.

<sup>9</sup> *Mitchell v. Davis*, 23 Cal. 381. And to the same effect, see *Sneed v. Osborn*, 25 Cal. 619; and see cases cited in *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000.

<sup>10</sup> See section 296, *post*. Also, see section 288, *ante*.

<sup>11</sup> See *Lawrence v. Ballou*, 37 Cal. 518; *De la Beckwith v. Superior Court*, 146 Cal. 496, 80 Pac. 717.

See note 48, section 291, *post*.

The departure referred to is to be found in the case of *Allen v. Bryant*,<sup>12</sup> but that decision is partly justified by earlier expressions of the court in the same connection. It was there held that a determination of the appellate court upon the question of the insufficiency of the evidence to justify the findings of the trial court would not be within the rule. It is true, this decision is *obiter*, since the court seems to have afterward proceeded upon the theory, either that additional evidence had been introduced upon the second trial, or that the appellate court had, upon the former appeal,<sup>13</sup> overlooked or disregarded certain evidence then before it. But the language of the learned justice who wrote the opinion of the court leaves no room to doubt that if the question shall be fairly and

<sup>12</sup> 155 Cal. 256, 100 Pac. 704. In this case Henshaw, J., for the court, said: ". . . . The doctrine of the law of the case presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal. It presupposes error because if the governing principle of law had been correctly declared, there would be no occasion for the invocation of the doctrine. The sole reason for the existence of the doctrine is that the court, having announced a rule of law applicable to a retrial of facts, both parties upon that retrial are assumed to have conformed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal. But, since the rule owes its very existence to error, it is not one whose extension is looked upon with favor. The ruling is adhered to in the single case where it arises, is not carried into other cases as a precedent, and the doctrine is rarely and in a very limited class of cases applied to matters of evidence, as distinguished from rulings at law. (*Wixson v. Devine*, 80 Cal. 385, [22 Pac. 224]; *Mattingly v. Pennie*, 105 Cal. 514, [45 Am. St. Rep. 87, 39 Pac. 200].) The narrow class of cases in which the doctrine will be held to apply to evidence and the rigid limitation upon the application of the doctrine will be found well expressed in *Wallace v. Sisson*, 114 Cal. 42, [45 Pac. 1000]."

If the "rule of the law of the case" was not mentioned in so many words in two or three places, the reader would, of course, believe that the learned justice was writing about the rule of *stare decisis*. Thus, it is said it "is not carried into other cases as a precedent." The rule of *stare decisis* alone is a rule of precedent, and a decision to which the rule of the law of the case might be applied, if erroneous, would most assuredly be subject to the rule of *stare decisis*, if the error should be allowed to stand long enough to become a precedent at all. The application of the rule of *stare decisis* does presuppose error, and is a rule of precedent. Law of the case is analogous to *res adjudicata*, but not to *stare decisis*. In truth, without the rule of law of the case, the doctrine of *res adjudicata* would have to be applied to protect decisions of an appellate court throughout subsequent proceedings. There is no other rule.

Again, it is described as a rule whose extension is not regarded with favor, yet in the preceding sentence its violation is said to be an injustice.

Similar language is used in *Tally v. Ganahl*, 151 Cal. 418, 90 Pac. 1049, but in no other of the score or more of California decisions cited elsewhere in this section.

<sup>13</sup> The prior appeal was before the district court of appeal. See *Allen v. Bryant*, 4 Cal. App. 371, 88 Pac. 294.

directly presented in some future case a similar conclusion will be reached. The opinion recited that the appellant "mistakenly" and "unwarrantably" sought to extend the rule; but, conceding that the question was as above stated, there are cases where the rule was applied to such a decision without question, and none, so far as a fairly thorough investigation has been able to reveal, to the contrary.<sup>14</sup>

Moreover, while the reason given finds some support in the cases cited, that support is less real than apparent. In *Wixson v. Devine*,<sup>15</sup> the first case cited, the question was whether the judgment in a prior action was an estoppel in the case at bar. It was said that the court held that it was, on the first appeal, and that that decision was the law of the case in subsequent proceedings; but it was shown that what the court had stated on the point was not necessary to the determination of the appeal, and the decision merely was that the rule had never been applied to statements

<sup>14</sup> See *Lassing v. Paige*, 56 Cal. 139; *Polack v. McGrath*, 38 Cal. 666; *Jaffe v. Skae*, 48 Cal. 540; *Brusie v. Gates*, 96 Cal. 265, 31 Pac. 111; *James v. Lyons Co.*, 147 Cal. 69, 81 Pac. 275.

In this last-cited case the supreme court seems to have held that where the evidence is the same without conflict, a decision upon a former appeal that it is sufficient is the law of the case on a subsequent appeal. The following excerpt shows both the facts and the opinion of the court, and is quoted as fairly illustrating the extent to which the rule will be applied to decisions upon the sufficiency of the evidence:

"It will be thus seen that that decision laid down, as a matter of law, the proposition that, under the undisputed evidence in the case as there presented, the letter of February 9th contained an unconditional promise to pay the draft in question, if it was purchased on the faith of it. That decision on a question of law arising between the parties to the action on a given state of facts became the law of the case, and controlled the lower court upon a subsequent trial of the cause, provided the same state of facts was again presented as was before this court when the decision on the former appeal was made. And, as there is

no question but that exactly the same state of facts was before the lower court upon this second trial as was reviewed on the previous appeal, and upon which the court reached the conclusion of law above declared, it was not only proper, but it was the duty of the lower court, in harmony with the law so laid down in that previous decision to instruct the jury specifically, or in effect, that as a matter of law such letter constituted an unconditional promise to pay the draft in question, provided the jury found that such draft was purchased by plaintiff's assignor on the faith of the promise contained therein, and limiting the consideration of the jury solely to that question of such purchase. The instruction of the jury was formulated upon this basis, and was correct."

As stated in the text, the true rule is believed to be that outlined in *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000.

Aside from the decision of *Allen v. Bryant*, 155 Cal. 256, 100 Pac. 704, quoted in note 12, *supra*, and analyzed in the text, no decision has been found going unqualifiedly to the extent of holding that the rule of the law of the case is not applicable to decisions upon the insufficiency of the evidence.

<sup>15</sup> 80 Cal. 385, 22 Pac. 224.



made *obiter*. The court, however, made use of the following language as to the law of the case:

"We have recently, in *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131, had occasion to consider this doctrine of the *law of the case*, which means, as we understand it, that the court, having erroneously decided some matter of law, will always stand by the error *in that case*, though it will not allow it to be a precedent in another, and we there determined that the doctrine had nothing to commend it to the favor of the court, and that its application would not be extended beyond the cases in which it had been held to apply."

The language of the *Sharon* case, thus referred to, is as follows:

"But lest a discussion of the questions arising here may result in a conflict between the former decision and the present one, we prefer to meet and decide the question whether the doctrine that a decision once made in an action is forever after the law of the case is applicable to this case in its present status.

"In support of the contention that the former decision is binding upon us here, counsel for respondent says:

"The validity of the contract of marriage set forth in the findings was directly involved in and directly adjudicated on that appeal, and no questions concerning its validity can now or hereafter be agitated in this court'; and cite as supporting this position, *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. 212; *Reclamation District v. Goldman*, 65 Cal. 635, 4 Pac. 676; *Clary v. Hoagland*, 6 Cal. 685; *Davidson v. Dallas*, 15 Cal. 75; *Mulford v. Estudillo*, 32 Cal. 131; *Jaffe v. Skae*, 48 Cal. 540; *Donner v. Palmer*, 51 Cal. 629; *Megerle v. Ashe*, 47 Cal. 632; *Heinlen v. Martin*, 59 Cal. 181; *Doyle's Appeal*, 73 Cal. 564, 15 Pac. 125.

"We have shown above that counsel are mistaken in their statement that the former decision directly adjudicated upon the validity of the contract of marriage as now presented. It did determine the validity of the contract as presented by the findings of the court below. The authorities cited sustain the general and well-established rule that a question presented and decided by an appellate court becomes thereafter the law of the case and a guide in all subsequent proceedings therein, and that the rule is binding on the appellate court if the case again comes before it after having gone down to the lower court for further proceedings, the facts on the second appeal being the same as on the first. The reason of

the rule is apparent. This court having declared the law, and the parties in the court below having acted upon it, as a matter of policy, the law as thus declared and acted upon, whether right or wrong, cannot afterward be changed. But for this salutary rule, litigation might go on indefinitely to the great detriment, not only of the parties concerned, but of the public."

It needs no second reading of this language, which is quoted in full, so as to include every possible reference to the point under consideration, to understand that the reference in the citation above quoted from the case of *Wixson v. Devine* is an inadvertence. Yet here, if anywhere, is the real source of the statement in *Allen v. Bryant*, and in possibly one or two other cases,<sup>16</sup> that the rule is limited strictly to the cases where previously applied, because it presupposes and "owes its very existence to error." The expression, "But for this salutary rule, litigation might go on indefinitely to the great detriment, not only of the parties concerned, but of the public," found in *Sharon v. Sharon*, is hardly reconcilable with that found in *Allen v. Bryant*, "since the rule owes its very existence to error, it is not one whose extension is looked upon with favor"; although the first is in strict accord with the principle stated in almost all the cases wherein the reason of the rule is discussed.

In *Mattingly v. Pennie*,<sup>17</sup> the second case cited in support of the decision of *Allen v. Bryant*, the contention of respondent was that on the former appeal the question of the sufficiency of the evidence to sustain plaintiff's verdict was decided in his favor, and that, as the evidence was substantially the same on the second as on the first trial, that decision had become the law of the case. The facts upon which this contention was based were as follows: On the former appeal plaintiff (appellant) alleged that the court erred in its ruling upon a certain instruction. Defendant replied that the evidence would not have supported a verdict for plaintiff, even if the ruling referred to had been in his favor. The supreme court held that the instruction was prejudicial error, and *expressed the opinion* that plaintiff's evidence was sufficient. The language of the second decision was as follows:

"It is settled beyond controversy that a decision of this court on appeal, as to a question of fact, does not become the law of the

<sup>16</sup> See note 12, *supra*.

<sup>17</sup> 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

case. But plaintiff contends that the question thus presented of the insufficiency of the evidence to support a verdict for plaintiff was a question of law, and was the very fact in judgment on that appeal. Assuming, without deciding, that that view is correct, we are, nevertheless, of opinion that the point now presented is not the same as that so supposed to have been decided on the former appeal, and that we are therefore now entitled to consider it without being concluded by the former decision. We adhere to what was said on that subject in *Wixson v. Devine*, 80 Cal. 385, 22 Pac. 224, and will not extend the application of the doctrine of the 'law of the case' beyond the cases in which it has hitherto been held to apply."

It thus appears that this language, as to the application of the doctrine of the rule, based upon that of *Wixson v. Devine*, is subject to the same criticism above applied to that case, in so far as it is to be regarded as authority for the *dictum* in *Allen v. Bryant*. Moreover, it is also very clear that, as to the application of the rule to a decision upon the sufficiency of the evidence, if it decides anything at all, it is in accord with the earlier decisions which hold that the rule does so apply. It was merely held that that question was not raised on the first appeal, nor was it decided, the court merely expressing its *opinion* that the evidence was sufficient.

In *Wallace v. Sisson*,<sup>18</sup> the third and last of the cases cited in support of the doctrine announced in *Allen v. Bryant*, the court treated the question as to the province of the two courts exhaustively, and seems to have arrived at the conclusion that a determination of the appellate court that there is no evidence to support a certain finding or verdict is a determination of a question of fact, and for this reason subject to the rule. On the other hand, it was said that if the decision had reference to a question of insufficiency depending upon the credit to be given a witness, or upon inferences of fact, or upon additional evidence, though merely cumulative, it is not within the application of the rule, for the reason that the appellate court has no power, in the first instance, to decide such a question.

And this is unquestionably the true test. The limitation of the rule in the manner suggested in *Wixson v. Devine*, as founded upon a presupposition of error, has often been applied to the rule of *stare decisis*. That rule is founded upon error, and can exist only

<sup>18</sup> 114 Cal. 42, 45 Pac. 1000.

with reference to an erroneous decision. A right decision would control under the application of the rule of precedent, as being in accord with the weight of authority. But, with the exception of the cases cited, and perhaps one or two others, traceable to the same source, it has never been applied to the rule of the law of the case.<sup>19</sup> If the appellate court has the power to make a decision in any event, that decision is within the rule of the law of the case, unless it is a decision as to the insufficiency of the evidence which involves the weight of the evidence and the credibility of the witnesses, or the truth of inferences of fact, which the trial court alone may make. There are certain findings that are conclusive upon the appellate court, as findings upon conflicting evidence,<sup>20</sup> and these have been held not to be within the rule.<sup>21</sup> Decisions upon rulings upon nonsuit, on the other hand, although indirectly involving the insufficiency of the evidence, is a question of law, and is subject to the rule.<sup>22</sup> As above stated, there are decisions in support of the doctrine that direct determination upon the sufficiency of the evidence is within the rule; but this is believed to be subject to the exception hereinbefore noted.<sup>23</sup>

The rule has no application where the evidence on the subsequent trial or appeal is not the same as that which was before the appellate court on the former appeal.<sup>24</sup> And the same may be said of

<sup>19</sup> See note 12, *supra*.

<sup>20</sup> See *Raymond v. Glover*, 144 Cal. 548, 78 Pac. 8; and see *James v. Lyons Co.*, 147 Cal. 69, 81 Pac. 275, where it was held that where the evidence is the same without conflict, a decision upon a former appeal that it is insufficient is the law of the case upon a subsequent appeal. And see *Mahan v. Wood*, 79 Cal. 258, 21 Pac. 757; *Robinson v. Thornton*, 114 Cal. 275, 46 Pac. 79; *Franz v. Mendonca*, 146 Cal. 640, 80 Pac. 1078.

<sup>21</sup> As to the rule of conflict, see section 288, *ante*.

<sup>22</sup> *McGraw v. Friend etc. Co.*, 133 Cal. 589, 65 Pac. 1051. In this case a distinction was drawn between a ruling upon nonsuit and a decision as to the sufficiency of the evidence.

<sup>23</sup> See *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200. As to cases in support of the application of the rule to decisions upon the insufficiency of the evidence, see note 14, *supra*.

In *Seabrook v. Coos Bay etc. Co.*, 54 Or. 172, 102 Pac. 175, it was held that where, upon a former appeal, it was held that the defense of adverse possession was not sustained by the evidence, and the evidence upon the second trial was no stronger, that defense would not be considered upon a second appeal. So, in *Teakle v. San Pedro etc. Co.*, 36 Utah, 29, 102 Pac. 635, it was held that where the evidence on the retrial was substantially the same as that adduced on the first trial, the decision of the supreme court based thereon was the law of the case upon the second appeal. See, also, *Potter v. Ajax etc. Co.*, 22 Utah, 273, 61 Pac. 999.

See, also, *Fürth v. Snell*, 13 Wash. 660, 43 Pac. 935; *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113.

<sup>24</sup> *Meeks v. S. P. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67; *Nieto v. Carpenter*, 21 Cal. 455; *McKinley v. Tuttle*, 42 Cal. 570; *Ryan v. Tom-*

the findings,<sup>25</sup> and all other facts or matters connected with the two appeals. As above suggested, the decision to which it is sought to apply the rule must be substantially the same as theretofore made by the appellate court.<sup>26</sup> The parties are at liberty to introduce other evidence, which may necessitate different findings, and the application of entirely different principles of law, and the rule is not applicable to *different* but to *the same* principles.

So the pleadings may be amended, and thereafter, except when such amendments are merely formal, the rule of the law of the case cannot apply to any decision upon the pleadings prior to amendment, or to any other decision affected thereby.<sup>27</sup> Where the pleadings contain different allegations and denials, presenting a different cause of action, and different issues, calling for entirely different relief, the rule cannot apply, although some of the allegations are common to both sets of pleadings.<sup>28</sup>

linson, 39 Cal. 639; Leese v. Clark, 20 Cal. 387; Mitchell v. Davis, 23 Cal. 381; Sneed v. Osborn, 25 Cal. 619; Kimball v. Semple, 25 Cal. 440; Cross v. Zellerbach, 63 Cal. 623; McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; People v. Smith, 79 Cal. 554, 21 Pac. 952; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500; Stockton etc. Works v. Glen Falls etc. Co., 121 Cal. 167, 53 Pac. 565.

The supreme court is not called upon, when new evidence has been introduced, to compare the evidence disclosed by the records on the two appeals for the purpose of ascertaining whether the rule is to be applied or not. It has been held to be sufficient that new evidence has been introduced, calling for the application of fresh principles of law, and nothing that may have been said in the first appeal as to the evidence then before the court can be of any consequence. Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500. It is otherwise, however, if the new evidence is immaterial. In re Cook, 83 Cal. 415, 23 Pac. 392.

Also, Maddox v. Teague, 18 Mont. 512, 46 Pac. 535; Creighton v. Herahfield, 2 Mont. 169; Daniels v. Insurance Co., 2 Mont. 500; Palmer v.

Murray, 8 Mont. 174, 19 Pac. 553; Kelly v. Cable Co., 8 Mont. 440, 20 Pac. 669; Davenport v. Kleinschmidt, 8 Mont. 467, 20 Pac. 823; Wright v. Carson etc. Co., 23 Nev. 39, 42 Pac. 196; Hughes v. Bravinder, 14 Wash. 304, 44 Pac. 530.

<sup>25</sup> Bennett v. Wilson, 133 Cal. 376, 85 Am. St. Rep. 207, 65 Pac. 880. In Jacks v. Deering, 150 Cal. 272, 88 Pac. 909, it was held that a decision based upon inferences as to what the findings were is not the law of the case on a second appeal where the findings were clearly shown, and were contrary to the inferences.

<sup>26</sup> See Klauber v. San Diego etc. Co., 98 Cal. 105, 32 Pac. 876, and see Knarston v. Manhattan L. I. Co., 140 Cal. 57, 73 Pac. 740, where it was held that though the evidence be the same, if the point decided be different the rule does not apply.

<sup>27</sup> Phelan v. San Francisco, 9 Cal. 15; Gould v. Stafford, 101 Cal. 32, 35 Pac. 429; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Goodsell v. Ashworth, 115 Cal. 222, 46 Pac. 1066; and see Greenburg v. California B. R. Co., 107 Cal. 667, 40 Pac. 1053.

<sup>28</sup> Flood v. Templeton, 152 Cal. 148, 93 Pac. 78, 13 L. R. A., N. S., 579.

But the rule will apply where the question presented is the same in substance as that decided on the former appeal, although its form and manner of presentation be different.<sup>29</sup>

There must be a decision. The rule has no application to mere statements, or to expressions or illustrations used to point an argument. Thus a statement or expression of opinion that a certain finding upon the statute of limitations would have been sufficient to support the judgment was held not within the rule upon the second appeal where there was a finding.<sup>30</sup> And the same may be said of an omission to decide, as where the question as to whether a deed was a deed of gift *in praesenti* was purposely left undecided on appeal from a decree denying the probate of the deed as a will. It was said that such question might be raised upon a proper proceeding for that purpose, and considered upon a subsequent appeal.<sup>31</sup>

The rule does not prevent the appellate court from passing upon every question properly raised by an appeal from an order on motion for new trial, even though such question may have been decided on a prior consideration of an appeal from the judgment in the same case, or *vice versa*.<sup>32</sup>

<sup>29</sup> See *Kittredge v. Stevens*, 23 Cal. 283; and see *Tally v. Ganahl*, 151 Cal. 418, 96 Pac. 1049, where it was held that the law of the case applied to decisions after dismissal on an appeal in a subsequent suit on the same cause of action. And see *Reed v. Ring*, 93 Cal. 96, 28 Pac. 851, where it was held that the rule was unaffected by a dismissal after the going down of the *remittitur*. And see *dicta* of Justice Field in *Tripp v. Spring*, 5 Saw. 209, Fed. Cas. No. 14,180.

<sup>30</sup> *Hibernia etc. Soc. v. Farnham*, 153 Cal. 578, 126 Am. St. Rep. 129, 96 Pac. 9.

<sup>31</sup> *Estate of Hall*, 154 Cal. 527, 98 Pac. 269.

There are decisions which support the doctrine that the rule does not apply to temporary injunctions, attachments, and other interlocutory orders of that description, thus restricting it to decisions or judgments that are final in character. Thus, in *Herring v. Wiggins*, 7 Okl. 312, 54 Pac. 483, it was held that orders discharging or modifying an attach-

ment or a temporary injunction are not final determinations of the rights of the parties, but are only interlocutory, and that the entire subject matter is liable to determination upon the final trial of the cause. This decision was followed in *School District v. Eakin*, 23 Okl. 321, 100 Pac. 528; and in *Shelby v. Ziegler*, 22 Okl. 799, 98 Pac. 989, it was held that a judgment or order discharging or modifying an attachment as being exempt was not *res adjudicata* in a subsequent direct proceeding in another action, brought to subject the property to the judgment rendered in the action in which the attachment was issued. Following these decisions, and others of a similar character of the supreme court of Kansas, it was held in *Kuchler v. Weaver*, 23 Okl. 420, 100 Pac. 915, that such orders were not subject to the rule of the law of the case.

<sup>32</sup> In *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131, the question as to the effect of the affirmance of the judgment upon subsequent proceedings on appeal from the new trial

order was raised. It was contended by the respondents, as well as by a portion of the court, that the decree sustaining the judgment was the law of the case when it came to the subsequent consideration of the appeal from the order, and Mr. Justice Thornton, in a strong opinion, upheld that view. The majority of the court, however, took the contrary view basing their opinion upon the dual system of appeals under the California system of procedure. Mr. Justice Works, delivering the opinion, said:

"The decision there [on the appeal from the judgment] was that the findings supported the judgment. The main question presented here is, whether or not the findings are sustained by the evidence. In other words, is the evidence sufficient to show that the parties did execute the contract, etc.?"

"But we are clear that the reason of the rule does not apply here, and that where the reason does not exist the rule itself is not applicable. The law of this state permits two appeals in the same case, one from the judgment and the other from the order denying the new trial. Both of these appeals have a direct effect upon the judgment, and if successful may vacate it entirely or modify it, as the court may determine. These appeals may both be prosecuted and be pending in this court at the same time, as was the case here until the appeal from the judgment was disposed of. The fact that this court has declared a rule of law in deciding the appeal first reached for decision, and upon which no action has or can be taken until the second appeal is disposed of, cannot by reason of the rule invoked by the respondent prevent the court from fully investigating and deciding the second appeal to the extent of modifying or wholly changing the former decision, if it be satisfied that an error has been committed. The case must be within the control of this court until both appeals are determined."

The following, from the opinion of Justice Thornton, not only presents an argument in contravention of the above conclusion, but outlines the principles involved in direct opposition to the modern view as stated in

Allen v. Bryant, 155 Cal. 256, 100 Pac. 704, and as Wixson v. Devine, 80 Cal. 385, 22 Pac. 224, initiates it.

After stating what was decided on the appeal from the judgment, the learned justice continues as follows:

"The points ruled as above stated arose in the case and were argued by counsel. They cannot in any respect be regarded as *obiter dicta*."

"The points decided in a cause by this court constitute 'the law of the case.'"

"This has frequently been held by this court. It was substantially so held in the case of Dewey v. Gray, 2 Cal. 374, which was the first case in this court in which the doctrine of the law of the case was applied. In Clary v. Hoagland, 6 Cal. 685, the court (by Murray, C. J.) said: 'It is well settled that when a case has been taken to an appellate court and the judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed.' (6 Cal. 687, 688.) 'A previous ruling by the appellate court,' said the court, by Field, J., in Phelan v. San Francisco, 20 Cal. 39, 'upon a point distinctly made, may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits.' The same proposition is stated again as sound law in the opinion in Leese v. Clark, 20 Cal. 387, and it is further said in that opinion: 'The decision is no longer open for consideration, whether right or wrong; it has become the law of the case.' (See cases cited in Leese v. Clarke, *supra*, and Mulford v. Estudillo, 32 Cal. 131; Megerle v. Ashe, 47 Cal. 632; Jaffe v. Skae, 48 Cal. 540; Donner v. Palmer, 31 Cal. 500; Heinlen v. Martin, 59 Cal. 181.) It is true that what has been decided as the law of the case is applicable only while the facts are the same—substantially unchanged. (Megerle v. Ashe, *supra*; Donner v. Palmer, *supra*.)

"It is contended here, conceding the rule as to the 'law of the case' to be as stated above, that it does not apply to this case, that it only applies where the cause is sent back to the court *a qua* for some further

proceeding to be there had in it, as when a judgment or order denying a new trial is reversed, and the cause remanded to be again tried.

"In *Leese v. Clark* the question of the conclusiveness of the former decision in this court is considered. It is there said: 'But in the case in which the decision is made, it is more than authority,—it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.' After stating that this has been the uniform doctrine of this court for years, and after repeated examinations and affirmations, it cannot be considered as open to further discussion, and that it is the doctrine of the supreme court of the United States, and of the supreme courts of several of the states, citing several authorities for the statements made, the opinion proceeds thus: 'And the reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the *remittitur*, from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This will not be controverted. So, on the other hand, if upon the construction of the contract supposed this court reverses the judgment of the court below and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as (*sic*) to the character of such judgment. The court cannot recall the case and reverse its decision after the *remittitur* is issued. It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below.'

"The same rule is laid down in *Ex parte Sibbald v. United States*, 12 Pet. (U. S.) 488, 9 L. ed. 1167. In that case the supreme court had entered its decree reversing in part the decree of the superior court of East Florida in *United States v. Sibbald*, 10 Pet. (U. S.) 313, 9 L. ed. 437, and had remitted to the superior court its mandate to be executed. The lower court refused to execute the mandate, and the party concerned (*Sibbald*) proceeded by petition [there were two] to procure the enforcement of the mandate of the court.

"On the hearing of these petitions Mr. Justice Baldwin delivered the opinion of the court. He said:

"'Before we proceed to consider the matter presented by these petitions, we think proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case brought within its appellate jurisdiction as well as that which the court, whose final decree or judgment has been thus verified, ought to take.

"'Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The supreme court have no power to review their decisions whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. Both are conclusive on the rights of the parties thereby adjudicated.

"'No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review in cases of equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion.

"'When the supreme court have exercised their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution,



In determining whether a fact was before the appellate court upon a former appeal it must be remembered that the presumption is that the court considered every fact appearing in the record, whether adverted to in the opinion or not.<sup>22</sup>

but shall send a special mandate to the court below to award it. Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it further than to settle so much as has been remanded. After a mandate no rehearing will be granted. It is never done in the House of Lords; and on subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate.

"The above, it will be observed, is stated as the settled opinion of the supreme court of the United States. . . . It laid down the general rule that no court can interfere with its own judgments after its jurisdiction over them has ceased (except in a few cases, neither of which appears here); that when the cause has gone beyond its jurisdiction it can neither reverse nor annul its decree or judgment for any errors, whether of fact or law; that, in such a case, the judgment is just as binding on the higher as on the lower court.

"The ruling in *Sibbald's case* was approved in *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 426, 11 L. ed. 664, and is no doubt the settled law of the United States supreme court. There are other cases to the same effect in that court which need not be referred to. They can be readily found in the digests.

"We think it settled law in this state, fixed and beyond debate, that the points involved in a cause finally decided by this court are beyond its jurisdiction; that it has no power to reverse or modify its judgment after the case has passed by the issuance of its *remittitur* from its control; that such decision, whether right or

wrong, is binding on this court and every other court; that it is a final adjudication, from the consequences of which this court cannot depart nor the parties relieve themselves. As was said by Field, J., speaking for the court in *Leese v. Clark*, *supra*: 'The court cannot recall the case and reverse its decision after the *remittitur* is issued.' (20 Cal. 388.) Its jurisdiction over the case is gone.

"The contention of the defendant limiting the application of the rule of the law of the case finds no countenance in any decision of this court.

"The *remittitur* has long since issued on the former appeal, and cannot now be recalled. The power of this court in regard to that appeal has long since ceased.

"In none of the cases cited by counsel for appellant (*Waldon v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135; *Fulton v. Hanna*, 40 Cal. 278, 281, and *McDonald v. McConkey*, 57 Cal. 325) is there anything, in my judgment, adverse to what has been said above. They are all in harmony with it. Where a judgment is affirmed, a new trial may still be granted after such affirmance on errors of law not considered or passed on in affirming the judgment, but a new trial cannot be granted when the court, in order to grant it, contravenes what has been adjudicated by the previous decision."

This argument would seem to be unanswerable. No other basis for the conclusion of the majority of the court is given than the mere assertion that there is here no reason for the rule, and hence the application cannot be made.

The doctrine of the majority opinion has not been directly overruled, however, although it has not been consistently followed always. On the other hand, it has not been upheld in any subsequent decision, in express terms. See *People v. Thompson*, 115 Cal. 160, 46 Pac. 912.

<sup>22</sup> *Mulford v. Estudillo*, 32 Cal. 131.

Like the rule of *stare decisis*, the rule as to the law of the case protects decisions only and not mere *dicta*,<sup>34</sup> or mere recitals of evidence.<sup>35</sup> But where the court passes upon points not strictly necessary to the disposition of the appeal, but which are presented by the record, and have been argued by counsel, and are likely to arise when the case goes back for retrial, the decisions upon such points are not *dicta*, but constitute the law of the case.<sup>36</sup> And where a decision is placed upon several distinct grounds, it is authority on each of the grounds,<sup>37</sup> and would govern subsequent appeals of the same case.

A party cannot claim the benefit of a portion of a decision as the law of the case. He must accept all the qualifications stated in the opinion.<sup>38</sup>

For the purpose of seeing what was before the court upon a former appeal, the record on such appeal may be looked into.<sup>39</sup>

Where a cause is remanded for a new trial, and the law of the case is disregarded by the trial court, it is error only, and does not render the decision void.<sup>40</sup>

A decision as to the sufficiency of the findings to support the judgment is within the rule.<sup>41</sup>

Where a motion to dismiss an appeal on the ground that the order appealed from is not appealable is denied, the decision is

<sup>34</sup> See *Trinity County v. McCammon*, 25 Cal. 117; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Lucas v. San Francisco*, 28 Cal. 591; *Oakland v. Carpentier*, 21 Cal. 642; *Mulford v. Estudillo*, 32 Cal. 131. Or mere argument. *Potter v. Ajax etc. Co.*, 22 Utah, 273, 61 Pac. 999; see, also, *Pacific Coast etc. Co. v. Dugger*, 42 Or. 513, 70 Pac. 523; *Herriman etc. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719.

<sup>35</sup> *Sneed v. Osborn*, 25 Cal. 619.

<sup>36</sup> *Table Mountain Co. v. Stranahan*, 21 Cal. 548, 9 Morr. Min. Rep. 465; also *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. 212; *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583. Also, *Taylor v. Gale*, 24 Wash. 336, 64 Pac. 533. But see *Sweeney v. Montana etc. Co.*, 25 Mont. 543, 65 Pac. 912; *Wastl v. Montana etc. Co.*, 24 Mont. 159, 61 Pac. 9, where the court seems to have held that the rule was applicable to deci-

sions upon points necessarily determined, but not to those not essential.

<sup>37</sup> *Camron v. Kenfield*, 57 Cal. 550; *Olney v. Sawyer*, 54 Cal. 379; *Clary v. Rolland*, 24 Cal. 147. As to decisions upon request of counsel, see *San Francisco v. S. V. W. W. Co.*, 53 Cal. 608.

<sup>38</sup> *Mulford v. Estudillo*, 32 Cal. 131.

<sup>39</sup> *McKinley v. Tuttle*, 42 Cal. 570; also *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382.

<sup>40</sup> This has not been directly decided, but is certainly in accord with well-settled principles of law. Disregarding the bar or estoppel of a judgment is error only. But as to directions for entry of judgment, see section 299, *post*. And see quotation from *Sharon v. Sharon*, *supra*, in note 32, *supra*, and argument of cases in United States courts.

<sup>41</sup> *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767.

the law of the case upon a subsequent motion to dismiss for the same reason.<sup>42</sup>

A construction of the constitutionality of an act of the legislature prior to the adoption of the new Constitution will be the law of the case on an appeal subsequent to that event.<sup>43</sup>

The rule applies though the parties to the second or subsequent appeal are different, if the subject matter is the same. Thus where the defendants were changed from the principal to the sureties on an official bond, the plaintiff being the same.<sup>44</sup>

Decisions inadvertently made are not within the rule. Such decisions establish nothing, and are uniformly disregarded. Thus in *Gage v. Downey*,<sup>45</sup> where the first appeal decided two conflicting principles of law, which were incapable of harmonious construction, the court said: "Effect can be given to neither, and as to such matter the law of the case has not been established."

There can be no question where the decision referred to was not concurred in by a majority of the court. A majority is a prerequisite in all cases, without which there can be no decision.<sup>46</sup>

The rule as to the law of the case does not apply to the decisions of *nisi prius* courts, but only to the decisions of appellate courts,<sup>47</sup> and appellate courts of last resort.<sup>48</sup>

**§ 292. Rehearings.**—The old Practice Act contained no provision in relation to the rehearing of a cause after it had been decided by the supreme court. But it was held at an early date that the court could grant a rehearing at any time before the issuance of the *remittitur*.<sup>1</sup> It was, for a time, indeed, both under

<sup>42</sup> *Murphy v. Stelling*, 1 Cal. App. 95, 81 Pac. 730.

<sup>43</sup> See *Emery v. Reed*, 65 Cal. 351, 4 Pac. 200.

<sup>44</sup> *Priet v. De la Montanya*, 85 Cal. 148, 24 Pac. 612.

<sup>45</sup> 94 Cal. 241, 29 Pac. 635.

<sup>46</sup> *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956.

<sup>47</sup> *Lawrence v. Ballou*, 37 Cal. 518.

<sup>48</sup> That the rule of the law of the case applies only to final decisions, such as may be rendered by courts of last resort alone, is well settled. In *Jungk v. Reed*, 12 Utah, 196, 42 Pac. 292, it was said that the rule applied not only to appellate courts alone, but to appellate courts of last resort solely. Thus, a decision of the supreme court of Utah Territory, in

a case involving a sum in excess of five thousand dollars, not being such a decision, was not subject to the rule. And see *United States v. Elliott*, 12 Utah, 119, 41 Pac. 720.

But in *Baldwin etc. Co. v. Quinn*, 46 Colo. 590, 105 Pac. 1101, it was held that though a decision of the court of appeals was not the law of the case so as to preclude a future decision in the supreme court, it was so with respect to a future consideration in the former.

<sup>1</sup> *Grogan v. Ruckle*, 1 Cal. 193; *Mateer v. Brown*, 1 Cal. 231. These cases were decided under the act of 1850, which, in this regard, is not different from the act of 1851.

The supreme court of South Dakota in *Re Seydel's Estate*, 14 S.

the old and new procedure, held that the power existed only with reference to decisions on appeal, and did not extend to decisions upon applications for such writs as the court had original jurisdiction to issue,<sup>2</sup> and the early cases seem to uphold this view. A more careful consideration was given the subject later on, however,<sup>2a</sup> and it is now well settled that a rehearing is the proper practice in all cases before the appellate courts, whether the jurisdiction is original or appellate; and that a new trial is never appropriate.

D. 115, 84 N. W. 397, held that: "Unless by express provision of law, a court of last resort has no power to grant a rehearing after the *re-mittitur* has gone down, and all appellate courts lose jurisdiction over their decisions at the expiration of the term at which they are rendered. *Wright v. Sherman*, 3 S. D. 367, 53 N. W. 425; *Dempsey v. Billingham*, 8 S. D. 86, 65 N. W. 427; *Ogilvie v. Richardson*, 14 Wis. 157; *Grogan v. Ruckle*, 1 Cal. 193; . . . ."

In the same case it was held that section 4939, Compiled Laws (see chapter 53, herein on "Relief from Judgments by Default"), which authorized a court to relieve a party from a decision taken against him through his mistake, inadvertence, surprise, or excusable neglect, was not authority for a rehearing by a court of last resort.

Motions for rehearing are limited to the record on appeal, and cannot be supported by affidavits or other matter *dehors* such record. *Bank v. McKinney*, 6 S. D. 58, 60 N. W. 162; *Harrison v. Railway Co.*, 6 S. D. 572, 62 N. W. 376; *In re Seyder's Estate*, 14 S. D. 115, 84 N. W. 397.

<sup>2</sup> *People v. Coon*, 25 Cal. 635; look at *People v. Holloway*, 41 Cal. 409. See, also, *Nevada Bank v. Steinmitz*, 65 Cal. 219, 3 Pac. 808.

<sup>2a</sup> *In re Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; *Granger's Bank v. San Francisco*, 101 Cal. 198, 35 Pac. 642; *In re Philbrook*, 108 Cal. 14, 40 Pac. 1061. The first case bearing on the subject was *People v. Coon*, 25 Cal. 635, where the court said, a petition for a rehearing in an original application for a writ of mandate having been presented, that "the course prescribed by statute has

not been followed . . . . in this case, and therefore the petition filed cannot be entertained." Although the court did not say specifically that new trial was the proper proceeding, it intimated as much, having referred to the fact that the case was one under the original jurisdiction, to which the practice with respect to rehearings did not apply. It is true that the same language might have been used had there been any fatal irregularity in the preliminary steps, as, for example, the want of a notice of intention or a statement on motion for new trial, as was suggested in the *Philbrook Case*, 108 Cal. 14, 40 Pac. 1061. In the second authority relied on to sustain the principle of new trial in original proceedings, *People v. Holloway*, 41 Cal. 409, the case was also an original application for writ of mandate. There were issues of fact requiring disposition, however, and the cause was referred to a superior court for the trial of such issues. Subsequently, a motion for a new trial was made in the lower court, and the supreme court merely held that such motion should have been made in that court, and the point as to whether a rehearing was or was not the proper practice was not touched on. The next case where the question might have been decided, but was not, was *Nevada Bank v. Steinmitz*, 65 Cal. 219, 3 Pac. 808. There both methods of procedure were made use of, first, an application for a rehearing, which was denied, and then a motion for a new trial, which was also denied. The point did not appear to have been raised, and was certainly not decided. In the *Tyler* disbarment case, an original proceeding, the supreme court, for the first

As explained in the next section, the court lost jurisdiction of the cause on the issuance of the *remittitur*, which would not be recalled unless improvidently issued. Hence no rehearing could be had in cases where the *remittitur* was ordered to issue forthwith.<sup>20</sup> Under existing rules, however, such orders are never made; nor, indeed, does it appear that they would be proper under the constitutional provisions governing rehearings.<sup>21</sup> There being

time, without, however, setting forth its reasons for so doing, held that "the motion for a new trial is not the proper remedy in this cause. Considered as a *petition for rehearing* we see no reason to grant it." In *Granger's Bank v. San Francisco*, 101 Cal. 198, 35 Pac. 642, following the *Tyler* case approvingly, the supreme court said: "It may be further said that the present Constitution provides that the judgment of a department of this court shall be final in thirty days, unless before that time ordered into bank; and that there has been a rule in this court ever since its origin that a judgment of the court in bank shall be final in thirty days, unless before that time a rehearing shall have been granted. Neither the Constitution nor the rule makes any distinction between cases of appellate jurisdiction and cases of original jurisdiction; and indeed most of the cases here which are in form original are, like the case at bar, in their nature appellate. Therefore, to apply to this court those parts of the Code of Civil Procedure about new trials, etc., which are evidently intended to regulate procedure in the superior courts would be to overturn the constitutional provision above mentioned, as well as the ancient rule and uniform practice of the court. A motion for a new trial, with its attendant consequences and delays, would suspend a judgment rendered here beyond the time fixed by the Constitution and the rule. Many of the provisions of the code about procedure have reference to appeal, and were intended as means for the perfection of records in the superior courts upon which cases might be reviewed in the appellate court; but in an original proceeding here this court has its own record." In the *Philbrook* case, above cited,

the cases here referred to were reviewed, and the court upheld the decision in *Granger's Bank v. San Francisco*. Those particularly interested in the subject will find in the brief of Mr. Robert Y. Hayne in this last case an argument in support of the earlier position. See, also, his brief, *contra*, in the *Philbrook* case.

<sup>20</sup> See Rule XX (52 Cal. 684).

<sup>21</sup> Article 6, section 2, California Constitution of 1879; and see Rule XXX, 144 Cal. lili. Also sections 43, 44 and 45, California Code of Civil Procedure.

Section 1596, Revised Statutes of Arizona, prescribes the practice there, with reference to rehearings.

Section 10, Rem. & Bal. Code of Washington, contains provisions as to rehearings practically identical with those of the California code above cited. The decision of a department shall become final at the expiration of the thirty day period after the filing thereof, unless a petition for a rehearing is filed. Such petition may be for a rehearing in department or in bank. The same section, however, contains a proviso that if the court believes the decision should become effective before the expiration of the thirty day period, the court may cause it to become effective "upon being in writing approved by the chief justice and any two associate justices who took no part in rendering such decision." And see section 1740, Rem. & Bal. Code (section 6524, Bal. Code).

Section 7227, Revised Codes of North Dakota, contains a suggestion of authority for a rehearing, but does not go further and prescribe conditions for granting the same.

Section 3322, Compiled Laws of Utah, provides for rehearing.

The supreme court is in most states invested with power to make all rules

no provision in relation to applications for rehearings, the matter depended entirely upon the rules of the supreme court.<sup>3</sup> The petition<sup>3a</sup> for rehearing had to be filed within the time limited by the rule, and would not be considered if filed afterward.<sup>4</sup> Points could not be made for the first time upon petition for rehearing.<sup>5</sup> In other words, the court would not consider points not made in the argument when the case was originally submitted. In this respect there is no change in the procedure, and the same rule is in force.<sup>6a</sup> If the court was of the opinion that the points made in the petition were well taken, the practice was to grant the petition and place the cause on the calendar for reargument. It was held to be improper to make a material change in the decision without a reargument of the case.<sup>6</sup> Where the justices were equally divided in opinion upon the petition for rehearing, it was held that it was equivalent to a denial of the petition.<sup>7</sup> Where a petition was granted and a reargument had and the cause again decided, the losing party could petition for another rehearing, although he was a party at whose instance the first rehearing was granted. But there is no precedent for a second petition for rehearing if the first was denied.<sup>7a</sup> And as above stated, no petition could be filed if the *remittitur* was ordered forthwith.

Under the Constitution of 1879 "rehearings" of causes decided by a department are somewhat different from rehearings

necessary in matters of practice and procedure, and this is ordinarily recognized as including the power to grant rehearings under proper conditions when such rehearing is not inconsistent with the constitutional and statutory limitations otherwise imposed.

<sup>3</sup> *Hanson v. McCue*, 43 Cal. 178. For previous rules on the subject, see 52 Cal. 684; 41 Cal. 702; 37 Cal. 711; 28 Cal. 708; 26 Cal. 698; 25 Cal. 663; 11 Cal. 412. For subsequent rules, see Rule XXVIII and Rule XXX, 130 Cal. xlvii, and xlviii, and existing rules, see 144 Cal. lii; and for an elaborate exposition of the subject, see the opinion of Chief Justice Beatty in the *Jessup Case*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

<sup>3a</sup> Under existing procedure the paper is an application instead of a petition, as required by the old rules.

<sup>4</sup> *Rhea v. Surrhyne*, 39 Cal. 581; *Hanson v. McCue*, 43 Cal. 178. The early rules permitted extensions of the time. See 11 Cal. 412; 25 Cal. 663, 664; 26 Cal. 698, 699; 28 Cal. 708, 709. The later rules do not. 41 Cal. 702; 52 Cal. 684; 130 Cal. xlvii, xlviii; 144 Cal. lii.

<sup>5</sup> *Payne v. Treadwell*, 16 Cal. 220; *Dougherty v. Henerie*, 49 Cal. 686. In this regard see *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

<sup>6a</sup> *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; *San Francisco v. Pacific Bank*, 89 Cal. 23, 26 Pac. 615, 835.

<sup>6</sup> *Clark v. Boyreau*, 14 Cal. 634; *Argenti v. San Francisco*, 30 Cal. 458; *Rhea v. Surrhyne*, 39 Cal. 581.

<sup>7</sup> *Ayres v. Bensley*, 32 Cal. 632.

<sup>7a</sup> And look at *Wilson v. Broder*, 24 Cal. 1900. But otherwise under the new procedure.

under the previous practice. For if granted they do not take place before the tribunal which decided the cause; but before the justices of the two departments sitting in bank. The provision of the Constitution is as follows: "The chief justice shall apportion the business to the departments, and may in his discretion order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in bank. If the order be not made within the time above limited the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice in writing, with the concurrence of two associate justices." \* This provision was reproduced in section 44 of the Code of Civil Procedure, as amended in 1880. The rule of court in relation to the matter is as follows: \*

"Rule 30. Applications made before or after judgment pronounced by a department, that a cause shall be heard and decided by the court in bank, must be made upon printed petition, addressed to the chief justice or the court, setting forth the question involved in the cause and the reasons why it should be heard by the court in bank. If made before judgment the petition must be filed with the clerk of the court at least ten days before the clerk makes up the calendar. And if made after judgment pronounced by any of the departments within twenty days after such judgment. The times herein prescribed shall not be extended by the chief justice, or any of the associate justices, or the court; and the clerk shall not file a petition after such times have expired. In cases of judgments the petition shall operate as a stay of proceedings until it shall be determined."

After the organization of the district courts of appeals, with powers to hear and determine causes transferred from the supreme

\* Const. 1879, art. 6, sec. 2.

\* See 130 Cal. xlvii, Rule XXVIII. The rule quoted took effect March 22, 1880.

court, with powers of supervision in the latter, not only as to causes so transferred, but also with respect to the transfer of causes from the lower to the higher appellate court, Rule XXVIII, reformed and expanded, became Rules XXX and XXXI, as at present constituted.\* Although radical changes were made in the

\* In the renumbering made necessary by these changes former Rule XXX became, with certain alterations demanded by the abolition of the court commission, present Rule XXVIII.

The rules relating to applications for rehearings and for transfers are as follows:

#### "RULE XXX.

##### "APPLICATIONS FOR REHEARING.

"1. Applications for a rehearing of a cause by the court rendering the judgment therein must be filed and a copy served on the adverse party, within twenty days after the judgment is pronounced. The adverse party may file an answer thereto not less than two days before the expiration of the time within which the rehearing can be granted.

"2. The submission of a cause to a department of the supreme court without oral argument shall be deemed to be a waiver of an oral argument of the same in bank, if for any reason the same is thereafter ordered to be heard in bank; and when the order that the cause be heard in bank is made, the same shall be at once submitted for decision, unless otherwise ordered by the court.

"3. Applications after a judgment of a district court of appeal has become final, for an order that the cause can be heard and determined by the supreme court, must be accompanied by a copy of the opinion of the district court of appeal, and must be filed and a copy served on the adverse party, within ten days after the judgment of the district court of appeal has become final therein. The adverse party may file an answer thereto not less than ten days before the time for making such order for hearing in the supreme court will expire.

"4. The time herein prescribed shall not be extended, and the clerk must not file any such application or answer after the time therefor has expired. In civil cases such applications and answers must be printed."

#### "RULE XXXI.

##### "APPLICATIONS FOR THE TRANSFER OF CAUSES.

"Applications, before judgment, to have a cause pending in a department of the supreme court heard in bank, or to transfer a cause from the supreme court to a district court of appeal, or from a district court of appeal to the supreme court, or to another district court of appeal, must set forth briefly the questions involved in the cause and the reasons why it should be heard in bank, or transferred as requested, and must be made before the submission of the cause in the court in which it is pending. Unless made at the time such cause is set for hearing in the supreme court, such applications must be filed and served on the adverse party at least twenty days before the same is to be heard. The adverse party may file an answer thereto which must be served on the applicant and filed at least five days before the time set for hearing. In civil cases the applications and answers must be printed."

#### "RULE XXXII.

##### "TRANSFER OF APPEALS NOT TAKEN TO THE PROPER COURT.

"When a district court of appeal decides that the appeal should have been taken to another district court of appeal, or to the supreme court, it shall make an order to that effect, and the clerk of such court shall immediately transmit to such other court all papers in the cause on file in his office, including the opinion



phraseology, so as to conform to the requirements of the new procedure in the matter of transfers and rehearings, except in a single particular no material changes were wrought. The new rules give to the adverse party the privilege of filing an answer to the application, up to within two days "before the expiration of the time within which the rehearing can be granted," and within "five days before the time set for hearing" the application for a hearing in bank. The application is practically one for a hearing in bank, in each case. If made after a judgment in department, it is a rehearing; if made before, it is of course, an application for an original hearing. The order in either case may be made by the chief justice alone, if the case has not already been allotted to a department, and a judgment rendered therein, in which event the concurrence of two associate justices is required, and the order itself must be made in thirty days after rendition of judgment in department. The order may also be made by four justices, at any time; but if made after rendition of judgment in department, it must be made within thirty days thereafter.

The provisions of these rules, as to the time of filing applications for rehearings, are mandatory. The reason lies in the fact that some action must be taken thereon within thirty days. In *Adams v. Dohrman*,<sup>10</sup> where the order granting a rehearing was made on the thirty-first day after the department decision, the thirtieth day having fallen on a legal holiday, the order was vacated, and it was held to have been void, notwithstanding the fact of the holiday, the limitation of thirty days being binding. In *Durgin v. Neal*,<sup>10a</sup> the application was denied, the same not having reached the court until one day after the expiration of the constitutional limit, although filed prior to such expiration.

It will be observed that Rule XXVIII, as above quoted, and as it stood originally, applies by terms to rehearings of department decisions only. With the single exception of the amendment of 1880 to section 45, Code of Civil Procedure, there is no provision, either statutory or constitutional, and no rule of court, prior to the adoption of Rule XXX, in its present form, for rehearing cases

of the court upon which such order was made, and thereupon such cause shall be deemed to be duly transferred to the proper court, according to such order, without further proceeding."

Rules XXXIII and XXXIV relate to the details of such transfers.

<sup>10</sup> 63 Cal. 417; and see *Herrlich v. McDonald*, 83 Cal. 505, 23 Pac. 710.

<sup>10a</sup> 82 Cal. 595, 23 Pac. 133.

decided in bank. But such rehearings have often been granted, even prior to the amendment referred to, and a different judgment has sometimes been rendered, after reargument.<sup>11</sup> Such rehearings may be said to be similar to rehearings by the old court. Even second rehearings in bank have been granted, and the reason therefor has sometimes been given,<sup>11a</sup> and sometimes withheld.<sup>11b</sup>

The amendment of section 45, here referred to, is as follows: " . . . and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by *five* justices, granting a rehearing."

It would thus appear that a rehearing in bank is practically prohibited, unless five judges concur, ignoring the constitutional rule of the majority. The provision was never regarded. Cases were given rehearings in bank, much as a matter of course, without so much as a reference to the limitation stated.<sup>11c</sup> In the Jessup case, however, Chief Justice Beatty wrote an elaborate opinion upon the general subject of rehearings, including within his point of view this legislative attempt to prescribe a rule of decision in matters judicial other than of the majority. The learned jurist said:

"The jurisdiction of this court is derived from the Constitution, and can be neither enlarged nor abridged by the legislature. What it was in the beginning, it remains, and it must remain until the Constitution itself is changed. If the Constitution has denied to this court the power to grant rehearings in causes that have been decided in bank, the legislature cannot confer the power. If the Constitution has conferred the power, the legislature cannot

<sup>11</sup> *Mulrein v. Kallock*, 61 Cal. 524 (see 9 Pac. C. L. J. 476, and 10 Pac. C. L. J. 266); *Hall v. Theisen*, 61 Cal. 524 (see 9 Pac. C. L. J. 479, and 10 Pac. C. L. J. 267).

As to rehearings in bank after hearing in department and subsequent hearing in bank, see *Hegard v. California Ins. Co.*, 72 Cal. 535, 14 Pac. 180, 359.

<sup>11a</sup> See *United States Land Assn. v. Knight*, 85 Cal. 448, 23 Pac. 267,

24 Pac. 818, where there was a second rehearing in bank on the ground, as given, that the case was one of great public importance, involving title to a large portion of the city of San Francisco.

<sup>11b</sup> *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

<sup>11c</sup> See cases cited in previous note (11b).

take it away, or by pretense of regulating its exercise substantially impair it. And whatever matters are by the Constitution committed to the jurisdiction of the court, the court may by a constitutional majority—that is to say, by the voice of four of its seven justices—decide. The legislature has no more right to say that we shall not decide a matter within our jurisdiction, unless five justices subscribe an order in writing, than we should have to require all acts of the legislature to be subscribed by two-thirds of the members of each house. The Constitution has conferred the power of deciding all matters within our jurisdiction upon a majority of the court; the legislature cannot require more than a majority.”<sup>11a</sup>

A motion to amend the records of the supreme court is something different from an application for a rehearing. If the entry of an order in the records of the court was not correct, it cannot be attacked collaterally,<sup>12</sup> but must be corrected on motion. Such motion should be made within the time allowed for the filing of a petition for rehearing.<sup>13</sup> But clerical errors may be corrected at any time,<sup>14</sup> even after *remittitur* filed.<sup>14a</sup> This rule applies to criminal as well as the civil cases.<sup>14b</sup>

Whatever rules may be made for the rehearing of causes before the supreme court, or for the reconsideration of principles of law decided therein, and the reformation of orders and judgments resulting therefrom, the inherent power of the court, which it shares with all other appellate courts, to revise, to modify, and to correct its judgments so long as they remain under its control remains unaffected. The Constitution does not limit this control to thirty days after rendition of judgment, otherwise than for a specific purpose—the taking of steps on the part of litigants themselves to

<sup>11a</sup> In *re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; also, see *Austin v. Pulschen*, 112 Cal. 528, 44 Pac. 788.

<sup>12</sup> *Willson v. Broder*, 24 Cal. 190; and look at *Patterson v. Ely*, 19 Cal. 28.

<sup>13</sup> *Gray v. Gray*, 11 Cal. 341.

<sup>14</sup> *Swain v. Naglee*, 19 Cal. 127; and compare *Rousset v. Boyle*, 45 Cal. 64; and *Sheldon v. Gunn*, 57 Cal. 40; *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. 732; *Fallon v. Brit-*

*tan*, 84 Cal. 511, 24 Pac. 381; *San Joaquin etc. Co. v. West*, 99 Cal. 345, 33 Pac. 928; *Chicago etc. Co. v. Tobin*, 123 Cal. 377, 55 Pac. 1007; *Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174; *Fox v. Stubenrauch*, 2 Cal. App. 88, 83 Pac. 82.

<sup>14a</sup> *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 38.

<sup>14b</sup> *People v. Murback*, 64 Cal. 369, 30 Pac. 608; *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *People v. Ward*, 141 Cal. 628, 75 Pac. 306.

secure a rehearing. Such control is retained in any event until the issuance of the *remittitur*.<sup>140</sup>

*Amici curiae* have no rights in the appellate courts, and therefore cannot be authorized to move for a rehearing.<sup>141</sup>

§ 293. *Remittitur*.—Section 958 of the Code of Civil Procedure is as follows:

“Sec. 958. When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified, by the supreme court on appeal.”<sup>1</sup>

This section is a reproduction of section 358 of the old Practice Act, which remained unchanged from the time of its adoption in 1851<sup>142</sup> until the adoption of the codes. The certificate of the clerk of the supreme court, provided for by the section quoted, is

<sup>140</sup> In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Niles v. Edwards, 95 Cal. 41, 30 Pac. 134; and see Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

<sup>141</sup> See In re Pina, 112 Cal. 14, 44 Pac. 332; also People v. Union Building Assn., 127 Cal. 400, 58 Pac. 822, 59 Pac. 692. In the last case it was said that a receiver appointed under the judgment appealed from is not an aggrieved party therein, even though served with notice of appeal, and his appearance in the appellate court is merely the appearance of an *amicus curiae*.

<sup>1</sup> Look at California Code of Civil Procedure, section 53, as amended in 1880.

See note 1, section 295, *post*, as to corresponding provisions of other codes.

Code provisions corresponding to section 958, California Code of Civil

Procedure, quoted in the text, are as follows: Sections 1590–1595, and sections 1525–1527, Revised Statutes of Arizona, outline the practice there; section 4826, Revised Codes of Idaho; section 7120, Revised Codes of Montana (section 1744, Code of Civil Procedure); section 3446, Cutting's Compiled Laws of Nevada; section 7227, Revised Codes of North Dakota; section 559, Lord's Oregon Laws; section 464, Code of Civil Procedure of South Dakota; section 3321, Compiled Laws of Utah; section 1740 and 1741, Rem. & Bal. Code of Washington (sections 6524 and 6525, Bal. Code); section 5125, Compiled Statutes of Wyoming.

See section 398, Mills' Annotated Code of Colorado, as to practice when decision of court reached; and also section 425 as to execution upon filing *remittitur*.

<sup>142</sup> Laws of 1851, p. 108.

known as the *remittitur*.<sup>3</sup> The court loses jurisdiction of the cause when the *remittitur* is issued.<sup>3</sup> If it is regularly issued, in accordance with proceedings which have been in strict compliance with the law and the rules of the court making the order for the same, and there has been no mistake of facts, and no fraud or imposition upon the court or the losing party, on the part of the successful party, the jurisdiction of the appellate court over the cause is at an end, and the judgment final, upon the issuance of the *remittitur*.<sup>3a</sup> But this is true only when the *remittitur* is properly issued. If it be improperly issued, it may be recalled upon proper showing. This rule was clearly explained in *Rowland v. Kreyenhagen*.<sup>4</sup> In that case a *remittitur* which had been issued was recalled, but afterward the order recalling it was, upon motion, vacated, and Sanderson, C. J., delivering the opinion, said:

"It is apparent from these authorities (and many others of like import which might be cited) that, as a general rule, this court cannot exercise any jurisdiction over a cause in which the *remittitur* has been issued by its order and filed in the court below. The office of the *remittitur* is to return the proceedings which have been brought up by the appeal to the court below, and when the *remittitur* has been duly filed the proceedings from that time are pending in that court, and not in this; and, in regard to them, it is not competent for this court to make any further order. But this general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party; for if it appears that such has been the case the appellate court will assert its jurisdiction, and recall the case. Against an order or judgment improvidently granted upon a false suggestion, or under a mistake as to the facts of the case, this court will afford relief after the adjournment of the term, and will, if necessary, recall a *remittitur*,

<sup>3</sup> The time for issuing the *remittitur* under the old Practice Act was regulated by rules of court. See rules quoted in 52 Cal. 684; 41 Cal. 702; 37 Cal. 711; 28 Cal. 709; 26 Cal. 699; 25 Cal. 664; 11 Cal. 412. Until the reformation of the rules in 1904, there were no corresponding rules under the code. The provision of the Constitution quoted in the preceding section in some measure regulated the time for the issuance of the *remittitur* of judgments pro-

nounced in the departments, but did not relate to judgments pronounced in bank. The present rule bearing upon the subject is Rule XXXIV. (See 144 Cal. lv.)

<sup>3</sup> *People v. Sprague*, 57 Cal. 147; *Blanc v. Bowman*, 22 Cal. 23; *Rowland v. Kreyenhagen*, 24 Cal. 52; *Leese v. Clark*, 20 Cal. 387; *Grogan v. Ruckle*, 1 Cal. 193.

<sup>3a</sup> See *People v. McDermott*, 97 Cal. 247, 32 Pac. 7.

<sup>4</sup> 24 Cal. 52.

and stay proceedings in the court below. This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree. These views are sustained by the numerous authorities cited on the argument by the counsel for appellant. In all of those cases, where the order or judgment was vacated, and the appeal reinstated, the reason assigned by the court for its action is, that the order or judgment had been *irregularly* made; that is, upon a false suggestion, or under a mistake as to the facts of the case.<sup>5</sup>

In the subsequent case of *Vance v. Pena*,<sup>6</sup> where the court directed that the petition for rehearing be granted, but by mistake the clerk entered an order denying the petition and issued the *remittitur*, it was recalled. So where the petition for rehearing was deposited in the express office in time to have reached the clerk of the court within the period prescribed by the rule, but by reason of some delay on the part of the express company it did not reach the clerk until after the expiration of the time for filing such petitions, the *remittitur* was on motion recalled, and the petition allowed to be filed.<sup>6</sup> But if the petition for rehearing accompanies the application for recalling the *remittitur* (as it should do), and the court is of opinion that the points made in the petition are not well taken, the motion to recall will be denied.<sup>7</sup> Nor will the *remittitur* be recalled, though improvidently issued, if it appears that the moving party is really not an interested one. Thus in *Re Treadwell*,<sup>8</sup> where a guardian voluntarily acquiesced

<sup>5</sup> 36 Cal. 328; and see, also, *Grogan v. Ruckle*, 1 Cal. 193.

<sup>6</sup> *Hanson v. McCue*, 43 Cal. 178; *Bernal v. Wade*, 46 Cal. 640. The following more recent decisions illustrate the same principle: *Hog's Back etc. Co. v. New Basil etc. Co.*, 65 Cal. 22, 2 Pac. 489; *Herrlich v. McDonald*, 83 Cal. 505, 23 Pac. 710; *In re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; *Ex parte Gal-*

*lagher*, 101 Cal. 113, 35 Pac. 449; *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008; *Richardson v. Chicago Co.*, 135 Cal. 311, 67 Pac. 769.

<sup>7</sup> *De Baker v. Carillo*, 52 Cal. 473. For other instances of denials of motions to recall the *remittitur*, see *San Francisco v. Calderwood*, 58 Cal. 355; *Douglas v. Fulda*, 59 Cal. 285.

<sup>8</sup> 111 Cal. 189, 43 Pac. 584. The right of the supreme court to recall

in an order removing him and approving his final accounts, it was held that he could not ask that the *remittitur* be recalled merely because of a failure to serve the notice of motion to dismiss the appeal, there being no actual mistake in the facts alleged in the motion, and no false suggestion.

The *remittitur* may be recalled for an amendment. This was done in *Romine v. Cralle*,<sup>9</sup> where the recall was for the purpose of inserting therein the words "without prejudice," thus allowing a second appeal.

No particular form of *remittitur* is required, and technical exactness needs not to be sought.<sup>10</sup>

**§ 294. Miscellaneous Matters.**—If while an appeal is pending the appellant takes a second appeal from the same judgment, such

the *remittitur* was doubted in *Ah Lep v. Gong Choy*, 13 Or. 205, 9 Pac. 483; but in *Livesley v. Johnston*, 47 Or. 193, 82 Pac. 854, this doubt was thought not to be sustained by the weight of decisions. (See cases cited.) The Oregon practice is further outlined in the following decisions: *Krause v. Oregon etc. Co.*, 50 Or. 88, 91 Pac. 442, 92 Pac. 810; *Robson v. Hamilton*, 41 Or. 239, 69 Pac. 651; *Apex etc. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513; *Woodward v. Oregon etc. Co.*, 31 Or. 423, 51 Pac. 450; *State v. Jacobs*, 11 Or. 314, 8 Pac. 332; *Portland v. Kamm*, 5 Or. 362.

In Washington the right of recall was stated in *Titlow v. Cascade etc. Co.*, 16 Wash. 676, 48 Pac. 406, where it was held that the supreme court might recall a *remittitur* after its filing in the superior court, for the purpose of enforcing the judgment in accordance with the decision of the court. This ruling was based upon the inherent power of the court to enforce its judgments, and the question was not decided as to whether, if the lower court had proceeded strictly in accordance with the opinion of the higher, the *remittitur* could have been recalled for the purpose of affording additional relief. In other words, while the court may correct its judgments, and make its *remittitur* conform to the opinion of the court as rendered (see

*Port Angeles etc. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305), and may also enforce its judgments by a similar process, it was not held that the case might be brought back and a rehearing given, after the *remittitur* had been filed in the lower court. In *Post v. Spokane*, 28 Wash. 701, 69 Pac. 371, 60 Pac. 1104, it was held that a petition might be filed to vacate a judgment after the *remittitur* is filed in the lower court, where the ends of justice demand an investigation.

<sup>9</sup> 80 Cal. 626, 22 Pac. 296. The court, by Mr. Justice Thornton, said:

"It is now urged that this court had no power to modify the order of dismissal after the *remittitur* had been issued. But we are of opinion that this court had, notwithstanding this fact, power over the order, and to modify it so as to permit the prosecution of a second appeal. The matter of prosecuting a second appeal from the judgment was one peculiarly within the power of this court, with the exercise of which power the lower court had no concern. This court could, in the exercise of its discretion, allow the plaintiff to prosecute a second appeal, and it was not divested of such power by the issuance of the *remittitur* on the dismissal of a prior appeal. The modification was one still within its discretion."

<sup>10</sup> *Trench v. Strong*, 4 Nev. 87.

second appeal will be dismissed.<sup>1</sup> Justice participating in decision without having heard the argument.<sup>2</sup> Death of a party before appeal taken.<sup>3</sup> Death of a party after submission of the case in the supreme court.<sup>4</sup> Judgment in favor of dead man.<sup>5</sup> Effect of

<sup>1</sup> *Hill v. Finnigan*, 54 Cal. 311; *Brown v. Plummer*, 70 Cal. 337, 11 Pac. 631; *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006.

Otherwise, if the first appeal was not properly taken. *Columbet v. Pacheco*, 46 Cal. 650.

An action between the same parties and as to the same controversy, commenced pending an appeal from the original action, will be abated. *Fisk v. Atkinson*, 71 Cal. 452, 10 Pac. 374, 12 Pac. 498.

An appeal inadvertently dismissed will be regarded as wholly nugatory upon a second appeal, where by stipulation the former appeal was dismissed without prejudice, prior to the second appeal. *Anthony v. Grand*, 99 Cal. 602, 34 Pac. 325.

<sup>2</sup> *Blanc v. Bowman*, 22 Cal. 23; *Wilson v. Broder*, 24 Cal. 190; and look at *People v. Eckert*, 16 Cal. 110; *People v. Hobson*, 17 Cal. 424; *People v. Henderson*, 28 Cal. 465.

<sup>3</sup> *Sanchez v. Roach*, 5 Cal. 248; *Judson v. Love*, 35 Cal. 463; *Schartzer v. Love*, 40 Cal. 93; and see section 210, *ante*, as to service of notice of appeal in cases of death of party. Ordinarily, the death of a party does not affect an abatement of an action. A substitution of the personal representatives of the deceased is usually ordered, and the proceedings are continued in the name of the representatives. It is otherwise, however, as to actions for divorce, where there are no rights of property involved, and where there are no personal rights which survive after the decease of the individual. In such cases, the personal status of the parties is the only matter in issue, and this personal status is obliterated by death, and the appeal, as well as all other proceedings, becomes a nullity. See *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141. So, there are other issues; as those involved in actions for personal injuries where there is no surviving interest, which end with

death; and applications for relief under section 473, Code of Civil Procedure, do not survive after death has eliminated all the interest of one of the parties thereto. See *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064.

But the right to prosecute an appeal survives in all cases where death does not obliterate all interest. Wherever there is any interest which survives and may be transmitted, death merely suspends proceedings. In *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75, it was held that the death of a party pending suit and before rendition of judgment does not render the latter void, and does not vitiate an appeal bond in his favor. His executor and the distributees of his estate were his successors in interest, and were entitled to take his place. In *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867, the purchasers of defendant's interest in an action in ejectment were held to acquire whatever rights he might have had under the judgment, and his death prior to the trial could not affect this right.

The death of a party pending appeal, against whom a personal judgment was taken from which no appeal lies, has no interest in the controversy, and an appeal may be prosecuted without substituting his personal representatives. *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

<sup>4</sup> *Black v. Shaw*, 20 Cal. 68; *S. & L. Soc. v. Gibb*, 21 Cal. 595; *Holloway v. Galliac*, 49 Cal. 149; *Lucas v. Provines*, 130 Cal. 270, 62 Pac. 509; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179.

<sup>5</sup> *McCreery v. Everding*, 44 Cal. 284; and see *Phelan v. Tyler*, 64 Cal. 80, 28 Pac. 114, where it was held that the death of the party pending appeal, without substitution of his representatives, did not render a judgment of the appellate court void. In *Martin v. Wagner*, 124 Cal. 204,



bankruptcy of appellant.<sup>6</sup> Supreme court equally divided in opinion. Stipulation in supreme court must be signed by attorneys of record in the court below, or by the party himself if he had no attorney.<sup>7</sup> Power of parties to stipulate away rules of appellate courts.<sup>8</sup> Power of lower court to amend original judgment after *remittitur* filed.<sup>9</sup>

56 Pac. 1023, this ruling was followed, and it was further held that in the absence of fraud or imposition, such a judgment would become a finality upon the issuance of the *remittitur*, beyond the power of the appellate court to amend or modify. See, also, *Wallace v. Center*, 67 Cal. 133, 7 Pac. 441.

As a matter of course, if the deceased party has no interest in the controversy which survives his death, and which might pass to a successor, the judgment is unaffected thereby, and no substitution is necessary. See *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

There should always be a substitution of parties, following death or a transfer of interest in the subject matter, "to the end that the record may be kept straight, and vexatious questions as to liens upon property, liability for costs, and the like, may be avoided." The substitution should

be made in the superior court, followed by a like substitution in the appellate court. It has been held, however, that substitution may be made in the appellate court first; but, when so made, the regular and orderly proceeding is to follow with a like substitution in the superior court. See *Fay v. Steubenbach*, 138 Cal. 656, 72 Pac. 156, and cases there cited.

<sup>6</sup> *Merritt v. Glidden*, 39 Cal. 559, 2 Am. Rep. 479; *O'Neil v. Dougherty*, 46 Cal. 575.

<sup>7</sup> *Estate of Arguello*, 50 Cal. 308.

<sup>8</sup> *Reynolds v. Lawrence*, 15 Cal. 359; and see *Graham v. Bayne*, 18 How (U. S.) 62, 15 L. ed. 266; *Poupion v. Muzio*, 68 Cal. 235, 9 Pac. 97; *Dougherty v. Fridermuth*, 68 Cal. 240, 9 Pac. 98.

<sup>9</sup> *Parker v. Bernal*, 68 Cal. 122, 8 Pac. 696; also *Heinlen v. Beans*, 73 Cal. 240, 14 Pac. 855; and see section 293, *ante*.

## CHAPTER L.

## RELIEF GIVEN UPON APPEAL.

- § 295. Remedial powers of appellate courts.
- § 296. When the appellate court will direct final judgment to be entered in court below.
- § 297. Frivolous appeal, and damages therefor.
- § 298. Costs on appeal.
- § 299. Effect of appellate court decision upon subsequent proceedings.
- § 300. Restitution on reversal.
- § 300a. *De minimis non curat lex*.
- § 300b. Moot questions.
- § 300c. Disposition of cases concerning which the appellate court is equally divided.

§ 295. Remedial Powers of the Appellate Courts.—Section 53 of the Code of Civil Procedure, as amended in 1880, provides that,—

“Section 53. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had.<sup>1</sup> . . . .”

There is also a provision in relation to restitution upon reversal which is considered in another place.<sup>2</sup> The provision of section

<sup>1</sup> The omitted portion of section 53 is as follows: “The decision of the court shall be given in writing; and in giving its decisions, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such an appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.”

Corresponding provisions of other codes are as follows: Section 1217, Revised Statutes of Arizona; section 398, Mills' Annotated Code of Colorado; section 3818, Revised Codes of Idaho; section 6253, Revised Codes of Montana (section 20, Code of Civil Procedure); section 2515, Cutting's Compiled Laws of Nevada (section 8, Civil Practice); section 6067, Compiled Laws of Oklahoma; section 557, Lord's Oregon Laws; section 464, Code of Civil Procedure

of South Dakota; section 655, Compiled Laws of Utah; section 1737, Rem. & Bal. Code of Washington (section 6521, Bal. Code); section 5109, Compiled Statutes of Wyoming.

See, also, as to supreme court practice, sections 1582-1596, Revised Statutes of Arizona; sections 6751-6760, Revised Codes of North Dakota; sections 868-899, Compiled Laws of New Mexico; sections 1-14, Rem. & Bal. Code of Washington (sections 4650-4658, Bal. Code).

Also, section 3, article 7, Constitution of Oregon, as to fundamental provisions with respect to the same subject.

The Montana section above cited provides that in equity cases and in matters and proceedings of an equitable nature, the supreme court shall review all questions of fact as well as of law, whether presented by specifications of particulars or not.

<sup>2</sup> See section 300.

53, above quoted, is the same as the provision of section 45 of the code, as first enacted, and is the same, in substance, as the provision of the old Practice Act.<sup>3</sup> As will be perceived, it gives the court the amplest power to suit its judgment to the exigencies of each case.<sup>3a</sup> The judgment or order may be reversed as to some of the appellants and affirmed as to others;<sup>4</sup> or it may be reversed as to one and modified as to the others;<sup>5</sup> or affirmed as to some and modified as to the others;<sup>6</sup> or reversed with directions to dismiss the action as to some of the defendants, and proceed with a retrial as to the remainder.<sup>7</sup> The judgment may be reversed and the cause remanded for further proceedings in accordance with the views expressed; in which event there should be a retrial subject to the directions given in the opinion.<sup>7a</sup>

<sup>3</sup> Section 345 of the old Practice Act contained the following:

"Section 345. Upon an appeal from a judgment or order the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may set aside or confirm or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. . . ." (The remainder of the section relates to restitution on reversal and to damages for frivolous appeals, as to which see section 300 and section 297.)

This section stood from the time of its adoption in 1851 (see Laws of 1851, pages 103, 106) to the adoption of the Code of Civil Procedure. In addition to it there was another provision, passed in 1863 (see Laws of 1863, page 334), not as an amendment to the Practice Act, but as an independent statute. Section 9 of this statute was as follows:

"The supreme court may reverse, affirm, or modify the judgment or order appealed from, as to any or all of the parties, and may, if necessary or proper, direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had."

This provision was the same as that contained in section 345 of the Practice Act, above quoted.

<sup>3a</sup> In construing this section, the Idaho supreme court, in *Boise City v. Artesian etc. Co.*, 4 Idaho, 392, 39 Pac. 566, said: "We . . . have no doubt of the authority of this court, under section 3818, Revised Statutes of 1887, . . . to make any modification whatever that it may deem proper and necessary, in the furtherance of justice between the parties. We do not think it necessary to put the extremely technical construction upon this statute which was done by the supreme court of California, but believe that a fair and liberal construction of the same fully authorizes this court to make any modification which was made in this case."

Other Idaho cases construing this provision are: *County of Bingham v. Woodin*, 6 Idaho, 284, 55 Pac. 662; *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434; *Madsen v. Whitman*, 8 Idaho, 762, 71 Pac. 152.

<sup>4</sup> *Meeker v. Harris*, 19 Cal. 278, 79 Am. Dec. 215; *White v. Moses*, 21 Cal. 43; *People v. Sanderson*, 30 Cal. 160; *Stewart v. Levy*, 36 Cal. 159; *Hawkins v. Abbott*, 40 Cal. 639; *Hall v. Polack*, 42 Cal. 218; *Ward v. McNaughton*, 43 Cal. 159; *Price v. Sturgis*, 44 Cal. 591; *S. & C. R. Co. v. Galgiani*, 49 Cal. 139.

<sup>5</sup> *Conroy v. Duane*, 45 Cal. 597.

<sup>6</sup> *Kimball v. Lohmas*, 31 Cal. 154.

<sup>7</sup> *Grattan v. Wiggins*, 23 Cal. 16.

<sup>7a</sup> *Chandler v. People's Sav. Bank*, 65 Cal. 498, 4 Pac. 502.

Section 345 of the old Practice Act expressly provided that the reversal, affirmance or modification could be "as to any or all of the parties."<sup>8</sup> This language was omitted from the provision of the code. But the omission works no change in the operation of the provision. For a reversal or affirmance in part is a modification. Under its power to modify a judgment the court may remand the cause for trial as to a particular issue, and leave it in force as to the other issues;<sup>9</sup> or where findings are defective in not disposing of some material issue, may remand the case with directions to the court below to find upon the omitted issue from the evidence before it, or such further evidence as may be introduced, and then to render such judgment upon the completed findings as may be proper;<sup>10</sup> or where the judgment does not fully cover the verdict, as where it is silent as to the disposition of some of the property in accordance with the determination of the verdict, the case may be remanded with directions for the entry of a judgment as authorized by the verdict.<sup>10a</sup> The judgment may be modified by striking out or reducing the damages awarded,<sup>11</sup> or by

<sup>8</sup> See note 3, above. The words "as to any or all the parties" meant any or all the parties to the appeal. As already shown, the judgment or order was final as to the parties to the action who did not appeal. Section 281.

<sup>9</sup> *Marziou v. Pioche*, 10 Cal. 545; *Jungerman v. Bovee*, 19 Cal. 354; *Soule v. Dawes*, 14 Cal. 247; *Argenti v. San Francisco*, 30 Cal. 458; *Mayberry v. Whittier*, 144 Cal. 322, 78 Pac. 16.

Where a new trial is ordered as to some of the issues and a judgment entered as to the others, the proper procedure is to withhold entry of judgment of the last until the new trial has been had, and the case is ready for a single final judgment. It is never proper to enter more than one final judgment in a single action. The court should wait until all the issues are disposed of before entering final judgment. *Fox v. Hale & Norcross S. M. Co.*, 112 Cal. 568, 44 Pac. 1022. But if there should be entry made of the portion which is allowed to stand, it will not be a ground for reversing the judgment last entered. Thus, in *Dawson v. Schloss*, 93 Cal. 194, 21 Pac. 31, it was held

that where joint tort-feasors were sued jointly, and a judgment recovered against both, and a new trial ordered as to one only, resulting in a judgment for a smaller amount than that of the first judgment, reversal of the last judgment was refused, there being no pretense that the first had been paid or satisfied.

<sup>10</sup> *Kinsey v. Green*, 51 Cal. 379; *Le Clert v. Oullahan*, 52 Cal. 252; *Watson v. Cornell*, 52 Cal. 91; *Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661; *Glasscock v. Ashman*, 52 Cal. 420; *Phipps v. Harlan*, 53 Cal. 87; *Goodlett v. St. Elmo Invest. Co.*, 94 Cal. 297, 29 Pac. 505; *Tunis v. Lakeport Assn.*, 98 Cal. 285, 33 Pac. 63, 447; *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437; *Emerson v. Yosemite etc. Co.*, 149 Cal. 50, 85 Pac. 122; *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521; *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159; and see section 1, as to new trials of parts of issues.

<sup>10a</sup> *Ryan v. Fitzgerald*, 87 Cal. 345, 25 Pac. 546.

<sup>11</sup> *Welch v. Sullivan*, 8 Cal. 511; *Butler v. Collins*, 12 Cal. 457; *Anderson v. Ryder*, 46 Cal. 134; *Potter v. Froment*, 47 Cal. 165; *Freeborn v.*

striking out the interest,<sup>12</sup> or directing the court below to compute the interest at a different rate,<sup>13</sup> or by striking out a clause making the judgment payable in gold coin,<sup>14</sup> or by directing the insertion of a clause that a judgment against an executor or administrator be made payable in due course of administration,<sup>15</sup> or by directing that certain land be excluded from the operation of the decree,<sup>16</sup> or by directing the insertion in a decree of foreclosure of the usual provision in case of a deficiency after sale,<sup>17</sup> or by directing the imposition of costs,<sup>18</sup> or by directing the court below to require the plaintiff to waive a portion of his judgment as a condition against reversal and a new trial;<sup>18a</sup> or by striking out an unauthorized portion of the judgment, provided such portion can be separated from the whole judgment without affecting the rest;<sup>18b</sup> or by correcting an error in a computed amount;<sup>18c</sup> or by correcting the amount of the judgment where it was greater than that authorized by the findings;<sup>18d</sup> or by directing the entry of the proper judgment where the amount adjudged, based upon the findings, was greater than that claimed;<sup>18e</sup> or by modifying by amendment a decree of distribution by directing certain omitted portions to be included;<sup>18f</sup> or by correcting a judgment by directing certain portions based upon findings outside the issues to be stricken out;<sup>18g</sup>

Norcross, 49 Cal. 313; Barnes v. Jones, 51 Cal. 303; Kelly v. McKibbin, 54 Cal. 192; Kern Valley Bank v. Chester, 55 Cal. 49; Kerry v. Pacific Marine Co., 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89.

<sup>12</sup> Gautier v. English, 29 Cal. 165; Dent v. Holbrook, 54 Cal. 145. See, also, Heald v. Hendy, 89 Cal. 632, 27 Pac. 67.

<sup>13</sup> Cassin v. Marshall, 18 Cal. 689; White v. Lyons, 42 Cal. 279; Hill v. Eldred, 49 Cal. 398.

<sup>14</sup> McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115; Burnett v. Stearns, 33 Cal. 468; Livingston v. Morgan, 53 Cal. 23.

<sup>15</sup> Racouillat v. Sansevain, 32 Cal. 376; Rice v. Inskip, 34 Cal. 224; Atherton v. Fowler, 46 Cal. 320; Kelly v. Bandini, 50 Cal. 530; Drake v. Foster, 52 Cal. 225.

<sup>16</sup> Moore v. Massini, 43 Cal. 389; Brady v. Kelly, 52 Cal. 371.

<sup>17</sup> Barron v. Kennedy, 17 Cal. 574.

<sup>18</sup> Howe v. Independence Co., 29 Cal. 72; Roland v. Kreyenhagen, 18 Cal. 455.

<sup>18a</sup> Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395. And see Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169.

Also Wirt v. Kutz, 15 N. M. 500, 110 Pac. 576.

<sup>18b</sup> People v. Fick, 89 Cal. 144, 26 Pac. 759.

<sup>18c</sup> Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275.

<sup>18d</sup> Behlow v. Shorb, 91 Cal. 141, 27 Pac. 546. Or, than verdict, instead of findings. Hayward v. Rogers, 62 Cal. 348; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

<sup>18e</sup> Kerry v. Pacific Marine Co., 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89.

<sup>18f</sup> Estate of Langdon, 129 Cal. 451, 62 Pac. 73.

<sup>18g</sup> Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470.

or by directing the correction of an erroneous final account in accordance with the fact;<sup>18a</sup> or by striking out surplusage from a judgment;<sup>18k</sup> or by directing a final account to be corrected by the elimination of certain erroneous items, and, as corrected, by affirming it;<sup>18l</sup> or by directing any other change to be made.<sup>19</sup>

The supreme court usually commands the court below to make the modification. But it is not uncommon for the court to make a conditional order, as, for example, that the judgment be affirmed upon condition that the respondent consent to remit the whole or a portion of the damages awarded,<sup>20</sup> or upon some other condition.<sup>21</sup> The consent is usually required to be filed in the supreme court,<sup>22</sup> but is sometimes directed to be filed in the court below.<sup>23</sup> In all such cases the judgment becomes permanently affirmed or reversed, as the case may be, upon the performance or nonperformance of the condition, and the *remittitur* cannot afterward be recalled. The only remedy in such a case, if a party should be dissatisfied, is by petition for a rehearing, if such petition can be filed within thirty days, and if the decision was rendered in department.<sup>23a</sup>

<sup>18a</sup> Estate of Adams, 131 Cal. 415, 63 Pac. 838.

<sup>18k</sup> Helings v. Duvall, 131 Cal. 618, 63 Pac. 1017.

<sup>18l</sup> Estate of Schandoney, 133 Cal. 387, 65 Pac. 877.

<sup>19</sup> Ellig v. Naglee, 9 Cal. 683; Heyman v. Landers, 12 Cal. 107; Gamble v. Voll, 15 Cal. 507; Barber v. Barber, 16 Cal. 378; Bay v. Pope, 18 Cal. 694; Bradbury v. Barnes, 19 Cal. 120, 11 Morr. Min. Rep. 354; Chater v. Sugar Refining Co., 19 Cal. 219; Union W. Co. v. Murphy's F. Co., 22 Cal. 620, 3 Morr. Min. Rep. 487; People v. Pacheco, 27 Cal. 175; Gates v. Salmon, 46 Cal. 361; Wallace v. Miller, 52 Cal. 655; Berry v. Ivancee, 53 Cal. 653; Heinlen v. Martin, 53 Cal. 321; Hibernia S. & L. Soc. v. Herbert, 53 Cal. 375, 379; Moore v. Roff, 13 Cal. 489; People v. S. B. Q. M. Co., 39 Cal. 511; Anderson v. Parker, 6 Cal. 197; De Celis v. Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811; White v. White, 86 Cal. 216, 24 Pac. 1031; Ryan v. Fitzgerald, 87 Cal. 345, 25 Pac. 546; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67;

Robinson v. Crescent etc. Co., 93 Cal. 316, 28 Pac. 950; Reid v. Reid, 112 Cal. 274, 44 Pac. 564.

<sup>20</sup> Paige v. O'Neill, 12 Cal. 483; Smith v. Johnson, 23 Cal. 63; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Doll v. Feller, 16 Cal. 432; Clark v. Boyreau, 14 Cal. 634; Crowther v. Rowlandson, 27 Cal. 376; Lally v. Wise, 28 Cal. 539; Carpentier v. Gardiner, 29 Cal. 160; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Tarbell v. C. P. R. Co., 34 Cal. 616; Kinsey v. Wallace, 36 Cal. 462; Kline v. C. P. R. Co., 39 Cal. 587; Mahoney v. Middleton, 41 Cal. 41; Hodap v. Sharp, 40 Cal. 69; Atherton v. Fowler, 46 Cal. 320.

See note 18a, *supra*. Also Tevis v. Ryan (Ariz.), 108 Pac. 461.

<sup>21</sup> McCracken v. San Francisco, 16 Cal. 591; Crowther v. Rowlandson, 27 Cal. 376; Price v. Reeves, 38 Cal. 457.

<sup>22</sup> See Crowther v. Rowlandson, 27 Cal. 376; Carpentier v. Gardiner, 29 Cal. 160; Kinsey v. Wallace, 36 Cal. 462.

<sup>23</sup> Atherton v. Fowler, 46 Cal. 320.

<sup>23a</sup> Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929.

It is not unusual for the respondent to offer to remit a portion of the judgment in order to obviate some error that has occurred, in which case the court may modify the judgment accordingly.<sup>24</sup>

But the court cannot direct a modification, unless a sufficient basis for it appears in the record. It will not act upon mere evidence. The facts must be established by findings or by admissions in the pleadings.<sup>25</sup> The cases in which the supreme court will direct final judgment to be entered in favor of the appellant are considered in the next section.

**§ 296. When the Appellate Court will Direct Final Judgment to be Entered in the Court Below.**—Several propositions are included in this head, and it will be convenient to examine them separately.

1. *The Court will not Direct Final Judgment upon Evidence.* In the early history of the court a notion prevailed that the provisions of the Practice Act did not apply to equity cases, in which it was supposed that an appeal took up the whole case, evidence and all, and that the supreme court examined the evidence and made the proper decree thereon, regardless of the findings of the court below. As has been elsewhere shown, this notion was finally repudiated,<sup>1</sup> and it came to be the settled doctrine that the findings of fact of the court below are conclusive in every case unless attacked in the manner pointed out by the statute,<sup>1a</sup> on the ground of the insufficiency of the evidence to justify the verdict or decision. When the attack is so made and the evidence is brought up, all that the supreme court does is to examine into its sufficiency to support the verdict or other decision of fact, and if it be not sufficient, to send the case back for a new trial. It will never examine the evidence to see what the facts are and order final judgment accordingly. In other words, the appellate court will not itself make findings upon which to base a judgment. Where the findings, as they stand, will not support the judgment, and the appellant is entitled to judgment on the evidence, the appellate court will go no further than to order the judgment

<sup>24</sup> *De Costa v. Mass. Mining Co.*, 17 Cal. 613, 10 Morr. Min. Rep. 93; *Muller v. Boggs*, 25 Cal. 175; *O'Grady v. Barnhisel*, 23 Cal. 287.

<sup>25</sup> *Ellis v. Jeans*, 26 Cal. 272; *Carpentier v. Gardiner*, 29 Cal. 160; *Hayes v. Martin*, 45 Cal. 559.

In Montana, under the provisions of section 6253, Revised Codes, it is

provided that the supreme court shall review all questions of fact presented by the evidence, etc., in equity cases and proceedings. See *Forrester v. Boston etc. Co.*, 30 Mont. 181, 76 Pac. 2; *Hays v. Buzard*, 31 Mont. 74, 77 Pac. 423.

<sup>1</sup> See section 7, *ante*.

<sup>1a</sup> See sections 236 and 244, *ante*.

or order appealed from to be reversed. It will in no way make findings for the trial court. This has been frequently decided. Thus in *Bagley v. Eaton*,<sup>2</sup> where a judgment of nonsuit was reversed, Field, J., delivering the opinion, said:

"We are requested to direct the entry of a judgment in favor of the plaintiff. It is urged in support of the request that this is the fourth appeal upon substantially the same facts upon which the court has each time adjudged that the plaintiff was entitled to recover. It has been a matter of surprise to us that a case so simple in its character, involving no question of difficulty, should be so often the subject of appeal; but it is impossible for us to say that the defendant might not have made some defense on the trial had the ruling of the court been different. It is not our practice to direct the entry of a judgment in the court below in actions at law, except where the facts have been found by the judge who tried the cause, or by the special verdict of a jury, or where from the character of the action or pleadings one of the parties is entitled to judgment without proof."

So in *Kimball v. Semple*,<sup>3</sup> Rhodes, J., delivering the opinion, said: "The learned counsel for the appellant requests the court 'to fix with certainty the starting point in the deeds to Coghill and Whitcomb.' To do so would be to find a fact, and that is the province of the jury, not of the court. We have attempted to give a construction to the deeds that will serve as a means—a rule—to the jury by which, coupled with the evidence, they may find the beginning point in the land described in the Coghill and Whitcomb deeds. We frequently state a portion of the facts in the case, not as finding them from the evidence, but to give application and point to our reasoning. If we mistake the facts or the evidence, it cannot by any possibility benefit or injure either party in a new trial of the action, for in that forum the parties must again produce their evidence and have the facts found, in the same manner as required at the first trial."

So in *Lick v. Diaz*,<sup>3a</sup> Crockett, J., delivering the opinion, said: "The counsel have urged us in view of the protracted and expensive litigation which has already occurred about this lot to render a final judgment in the case if practicable. But the result must depend on controverted facts which it is not our province to decide, and it is therefore impracticable for us to render a final

<sup>2</sup> 10 Cal. 126.

<sup>3</sup> 25 Cal. 440.

<sup>3a</sup> 37 Cal. 437.



judgment." So in *Ellis v. Jeans*,<sup>4</sup> which was an action of ejectment where the plaintiff obtained judgment for the possession of five hundred acres of land, but the evidence showed that he was himself in possession of one hundred and eighty acres of the tract, and to obviate the objection he offered to release the one hundred and eighty acres from the operation of the judgment, the court held that this course could not be taken, and Shafter, J., delivering the opinion, said: "If the particular location of the one hundred and eighty acres appeared either in the pleadings or by the findings, we might order the modification upon the basis of the record, but there is nothing in either showing the location, and we are not at liberty to examine the evidence for the purpose of determining the location as a question of fact. To do so would be to exercise original rather than appellate jurisdiction."

So in *Benson v. Shotwell*,<sup>4a</sup> which was an action to quiet title, where the defendant set up a certain contract to purchase, which the court below thought was insufficient, but which the supreme court thought was a valid contract and enforceable, but for a defective title, the court thus stated the principle here under consideration:

"It is suggested that we can order a modification of the judgment requiring the plaintiff to repay the sum of one thousand dollars, with interest thereon from September 22, 1883, and that thereupon plaintiff's title be quieted. On the evidence such a judgment would seem to be equitable between the parties, but it would not be supported by the findings as they now stand, and this court cannot make findings for the court below. . . . All that we can do is to order that the judgment and order appealed from be reversed."

The principle has been approved and applied in many other cases,<sup>5</sup> and must be regarded as settled. And as the supreme court cannot find the facts from evidence introduced in the court

<sup>4</sup> 26 Cal. 272.

<sup>4a</sup> 87 Cal. 49, 25 Pac. 249.

<sup>5</sup> *Carpentier v. Gardiner*, 29 Cal. 160; *Hayes v. Martin*, 45 Cal. 559; *Rush v. Casey*, 39 Cal. 339; *Polhemus v. Carpenter*, 42 Cal. 375; *Poorman v. Mills*, 43 Cal. 323; *C. P. R. R. v. Yolland*, 49 Cal. 438; *Downing v. Graves*, 55 Cal. 544; *Hidden v. Jordan*, 32 Cal. 397; *Clark v. Huber*, 20 Cal. 196; *Hicks v. Coleman*, 25 Cal.

122, 85 Am. Dec. 103; *Merrill v. Hurlburt*, 63 Cal. 494; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860; *Posachane v. Standart*, 97 Cal. 476, 32 Pac. 532; *Blood v. La Serena etc. Co.*, 113 Cal. 221, 41 Pac. 1017. 45 Pac. 252; *Kellogg v. King*, 114 Cal. 378, 55 Am. St. rep. 74, 40 Pac. 160.

below, still less can it do so from evidence which ought to have been admitted but which was erroneously excluded.<sup>6</sup> Nor will the appellate courts reform or modify the findings so as to conform to the judgment which ought to be entered, as where the findings are exaggerated.<sup>6a</sup>

But the rule is subject to a slight modification in that the appellate court will order a modification of the judgment, without ordering a new trial, and without specific findings, where the undisputed facts warrant it. Thus in *McConnell v. Corona City Co.*,<sup>6b</sup> where the only question of fact was one of an excessive allowance for extra work, and the undisputed evidence on the part of the plaintiff himself, who was asking compensation therefor, disclosed the excess, the supreme court ordered the necessary modification of the judgment to conform to the facts, without ordering a new trial, and without formal findings.

Where the facts found by the trial court are undisputed, the case will be remanded with directions that the erroneous judgment be corrected.<sup>6c</sup>

2. *Qualifications of the Above Rule.*—The above rule is to be taken with this qualification, that where a part of the verdict or finding is distinctly severable from the rest, and is not supported by the evidence, the supreme court will sometimes strike out such part altogether, leaving the judgment to stand as to the remainder. Thus where a verdict was for a certain sum *in gold coin*, and the evidence did not show that the plaintiff was entitled to gold coin, the supreme court directed that the gold coin clause should be stricken out of the verdict and judgment, but left the judgment to stand for the sum awarded.<sup>7</sup> So where in an action for negligence the jury stated that they found for the plaintiff in the sum of five thousand dollars—two thousand five hundred in actual damages and two thousand five hundred as “smart-money”—the su-

<sup>6</sup> *Dyer v. Brogan*, 57 Cal. 234.

<sup>6a</sup> *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795.

<sup>6b</sup> 149 Cal. 60, 85 Pac. 929, 8 L. R. A., N. S., 1171.

<sup>6c</sup> *Smith v. Polk Co. (Or.)*, 112 Pac. 715.

Where a case is tried on an agreed statement of facts, the appellate court is as competent to consider such facts and apply the law as the trial court. There being nothing

to weigh as to the credibility of witnesses, the appellate court will determine the law on the facts agreed to, and may render such judgment as the trial court should have rendered. *Consolidated etc. Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654.

<sup>7</sup> *Williston v. Perkins*, 51 Cal. 554; and look at *Livingston v. Morgan*, 53 Cal. 23; *Burnett v. Stearns*, 33 Cal. 468; *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115.

preme court ordered the sum given as smart-money to be stricken out, and directed judgment for the amount awarded for actual damages.\* So in an action of ejectment, where the findings were that the plaintiff was entitled to the possession of the land, and to damages for the withholding of the possession, and judgment was rendered accordingly, the supreme court held that it could not apportion the damages because "the finding does not afford the data for making any apportionment," but allowed the plaintiff to remit the entire amount of the damages, and on condition of his doing so affirmed the judgment as to the land.<sup>9</sup> In the foregoing cases, however, the court did not make findings of its own from the evidence, but simply struck out a finding which was not sustained by the evidence, and which was manifestly separate and distinct from the rest of the findings.

And there is a class of cases which, at first view, seems to constitute an exception to the rule that the supreme court will not examine the evidence for the purpose of directing final judgment. These are actions where the whole case—evidence, pleadings, and judgment—shows that the plaintiff can by no legal possibility recover. Where such is the case it is not unusual for the court, upon reversing the judgment, to direct the court below to dismiss the action.<sup>9a</sup> But in so doing the court does not make findings from the evidence, but determines as a matter of law not only that the plaintiff has made no case, but that his case is not susceptible of improvement.

\* *Moody v. McDonald*, 4 Cal. 297, 2 Morr. Min. Rep. 185.

<sup>9</sup> *Carpentier v. Gardiner*, 29 Cal. 160; and look at notes 20 and 21 to the preceding section.

<sup>9a</sup> The following cases furnish examples of the practice:

1. *Actions at law*: *Potter v. Seale*, 8 Cal. 217; *Anthony v. Wessell*, 9 Cal. 103; *Swan v. Chorpenning*, 20 Cal. 182; *Loupe v. Wood*, 51 Cal. 586; *Simonton v. El Dorado County*, 22 Cal. 554; *People v. Ebner*, 23 Cal. 158; *Crowell v. Sonoma County*, 25 Cal. 313; *El Dorado County v. Davison*, 30 Cal. 520; *Gett v. McManus*, 47 Cal. 56; *People v. Cone*, 48 Cal. 427; *Keema v. Doherty*, 51 Cal. 3; *San Benito County v. Whitesides*, 51 Cal. 416; *People v. Seale*, 52 Cal. 71; *Wills v. Austin*, 53 Cal. 152; *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Bigley v. Nunan*, 53 Cal. 403.

In some of the above cases there probably were findings, but this is not shown by the reports.

2. *Cases in equity*: *S. F. & N. P. R. R. v. Bee*, 48 Cal. 398; *Vandall v. S. F. Dock Co.*, 40 Cal. 83; *Crowley v. Davis*, 37 Cal. 268; *Camden v. Vail*, 24 Cal. 392; *Oakland v. Carpentier*, 21 Cal. 642; *Williams v. Young*, 21 Cal. 227; *Purdy v. Irwin*, 18 Cal. 350; *Mott v. Hawthorne*, 17 Cal. 58; *Macovich v. Wemple*, 16 Cal. 104; *Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518; *More v. Ord*, 15 Cal. 204.

In the early cases, as above stated, the supreme court directed final judgments upon the evidence in equity cases upon the theory that the provisions in relation to new trials did not apply to equity cases. But this theory was afterward repudiated. See note 1 above.

3. *Where All the Material Facts are Established in the Court Below, the Supreme Court, on Reversing a Judgment, may, in Its Discretion, Direct Final Judgment in Favor of the Appellant—Application of the Rule.*—Where all the material facts are established in the court below, either by the special verdict of a jury, or the findings of a judge or referee, or by an agreed statement of facts, or admission in the pleadings, the supreme court on reversing the judgment may, in its discretion, direct the court below to enter final judgment in favor of the appellant. Since 1863 this power has been expressly given by statute, the provision being that the court “may direct the proper judgment or order to be entered”;<sup>10</sup> but there are frequent instances of its exercise before that time. The rule is well established, and the reports abound with cases in which it has been applied.<sup>11</sup> But as a matter of course it is

<sup>10</sup> See provisions quoted in section 295.

<sup>11</sup> *As to verdicts:* *Leese v. Clark*, 20 Cal. 387; *McDermott v. Burke*, 16 Cal. 580. And it does not matter that there is an inconsistency between the general and the special verdict. The rule governing such inconsistencies (section 233, *ante*) will be applied and the judgment will be ordered accordingly. *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

*As to agreed statement of facts:* *Danglada v. De la Guerra*, 10 Cal. 386; *Whitney v. Arnold*, 10 Cal. 531; *Gee v. Moore*, 14 Cal. 472; *Jones v. Petaluma*, 38 Cal. 397; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Treadwell v. Holloway*, 46 Cal. 547; *Frisbie v. Moore*, 51 Cal. 516; *Mason v. Johnson*, 51 Cal. 612; *Donner v. Palmer*, 51 Cal. 629; and see section 249.

*As to facts admitted in the pleadings:* *Hills v. Sherwood*, 33 Cal. 474; and look at *Alexander v. Greenwood*, 24 Cal. 505; *Mason v. Cronise*, 20 Cal. 211; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *Kierski v. Mathews*, 25 Cal. 591. The latter cases relate to insufficiency of the complaint.

*As to report of a referee:* *Grayson v. Guild*, 4 Cal. 122; *Fulton v. Hanlow*, 20 Cal. 450; *McLaughlin v. Piatti*, 27 Cal. 451; *Donahue v. Cromartie*, 21 Cal. 80; *Gray v. Collins*, 42 Cal. 152.

*As to findings of the judge (in cases in equity):* *Ricketson v. Richardson*, 19 Cal. 330; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Cohen v. Davis*, 20 Cal. 187; *San Francisco v. Lawton*, 21 Cal. 589; *Dolhequy v. Tabor*, 22 Cal. 279; *Kittle v. Pfeffer*, 22 Cal. 484; *Himmelman v. Schmidt*, 23 Cal. 117; *Gray v. Dougherty*, 25 Cal. 266; *Englund v. Lewis*, 25 Cal. 337; *Poett v. Stearns*, 31 Cal. 78; *Peck v. Brummagim*, 31 Cal. 440; *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205; *Grigsby v. Burtnett*, 31 Cal. 406; *Dougherty v. Miller*, 36 Cal. 83; *Ayres v. Bensley*, 32 Cal. 632; *Broad v. Broad*, 40 Cal. 493; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Gerdes v. Moody*, 41 Cal. 335; *Sichel v. Carillo*, 42 Cal. 493; *Fletcher v. Mower*, 55 Cal. 119; *Hearst v. Eaglestone*, 55 Cal. 365.

*As to findings of the judge (in actions at law):* *McDevitt v. Sullivan*, 8 Cal. 592; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Shaver v. B. R. & A. W. Co.*, 10 Cal. 396, 2 Morr. Min. Rep. 537; *Beals v. Evans*, 10 Cal. 459; *Haskell v. Manlove*, 14 Cal. 54; *Smith v. Ogg Shaw*, 16 Cal. 88; *Lewis v. Clarkin*, 18 Cal. 399; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Johnson v. Van Dyke*, 20 Cal. 225; *Burpee v. Bunn*, 22 Cal. 194; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec.

impossible to apply the rule where all the material facts are not established in the court below. And even where all the material facts are established, the supreme court is not obliged to direct final judgment on reversing the case, but may, in its discretion, order a new trial. In the case of *McMillan v. Richards*,<sup>12</sup> Field, J., delivering the opinion, said: "All the facts are found by the court below; and it is the settled practice of this court since the decision of *Holland v. San Francisco*, 7 Cal. 361, to direct in such cases, upon a reversal, the entry of the judgment warranted by the facts found." This, however, is stating the rule too broadly. There are cases in which the court has remanded the cause for a new trial although all the material facts were found. Thus in *Thomasson v. Wood*,<sup>13</sup> the court declined to order final judgment on the findings because it was of opinion that the respondent might have been induced to rest his defense upon one ground by the intimations of the court in a previous case which had since been overruled. So in *Cooper v. Shepardson*,<sup>14</sup> the court reversed the case, but declined to order final judgment on the findings, saying: "It may be that upon a new trial a different case will be made out."

69; *Rogers v. Soggs*, 22 Cal. 444, 14 Morr. Min. Rep. 375; *Wood v. Truckee T. Co.*, 24 Cal. 474; *Owen v. Fowler*, 24 Cal. 192; *Terry v. Megerle*, 24 Cal. 609, 85 Am. Dec. 84; *Curia v. Abadie*, 25 Cal. 502; *Galland v. Lewis*, 26 Cal. 46; *Mulford v. Le Franc*, 26 Cal. 88; *Wallace v. Moody*, 26 Cal. 387; *People v. Reynolds*, 28 Cal. 107; *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49; *Bicknell v. Amador Co.*, 30 Cal. 237; *Boulware v. Craddock*, 30 Cal. 190; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Barroilhet v. Hathaway*, 31 Cal. 395, 89 Am. Dec. 193; *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542; *Bernal v. Gleim*, 33 Cal. 668; *Hale v. Trout*, 35 Cal. 229; *Polack v. Pioche*, 35 Cal. 416; *People v. Gerke*, 35 Cal. 677; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427; *Pond v. Maddox*, 38 Cal. 572; *Rhea v. Surrhyne*, 39 Cal. 579; *People v. Kohl*, 40 Cal. 127; *Low v. Hutchings*, 41 Cal. 634; *De la Montagne v. Union Ins. Co.*, 42 Cal. 290; *Potter v. Ames*, 43 Cal. 75; *Utter v. Chapman*, 43 Cal. 279; *Brady v. Wilcoxson*, 44 Cal. 239; *Ogburn v. Connor*,

46 Cal. 346, 13 Am. Rep. 213; *Serrano v. Rawson*, 47 Cal. 52; *Hancock v. Pico*, 47 Cal. 161; *Englebrecht v. Shade*, 47 Cal. 627; *Jaffe v. Skae*, 48 Cal. 540; *Camarillo v. Fenlon*, 49 Cal. 202; *Weaver v. Wood*, 49 Cal. 297; *Cunningham v. San Joaquin Co.*, 49 Cal. 323; *Huff v. Doyle*, 50 Cal. 16; *Ringstorf v. Guth*, 50 Cal. 86; *Marks v. Sayward*, 50 Cal. 57; *King v. Wise*, 43 Cal. 628; *Mull v. Van Trees*, 50 Cal. 547; *Meyer v. Metzler*, 51 Cal. 142, 145; *Haggin v. Clarke*, 51 Cal. 112; *Burton v. Robinson*, 51 Cal. 186; *Curtiss v. Sprague*, 51 Cal. 239; *Treadwell v. Patterson*, 51 Cal. 637; *Nathan v. King*, 51 Cal. 521; *Veach v. Adams*, 51 Cal. 609; *Mastie v. Cave*, 52 Cal. 67; *Dorn v. Howe*, 52 Cal. 630; *Watson v. Rodgers*, 53 Cal. 401; *Vigoureux v. Murphy*, 54 Cal. 346; *Olney v. Sawyer*, 54 Cal. 379; *O'Connor v. Frasher*, 56 Cal. 499; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *People v. Budd*, 57 Cal. 349; *Thomas v. Moody*, 57 Cal. 215.

<sup>12</sup> 9 Cal. 420, 421.

<sup>13</sup> 42 Cal. 417.

<sup>14</sup> 51 Cal. 298.

So in the recent case of *Schroder v. Schweizer Lloyd*,<sup>15</sup> Ross, J., delivering the opinion of the court in bank, said:

"The opinion delivered in department two in this case is hereby approved and adopted, but we think that instead of directing judgment to be entered for the defendant on the findings the cause should be remanded for a new trial. The power so to do is expressly conferred on the court by section 53 of the Code of Civil Procedure, which declares: 'The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. . . . ' (See, also, *Argenti v. San Francisco*, 30 Cal. 463; *Pollard v. Putnam*, 54 Cal. 630.) Of course this power must be exercised in a proper case; and the appellant here contends, as was contended in *Enrichs v. De Mill*, 75 N. Y. 375, that as the findings of fact were not excepted to they are to be taken as absolutely true, and assented to by both parties. But to this we answer, as did the court of appeals of New York, in the case cited, that it must be remembered that the plaintiff obtained judgment in the trial court upon the findings as they stood, and was not called upon to except to them or to insert the evidence in the case to show that they were controverted. And we also agree with the same court where it says, in another case,—*Griffin v. Marquardt*, 17 N. Y. 28,—that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit."

The language quoted in the foregoing opinion, from the case in 17th New York, seems to go as much to one extreme as that of *Field, J.*, in *McMillan v. Richards* above quoted, goes to the other. The true rule does not seem to be that, where all the issues of fact are disposed of, the supreme court ought not to direct final judgment, unless it *appears affirmatively* that the respondent would not be able to make a different case on a retrial. Where all the material issues are disposed of by the findings, it seems unreasonable and contrary to the settled rules of practice to presume, in

<sup>15</sup> 60 Cal. 467, 44 Am. Rep. 61. This case was approved and followed in *Cox v. McLaughlin*, 63 Cal. 196.

Also in *Merrill v. National Bank*, 94 Cal. 59, 29 Pac. 242.

the absence of anything in the record to such effect, either that the respondent did not do his duty in producing all of his evidence, or that the finding of the court upon such evidence was incorrect. The natural presumption, in the absence of anything in the record to the contrary, is that the respondent had a full and fair trial; that he was afforded every reasonable opportunity to produce all his evidence, and that he did not keep back anything, but did what the settled rules required of him, and produced all his proof; and that the action of the court thereon was regular and correct. Now, if such be the case (the policy of the law being adverse to the prolonging of litigation if it can be avoided), it would seem to be an unsound rule which compels the parties to go through the strife of a second trial, upon the bare possibility, not founded upon anything in the record, that the respondent might be able to make a different case upon the retrial. The rule to be extracted from all the cases, considered together,<sup>15a</sup> seems to be this, that where all the material issues are disposed of the supreme court, on reversing the judgment, should direct the proper judgment to be entered upon the findings, unless there is a probability *founded upon something in the record*,<sup>16</sup> or on something of which the court will take judicial notice,<sup>17</sup> that the respondent would be able to make a different case on the retrial, and this is believed to be the principle recognized by the more recent decisions. The language of the case in the 17th New York was again quoted with approval in *Oakland Paving Co. v. Bagges*,<sup>17a</sup> but in *Fox v. Hale & Norcross Co.*,<sup>17b</sup> a rule more definite and more nearly in consonance with the text here was adopted, Mr. Justice Harrison, for the court, delivering the opinion:

"This court does not reverse a judgment or direct a new trial, if it is able from the record to determine the rights of the parties, but will itself make final determination of these rights by a correction or modification of the judgment. Under its authority to

<sup>15a</sup> But it is to be remembered that the more recent cases assert the doctrine that a new trial should be directed unless it is *plain* that the party against whom the reversal is pronounced *cannot prevail in the suit*. See note 15 above.

<sup>16</sup> There might be something in the pleadings which would indicate such a probability; or where, as is usually the case, the appellant brings

up the evidence as well as the findings and judgment, there might be something in the evidence which would suggest the propriety of a new trial; or possibly (though not probably) the court would accept an affidavit from counsel.

<sup>17</sup> As in *Thomasson v. Wood*, 42 Cal. 417.

<sup>17a</sup> 79 Cal. 439, 21 Pac. 855.

<sup>17b</sup> 122 Cal. 219, 54 Pac. 731.

modify any judgment or order appealed from, whenever it is shown, either by the record on appeal, or by the admission or consent of the parties, that their rights can be finally determined here, this court will render its own judgment to that effect, or will direct such action in the court below as in its opinion will best conserve the rights of the parties to the action, without subjecting them to further delay or expense. This rule is followed whether the error is found upon an examination of the record (*Kern Valley Bank v. Chester*, 55 Cal. 49; *Woods v. Merrill*, 57 Cal. 435); or appears upon the face of the judgment (*Union Water Co. v. Murphy's F. F. Co.*, 22 Cal. 621; *Foucalt v. Pinet*, 43 Cal. 136); or is confessed by the respondent (*Atherton v. Fowler*, 46 Cal. 320; *Oakland Paving Co. v. Baggs*, 79 Cal. 439, 21 Pac. 855; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786); or when the respondent asks for, or consents to, a modification (*De Costa v. Massachusetts etc. Min. Co.*, 17 Cal. 613; *Muller v. Boggs*, 25 Cal. 187; *Carpentier v. Gardiner*, 29 Cal. 160; *Beamer v. Freeman*, 84 Cal. 554, 24 Pac. 169)."

This opinion was upheld by subsequent ones,<sup>170</sup> and eliminates whatever doubts upon the point may have arisen from the earlier expressions of the court. But there is a much greater reluctance upon the part of the court to direct final judgments upon admissions in the pleadings,<sup>18</sup> although even that has been done;<sup>19</sup> and judgment will never be entered, even though all the facts in issue are before the court, and such entry would follow from the application of the above rule, if such entry threatens injustice.<sup>19a</sup>

Where the judgment to be entered is directed in specific terms leaving nothing for the court below to do, it may be entered by the clerk without the order of the court below.<sup>20</sup>

Where the conclusions are erroneously drawn from the findings, and the findings show that the judgment should have been otherwise,—in other words, where the findings not only do not support the judgment, but suggest an entirely different judgment,—the

<sup>170</sup> See *Sun Ins. Co. v. White*, 123 Cal. 196, 55 Pac. 102; *Perine v. Lewis*, 128 Cal. 436, 60 Pac. 422, 772.

<sup>18</sup> Look at *Stockton etc. Soc. v. Hildreth*, 53 Cal. 723; *McMillan v. Dana*, 18 Cal. 339; *Jungerman v. Bovee*, 19 Cal. 354; *People v. Hager*, 19 Cal. 462.

<sup>19</sup> See *Hills v. Sherwood*, 33 Cal. 479; and look at *Mason v. Cronise*, 20 Cal. 211, 219; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *Kierski v. Mathews*, 25 Cal. 592; and see note 11 above.

<sup>19a</sup> See *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911.

<sup>20</sup> *McMillen v. Richards*, 12 Cal. 467.



appellate court will order the proper judgment to be entered in the court below.<sup>21</sup>

**§ 297. Damages for a Frivolous Appeal.**—Section 957 of the Code of Civil Procedure provides, among other things, that “when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.” The old Practice Act contained a similar provision.<sup>1</sup> In the great majority of cases damages are imposed for frivolous appeals by defendants against whom there is a money judgment. But in some instances the court has awarded damages for an appeal by plaintiff from a simple judgment in favor of defendants.<sup>2</sup> No damages can be given unless the transcript has been filed, unless a specific showing is made as a basis for the imposition of damages,<sup>3a</sup> for in the absence of the record the court cannot determine that the appeal was without merit.<sup>3</sup> If the appellant does not file the transcript, the respondent may file it for the purpose of obtaining damages.<sup>4</sup> Damages imposed are to be confined to the party appealing.<sup>5</sup> They are not to be computed upon the costs,<sup>6</sup> unless such is the express direction of the court. The cases cited below

<sup>21</sup> See *Overacre v. Blake*, 82 Cal. 78, 22 Pac. 979; also *Waldron v. Waldron*, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487.

And see *Smith v. Polk Co. (Or.)*, 112 Pac. 715.

<sup>1</sup> Section 345, Laws of 1851, pp. 105, 106.

Provisions of other codes are as follows: Section 1592, Revised Statutes of Arizona; section 4825, Revised Codes of Idaho; section 7119, Revised Codes of Montana (section 1743, Code of Civil Procedure); section 3434, Cutting's Compiled Laws of Nevada; section 3142, Compiled Laws of New Mexico; section 560, Lord's Oregon Laws; section 3320, Compiled Laws of Utah; section 1738, Rem. & Bal. Code of Washington (section 6522, Bal. Code).

Provision is made for restitution in specific instances in some, if not all, the states.

<sup>2</sup> See *Meagher v. Gagliardo*, 35 Cal. 602.

<sup>3a</sup> This was done in *Duncan v. Grady*, 99 Cal. 553, 34 Pac. 112; *Koelling v. Rutz*, 108 Cal. 664, 41 Pac. 281; *McFadden v. Dietz*, 115 Cal. 699, 47 Pac. 777.

<sup>3</sup> *Vaughn v. Werley*, 82 Cal. 181.

<sup>4</sup> This may well be questioned. It has not been recently done and the authority seems to have rested upon former Rule XV. See 9 Pac. C. L. J. 845; 52 Cal. 677; 49 Cal. 9; 41 Cal. 695; 37 Cal. 705; 28 Cal. 687; 26 Cal. 671; 25 Cal. 658; 11 Cal. 408. And look at *Cunningham v. Breed*, 4 Cal. 384; *Pacheco v. Bernal*, 2 Cal. 150.

This rule no longer exists, nor is there another of similar import. The relief in question may be obtained by a proper showing without the necessity of filing the transcript, and it is probable the court would require this rather than the old practice.

<sup>5</sup> *McMillan v. Visser*, 14 Cal. 241.

<sup>6</sup> *McMillan v. Visser*, 14 Cal. 241.

will give some idea of the amounts which it has been usual to impose by way of damages for frivolous appeals.<sup>7</sup>

The *bona fides* of the appellant will not be allowed to affect the question of the imposition of damages for a frivolous appeal. In

<sup>7</sup> In the following cases the court awarded five per cent upon the judgment, but the report does not give the amount of the judgment: Drum v. Whiting, 9 Cal. 422; Squires v. Foorman, 10 Cal. 298; Moore v. Semple, 11 Cal. 360; Pinkham v. Wemple, 12 Cal. 449; Magruder v. Melvin, 12 Cal. 559.

In the following cases the court awarded ten per cent upon the judgment, but the amount of the judgment is not stated in the report: Pacneco v. Bemal, 2 Cal. 150; Wingate v. Brooks, 3 Cal. 112; Emeric v. Tams, 6 Cal. 155, 156; Winans v. Hardenbergh, 8 Cal. 291; McCann v. Lewis, 9 Cal. 246; Hartman v. Burlingame, 9 Cal. 557; Prim v. Gray, 10 Cal. 522; Hutchinson v. Ryan, 11 Cal. 142; Porter v. Elam, 25 Cal. 291, 85 Am. Dec. 132; Villiac v. Biven, 28 Cal. 410; People v. Culverwell, 44 Cal. 620; Lezinsky v. White, 45 Cal. 278; Adler v. Winkle, 53 Cal. 187; Mix v. Boothe, 54 Cal. 589; Gieske v. Anderson, 77 Cal. 249, 19 Pac. 421; Dreyfuss v. Giles, 75 Cal. 409, 21 Pac. 840.

In the following cases the court awarded fifteen per cent upon the amount of the judgment, but the amount of the judgment is not given in the report: Vinton v. Crowe, 4 Cal. 309; Reyes v. Sanford, 5 Cal. 117; Parke v. Williams, 7 Cal. 249; Hopkins v. Delaney, 8 Cal. 86; Pearkes v. Freer, 9 Cal. 642; De Witt v. Porter, 13 Cal. 171; Whitcher v. Webb, 44 Cal. 131.

In the following cases the court awarded twenty per cent upon the amount of the judgment, but the amount of the judgment is not stated in the report: Beach v. Farish, 4 Cal. 340; Escolle v. Merle, 9 Cal. 94; Meerholz v. Sessions, 9 Cal. 277; Nickerson v. Cal. Stage Co., 10 Cal. 520; Wilber v. Sander-son, 43 Cal. 496; Perkins v. Patrick, 45 Cal. 393; Lemon v. Rucker, 80 Cal. 610, 22 Pac. 471.

In the following cases damages were awarded as follows: Ten per cent on \$2,552, in Buckley v. Stebbins, 2 Cal. 149, 56 Am. Dec. 322; ten per cent on \$1,027, in Bates v. Vischer, 2 Cal. 356; ten per cent on \$5,500, in Benedict v. Cozzens, 4 Cal. 381; ten per cent on \$8,100, in Cunningham v. Breed, 4 Cal. 384; ten per cent on \$800, in Waltham v. Carson, 10 Cal. 178; ten per cent on \$1,550, in T. C. W. Co. v. C. & S. W. Co., 10 Cal. 194; ten per cent on \$2,080, in Heston v. Martin, 11 Cal. 41; ten per cent on \$500, in Webster v. Wade, 19 Cal. 292, 79 Am. Dec. 218; ten per cent on \$2,100, in Gannon v. Dougherty, 41 Cal. 661; ten per cent on \$2,700, in Spinetti v. Brignardello, 53 Cal. 282; twenty per cent on \$1,120, in Hancock v. Pico, 40 Cal. 153; twenty per cent on \$5,640, in S. P. R. R. Co. v. Reed, 41 Cal. 262; fifty per cent on \$90, in Kincaid v. Johnson, 47 Cal. 618.

In some instances, and by far the greater number of late cases, damages have been awarded without regard to percentage. Thus in Whitby v. Rowell, 82 Cal. 635, 34 Pac. 40, 382, \$200 and costs were awarded; in Dougherty v. Ward, 89 Cal. 81, 26 Pac. 638, \$100; Long v. Saufley, 89 Cal. 437, 26 Pac. 902, \$100; Duncan v. Grady, 99 Cal. 553, 34 Pac. 112, \$100; Roundtree v. I. X. L. Lime Co., 106 Cal. 63, 39 Pac. 16, \$100 and costs of appeal; Janes v. Bullard, 107 Cal. 32, 40 Pac. 108, \$50; Koelling v. Rutz, 108 Cal. 664, 41 Pac. 681, \$50; McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777, \$100; Clark v. Nordholt, 121 Cal. 27, 53 Pac. 400, \$50; Henahan v. Hart, 127 Cal. 658, 60 Pac. 426, \$50; Hearst v. Hart, 128 Cal. 328, 60 Pac. 846, \$100; Harloe v. Lambie, 132 Cal. 135, 64 Pac. 88, \$100; Home etc. Assn. v. Western etc. Co., 145 Cal. 218, 78 Pac. 626, \$100; Santa Rosa Bank v. Paxton, 149 Cal. 197, 86 Pac. 193, \$100; Goff v. Healey, 2 Cal. App. 95, 53 Pac. 89, \$100.

*Lemon v. Rucker*\* there was an assessment of twenty per cent against appellant, by way of damages for a frivolous appeal, the court holding that "the criticisms made upon the findings are frivolous and unworthy of consideration," and "the appeal is without merit." Upon an application for a rehearing, counsel for appellant filed an "earnest and elaborate petition" in which his good faith was urged. The court said:

"We cannot, after reading this petition, question the good faith of counsel in taking the appeal. He was undoubtedly of the belief that there was sufficient ground for reversing the cause. But we are still of the opinion that this belief was wholly unfounded. Therefore, the question is, whether or not the right and duty of this court to assess damages depends upon the belief of the attorney for appellant that he has sufficient ground for reversal. . . .

"In many cases the appeal may be prosecuted with the full belief that the cause may be reversed, and not only the appeal be taken, but the reversal desired for delay only. This may, and generally does, occur where the appeal does not affect the merits of the case, but rests entirely on technical grounds. The case before us is one of this kind. . . . A reversal, if the technical objections had been sustained, would not have reached the merits of the case, and would only have resulted in delay. It is fair to presume that this was the sole object of the appeal, as this would have been the only result, in view of the fact that the merits of the case were not presented to this court. It seems to us, therefore, that if there ever was a case in which the assessment of damages was not only justifiable, but eminently proper, this was such a case. In the crowded condition of the business of this court, it is due not only to the respondent, whose right to the recovery of her money is delayed, but to the court and other litigants whose appeals are waiting to be heard, that the respondent should be properly remunerated for the delay, and this kind of appeals be discouraged."

An appeal cannot be dismissed on the ground that it is frivolous. Before doing so it would be necessary to determine whether the appeal had merit. In other words, a motion to dismiss for this reason is self-contradictory. As was said in *People v. McNulty*,<sup>o</sup>

\* 80 Cal. 610, 22 Pac. 471.  
<sup>o</sup> 95 Cal. 595, 30 Pac. 963; and  
see, also, *Howell v. Howell*, 101 Cal.

115, 34 Pac. 443; *Randall v. Duff*,  
104 Cal. 127, 43 Am. St. Rep. 79,  
37 Pac. 803.

“to dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered and the record must be examined.” The remedy for such an appeal is not dismissal, but that provided in section 957, Code of Civil Procedure, to wit, damages for delay.<sup>10</sup>

An appeal from a judgment directed to be entered in the lower court is not necessarily frivolous.<sup>11</sup>

**§ 298. Costs on Appeal.**—The provision of the Code of Civil Procedure in relation to costs on appeal is as follows:

“Sec. 1027. In the following cases the costs of appeal are in the discretion of the court:—

“When a new trial is ordered;

“When a judgment is modified.”

This is a reproduction of section 500 of the old Practice Act, which was in force since 1851.<sup>1</sup> The clear implication is that costs are in the discretion of the court only in the cases mentioned. No express provision is made for cases where the judgment is affirmed, or where it is reversed with directions to enter a final judgment in favor of appellant. Such reversal or affirmance, however, carries costs with it. Where a new trial is directed, or the judgment is modified, the court, in its discretion, sometimes allows costs to the appellant, sometimes to the respondent, and sometimes to neither party, and sometimes, where the judgment is reversed, it is directed that the costs of appeal abide the result in the court below. In the case of *Cassin v. Marshall*,<sup>2</sup> Baldwin J., delivering the opinion, said: “When we modify the judgment below for an apparent error, which the counsel for appellant might have corrected below by specific motion for that purpose, we think

<sup>10</sup> *Nevills v. Shortridge*, 129 Cal. 576, 62 Pac. 120.

<sup>11</sup> *Randall v. Duff*, 105 Cal. 272, 38 Pac. 739; *S. C.*, 104 Cal. 127, 43 Am. St. Rep. 79, 37 Pac. 803.

<sup>1</sup> *Laws of 1851*, p. 129.

Corresponding provisions of other codes are as follows: Sections 1548 and 1549, Revised Statutes of Arizona; section 4906, Revised Codes of Idaho; section 7158, Revised Codes of Montana (section 1855, Code of Civil Procedure); section 3575, *Cutting's Compiled Laws of*

Nevada; section 3150 et seq., *Compiled Laws of New Mexico*; section 7180, *Revised Codes of North Dakota*; section 6088, *Compiled Laws of Oklahoma*; section 565, *Lord's Oregon Laws*; section 419, *Code of Civil Procedure of South Dakota*; section 3344, *Compiled Laws of Utah*; section 1744, *Rem. & Bal. Code of Washington* (section 6528, *Bal. Code*); section 5126, *Compiled Statutes of Wyoming*.

<sup>2</sup> 18 Cal. 692.

it not equitable to tax the costs to the respondent." And this rule was acted on in *Noonan v. Hood*.<sup>49</sup> Where a judgment is reversed as to two appellants, and it is more favorable to one of them, it has been held that that appellant is not entitled to recover his costs.<sup>50</sup>

If no direction is given as to costs, the matter is regulated by Rule XXIII, which provides, among other things, that "in all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no direction as to costs of appeal, the clerk will enter upon the record and insert in the *remittitur* a judgment that the appellants recover the costs of appeal."<sup>51</sup>

If the clerk omits compliance with the rule, and the order for costs is not included in the *remittitur*, the party interested is entitled to a recall of the *remittitur*, and to have a proper one issued; and his right in this respect is unaffected by the fact that two unsuccessful attempts have been already made to secure a proper *remittitur*; and it is not laches on his part to wait until the next term of the court in the district in which the appeal was heard.<sup>52</sup>

But this provision refers to the costs on appeal only. In this regard the court in *Gray v. Gray*<sup>53</sup> said: "Where a case is remanded for further proceedings, and costs awarded in this court in general terms, we mean only to include the costs *upon appeal*, leaving the costs of the former trial to abide the event of the suit."

With respect to what are costs on appeal the court, in the case last cited, said: "Costs on appeal are properly the costs in this court, and the costs of making up the appeal in the court below, including the cost of making out the transcript." The costs in the supreme court are the sums required to be paid to the clerk of that court.<sup>54</sup>

<sup>49</sup> 49 Cal. 293. See, also, *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429.

<sup>50</sup> *Cramer v. Tittle*, 79 Cal. 332, 21 Pac. 750.

<sup>51</sup> See 144 Cal. xlix. This rule was formerly numbered 24 (9 Pac. C. L. J. 846), and prior to July, 1878, there appears to have been no similar rule. As to previous rules, see 52 Cal. 685, and 41 Cal. 695; 37 Cal. 705; 28 Cal. 687; 26 Cal. 671; 25 Cal. 658; 11 Cal. 408.

<sup>52</sup> *Baker v. Southern California Ry. Co.*, 130 Cal. 113, 62 Pac. 302.

<sup>53</sup> 11 Cal. 341, sometimes cited as *Eaton v. Palmer*.

<sup>54</sup> The clerk's fees are provided for by section 752, Political Code, which, as it stands at present, is as follows:

"Sec. 752. He must collect in advance the following fees: For filing the transcript on appeal, in each civil case appealed to the supreme court, ten dollars, in full of all services rendered in each case up to the rendering of the judgment, or the issuing of the *remittitur*, when no petition for a rehearing has been filed; for filing a petition for a rehearing, and for all services to the issuing of *remittitur* to the court below, two dollars and fifty cents; for filing motion

The latter part of the definition quoted is not very precise. The cost of "making up the appeal in the court below" does not include the fees of the shorthand reporter for transcribing the testimony to be used in the preparation of the bill of exceptions or statement.<sup>7</sup> Aside from the printing of the transcript the phrase can have reference only to the certifying of the same by the clerk,<sup>8</sup> and it would seem that this can only be charged for where the respondent has been requested to certify the transcript as provided in Rule XI.<sup>9</sup> The largest item of the bill of costs on appeal is usually for the printing of the transcript. This is allowed by rule of court.<sup>10</sup> But if the appellant has made up an unnecessarily voluminous transcript, the supreme court will only allow him the cost of such part thereof as constitutes a proper record for the appeal.<sup>11</sup> And in one case the court refused to allow any part of the cost.<sup>12</sup>

to dismiss appeal on clerk's certificate, two dollars and fifty cents; for filing petitions for writs of mandate, review, prohibition, and other original proceedings, seven dollars and fifty cents, in full for all services rendered in each case; for filing order extending time to file transcript, fifty cents; for certificate of admission as attorney and counselor, ten dollars; for filing each paper in writs of error to the supreme court of the United States, twenty-five cents; for making record in writs of error to the supreme court of the United States, and for copies of any record or document in his office, per folio, ten cents; but this fee shall not be taxed against parties to suits for any paper or copy of paper up to and including *remittitur*; for comparing any document (requiring any document) requiring a certificate, per folio, five cents; for each certificate under seal, one dollar."

Section 759a of the same code prescribes fees to be charged by the clerks of the various district courts of appeal, the fees being the same as those provided above.

Corresponding provisions of other codes are as follows: Section 2593, Revised Statutes of Arizona; section 213, Revised Code of Idaho; section 301, Revised Codes of Montana; section 2469, Cutting's Com-

piled Laws of Nevada; section 452, Revised Codes of North Dakota; section 1796, Compiled Laws of New Mexico; sections 3367 and 3368, Compiled Laws of Oklahoma; section 898, Lord's Oregon Laws; section 628, Political Code of South Dakota; section 967, Compiled Laws of Utah; section 497, Rem. & Bal. Code of Washington (sections 1609 and 1610, Bal. Code); section 893, Compiled Statutes of Wyoming.

<sup>7</sup> Bank of Woodland v. Hiatt, 59 Cal. 580.

<sup>8</sup> Possibly the justification of the sureties on the appeal bond might be charged for.

<sup>9</sup> Quoted in section 268, *ante*. But see Loftus v. Fischer, 114 Cal. 136; and see section 268, *ante*.

<sup>10</sup> "Rule XIII. The expense of printing transcripts on appeal in civil cases and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode."

<sup>11</sup> Harper v. Minor, 27 Cal. 111; Budd v. Holden, 28 Cal. 140; Mendocino County v. Morris, 32 Cal. 149; Sichel v. Carrillo, 42 Cal. 507; McDougal v. Downey, 45 Cal. 166.

<sup>12</sup> Bullard v. His Creditors, 56 Cal. 606.

Neither attorneys' fees<sup>12</sup> nor the expenses of printing briefs can be taxed as costs. Costs in special proceedings brought before the court in any other way than by appeal are allowed as in cases on appeal.<sup>13</sup>

In the early history of the court the practice was to file the bill of costs on appeal *in the supreme court*.<sup>14</sup> This practice was disapproved in *Gray v. Gray*,<sup>15</sup> where it was held that the bill should be filed in the court below. This case was followed in *Ex parte Burrill*,<sup>16</sup> although the court said that, if the question were an open one, it would be inclined to hold that the bill should be filed in the supreme court. The question was set at rest by section 1034 of the Code of Civil Procedure, which is as follows:<sup>16a</sup>

"Sec. 1034. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the *remittitur* is filed with the clerk below, deliver to *such clerk* a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor,"<sup>17</sup> as upon a judgment."

It will be noted that this section contains no provision for notice to the adverse party, and that no opportunity is given the latter to be heard. For this reason it was, in effect, held unconstitutional in *Bell v. Superior Court*,<sup>18</sup> its constitutionality being preserved

<sup>12</sup> Section 1021, California Code of Civil Procedure.

And see section 4900, Revised Codes of Idaho; section 7153, Revised Codes of Montana (section 1850, Code of Civil Procedure); section 3569, Cutting's Compiled Laws of Nevada; section 7173, Revised Codes of North Dakota; section 561, Lord's Oregon Laws; section 410, Code of Civil Procedure of South Dakota; section 3338, Compiled Laws of Utah; section 474, Rem. & Bal. Code of Washington (section 5165, Bal. Code); also section 481, Rem. & Bal. Code (section 5172, Bal. Code).

<sup>13</sup> Section 1032, California Code of Civil Procedure.

And see section 4911, Revised Codes of Idaho; section 7163, Revised Codes of Montana (section 1860, Code of Civil Procedure); section 3580, Cutting's Compiled Laws of Nevada; section 576, Lord's Oregon Laws; section 415, Code of Civil Procedure of South Dakota; section 3349, Compiled Laws of Utah; sec-

tion 492, Rem. & Bal. Code of Washington (section 5183, Bal. Code).

<sup>14</sup> See *Marysville v. Buchanan*, 3 Cal. 214.

<sup>15</sup> 11 Cal. 341. Sometimes cited as *Eaton v. Palmer*.

<sup>16</sup> 24 Cal. 350.

<sup>16a</sup> Corresponding sections in other codes are, section 1557, Revised Statutes of Arizona; section 4913, Revised Codes of Idaho; section 7172, Revised Codes of Montana (section 1869, Code of Civil Procedure); section 3581, Cutting's Compiled Laws of Nevada; section 3351, Compiled Laws of Utah.

<sup>17</sup> As to stay of such execution, see *Ex parte Burrill*, 24 Cal. 350; and compare *Marysville v. Buchanan*, 3 Cal. 214.

<sup>18</sup> 150 Cal. 31, 87 Pac. 1031. As to construction of section in other respects, see *McMann v. Superior Court*, 74 Cal. 107, 15 Pac. 448; *Reay v. Butler*, 118 Cal. 114, 50 Pac. 375.

by a construction based upon an assumed analogy between this and the section immediately preceding. This opinion was sanctioned by a majority of the court, Justice Shaw alone dissenting, the chief justice taking no part in the case, and it was held that although the section empowered the appellate court to determine who was entitled to costs, it was still a matter within the jurisdiction of the trial court to determine the amount thereof. For this purpose, treating the two sections as analogous, notice is required. Doubtless the same notice would have to be given in both cases.

**§ 299. Effect of a Decision of the Appellate Court upon Subsequent Proceedings in the Cause.**—The several propositions involved here may conveniently be considered separately.

1. *Where the Supreme Court Directs a Particular Judgment to be Entered, the Court Below must not Retry the Cause, but must Enter the Judgment Directed; the Entry of a Different Judgment is Void.* In the case of *Argenti v. San Francisco*,<sup>1</sup> the judgment was reversed with directions to enter a judgment for the plaintiff of a specific character. The court below, however, proceeded to retry the case (no objections to such a course being interposed), and nonsuited the plaintiff. Upon appeal the supreme court held that a retrial was improper, and reversed the judgment of nonsuit and directed the entry of the judgment first directed; and Rhodes, J., delivering the opinion—after interpreting the language used on the former appeal and defining the character of the judgment then rendered—said: “It is further contended that if the judgment was what the plaintiff claimed it to be when the cause was returned to the court below, it was competent for him to waive, and he did waive, his right to have a single issue tried, and opened the cause for trial *de novo*. This view, which on the first argument we thought unanswerable, loses all its force when the judgment, instead of being taken as ordering the trial of an issue of fact, is regarded as we now hold it to be. The learned counsel of the plaintiff was in error in his interpretation of the judgment, but because he so erred, and in pursuance of it, attempted to retry an issue that had been finally passed upon, the cause was not opened for trial on all the original issues. The trial of any issue would be repugnant to the judgment of the appellate court because the judgment finally determined the controversy between the parties; and something

<sup>1</sup> 30 Cal. 453.



stronger and of a more solemn character than matters that are sufficient to raise implications or presumptions would be required in order to set the judgment aside."

The principle established in this case is that where the court below does not obey the mandate of the supreme court, but causes a different judgment to be entered, such judgment is not merely erroneous but is void. The reason upon which it rests was stated in *Mulford v. Estudillo*,<sup>2</sup> as follows: "If it can be maintained that the judgment was merely erroneous, the same would be true of a third or any further judgment, and thus there might be an indefinite number of judgments between the same parties for the same cause of action, all of which might be enforced unless reversed by the appellate court." The principle that the court below must obey the direction of the appellate court has been affirmed in other cases.<sup>3</sup>

In *Cowdery v. London etc. Bank*,<sup>4a</sup> where the supreme court reversed a judgment and order and remanded the cause with directions that a judgment be entered in accordance with the views expressed, the superior court treated it as a modified judgment, making an order *nunc pro tunc*, as of the date of original entry of judgment, thereby seeking to preserve the validity and vitality of a sale of the property previously made pending appeal. The appellant applied to the supreme court again, and Shaw, J., delivering the opinion, said:

"The mandate of reversal did not authorize the trial court to modify the judgment in the manner attempted in this order. 'No modification of the judgment or decree directed by the appellate tribunal can be made by the trial court; no provision can be grafted upon it, nor can any be taken from it.' (Elliott on Appellate Procedure, sec. 576; Hughes' Appeal, 90 Pa. St. 60; Murrill v. Murrill, 90 N. C. 122.) Where the supreme court directed the entry of a

<sup>2</sup> 32 Cal. 131. See, also, *Chafoin v. Rich*, 92 Cal. 471, 38 Pac. 488, where the doctrine of the *Mulford v. Estudillo* case was reiterated, although the case did not present the question.

<sup>3</sup> *Argenti v. Sawyer*, 32 Cal. 415; *Mayer v. Kohn*, 33 Cal. 486; *Keller v. Lewis*, 56 Cal. 469; *Heinlein v. Martin*, 59 Cal. 182. The notion of the early judges was that the supreme court would make a final decree upon the evidence. And such

decrees were final and conclusive. *Soule v. Dawes*, 14 Cal. 248; *Crowell v. Gilmore*, 17 Cal. 195; *Cahoon v. Levy*, 10 Cal. 216. But it is now settled that the court will not examine the evidence for the purpose of making findings and judgment thereon. See section 296.

For instance of wrong entry by clerk treated as surplusage, see *Will v. Sinkwitz*, 41 Cal. 594.

<sup>4a</sup> 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

certain judgment, it was said, in *Argenti v. Sawyer*, 32 Cal. 415, that the lower court 'had no authority to enter a different judgment. The duty of that court was simply to enter a judgment in conformity with the order of this court. That order is decisive of the character of the judgment to which the plaintiff is entitled. It is therefore unnecessary to consider whether the plaintiff was entitled to interest upon interest, or whether the judgment of this court would have been modified if it had been asked for in proper time. . . . The judgment of this court concludes the parties, and it is now too late to change it; and certainly the district court has no authority to modify, change, or disregard it in any respect.' In such a case the trial court 'must enter the judgment directed, and the entry of a different judgment is void' (*Chafoin v. Rich*, 92 Cal. 473, 38 Pa. 488); and if the court had retried the case, and upon the new trial 'had rendered a judgment, it would have been void.' " (Citing cases.)

There is usually not much difficulty in determining whether a cause is remanded for a new trial or for the entry of a particular judgment. The rule is that where the court reverses a judgment without giving any direction as to what shall be done in the court below, the case goes back for a new trial on all the issues.<sup>4</sup> For the entry of a particular judgment some express direction is necessary. There is not ordinarily any difficulty in ascertaining the meaning of the court. The direction is usually placed at the end of the opinion. If there be any ambiguity, the direction is to be read in connection with the opinion. The following are instances of directions for final judgment.

In *Argenti v. San Francisco*,<sup>5</sup> the court concluded its opinion as follows: "Our conclusion is that the right of the plaintiff to recover is limited to the amounts specified in the contracts to which we have referred, and legal interest upon such amounts. The judgment is for a larger sum than the plaintiff is entitled to recover, and must therefore be reversed. Upon the return of the cause the court below will render a judgment in accordance with this opinion. Judgment reversed and cause remanded." This was held to be a direction for the entry of a particular judgment, and although no amounts were "specified in the contracts," the meaning of the court was gathered from the opinion.

<sup>4</sup> See subdivision 2 below.

<sup>5</sup> 30 Cal. 461.

In *Meyer v. Kohn*,<sup>6</sup> the opinion concluded as follows: "The plaintiffs are entitled to a general judgment for eleven hundred and twenty-seven dollars and seventy-five cents, and a judgment for four thousand and twenty-six dollars, payable in United States gold coin, and the judgment is modified accordingly." This was held to be a direction for the entry of a judgment for certain specified sums, and that the court below could not add the interest which "had accrued on the demand for which the action was brought during the interval between the commencement of the action and the rendering of the judgment in the district court."

So where the supreme court concluded its opinion as follows: "Judgment and order reversed and cause remanded, with directions to the court below to render a decree in accordance with the views herein expressed," it was held that the only thing to be done was to enter a decree in accordance with the opinion, and that the court below was right in refusing to allow the party to file a supplemental cross-complaint and answer and have a new trial.<sup>7</sup>

A modified judgment is not, however, a new judgment; and wherever the mandate of the appellate court decrees the correction of findings and the modification of the judgment to correspond therewith, either by deducting certain items or by adding certain other items, it is not a new "decision" of the court, and the judgment, as corrected, relates back to the time when the findings were originally made.<sup>8a</sup>

The trial court has no authority, under an order directing a new trial as to a part only of the issues, to hear any except the issues specified; and, upon a second appeal, the appellate court will review only the issues with respect to which the new trial was ordered by the former appeal.<sup>7b</sup>

The trial court has no jurisdiction to make conditions, or to require terms, in proceeding under the mandate of the appellate court, in a case that has been reversed and remanded with specific directions as to such proceeding. Thus, it cannot require plaintiff to pay the costs of the appeal, with its accruing costs, as a condition to his being permitted to amend his complaint in accordance with the terms of the supreme court *remittitur*. In granting an

<sup>6</sup> 33 Cal. 486.

<sup>7</sup> *Keller v. Lewis*, 56 Cal. 468; and look at *Donner v. Palmer*, 45 Cal. 181; *Heinlen v. Martin*, 59 Cal. 181; but compare *People v. San Francisco*, 43 Cal. 101. Also see

*Chandler v. People's Savings Bank*, 65 Cal. 498, 4 Pac. 502.

<sup>7a</sup> *Barnhart v. Edwards*, 128 Cal. 576, 61 Pac. 176.

<sup>7b</sup> *Gage v. Downey*, 94 Cal. 244, 29 Pac. 635.

application for a writ of mandate, directing the superior court to permit the amendment in question, the supreme court said:<sup>70</sup>

" . . . . The court was directed to permit plaintiff to amend his complaint in certain respects, which were specified. He had an absolute right to make those amendments. Undoubtedly it was within the power of the superior court to interpret the judgment rendered here and to restrict the plaintiff to those amendments. If the court erred in its construction of the judgment rendered by this court, or abused its discretion in refusing other amendments, such error or abuse of discretion could not be corrected by mandate. Plaintiff would be forced simply to take his exceptions and seek his remedy upon an appeal from the judgment. But when the court refuses to allow the amendments which were ordered by this court, even as understood by the trial court, it refuses to obey the direction of this court, and obedience may be compelled. It is not the province of that court to affix conditions to the exercise of privileges granted by this, unless, as is sometimes done, this court directs that the amendments may be made on terms to be fixed by the trial court.

"It is conceded that the learned judge of the superior court acted in making the order in no contumacious spirit, but conscientiously in the discharge of his duty; but there has sometimes been friction, and if the judge could impose conditions upon the exercise of rights granted by this court, a litigant could, in some cases, be deprived of the benefit of a judgment in his favor here.

"In no event, however, was the court justified in making an order which is equivalent to a refusal for an indefinite period to try the case. If the court had the right to impose the conditions, and the plaintiff refused to comply with them, the court should proceed with the trial on the pleadings as they now are. . . . Under the order the plaintiff must pay the costs or leave his case forever untried."

2. *A General Order of Reversal not Qualified by Any Specific Direction Sends the Case Back for a New Trial on All the Issues.*—This rule was first announced in *Stearns v. Aguirre*.<sup>71</sup> In that case, which was upon a promissory note, a judgment in favor of the

<sup>70</sup> *Dixon v. Risley*, 114 Cal. 204, 46 Pac. 5.

<sup>71</sup> 7 Cal. 448; look at *Phelan v. San Francisco*, 9 Cal. 16; and see,

also, *Sharp v. Miller*, 66 Cal. 99, 4 Pac. 1065; *Falkner v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386; *Heidt v. Minor*, 113 Cal. 385, 45 Pac. 700.

plaintiff was reversed, the supreme court merely saying "judgment reversed" without giving any direction as to what should be done when the case went back to the court below. Upon a retrial in the court below judgment passed for the defendants; and upon appeal by the plaintiff it was contended that the judgment for the defendants was right, because the decision of the supreme court upon the first appeal was an end of the controversy. But the supreme court held otherwise, and Murray, C. J., delivering the opinion, said: "We are now called on for the first time to determine whether a simple judgment of reversal is a bar to further proceedings in the same suit, and as the point has never before been adjudicated by this court, and we have no rule of court or of law which would control our judgment in the premises, we think it would be more just to follow the common law on this subject, by which the parties in this suit have in all probability been governed. At common law the appellate court either affirms or reverses the judgment upon the record before it. The opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court below have the same rights that they originally had." The concluding sentence of this extract seems to ignore the rule as to the law of the case, but was explained by the court in a subsequent case as follows: "The general words used by Murray, C. J., that the parties had the same rights after the reversal as before, did not mean more than this, that they had the same right to try the case—not the right to try it in disregard of the opinion of the appellate court."<sup>9</sup>

The case of *Stearns v. Aguirre*, however, was a common-law case. And for some time the rule established by it was considered inapplicable to equity cases. This was founded upon the notion that the provisions of the Practice Act in relation to new trials did not apply to equity cases, but that an appeal in such cases took up the evidence, and everything else, and that the supreme court found the facts from the evidence, and rendered judgment accordingly.<sup>10</sup> After a while, however, this notion was repudiated, and it became settled that the provisions of the Practice Act in relation to new trials applied alike to all cases,<sup>10</sup> and that the supreme court would never find the facts of a case, or direct judgment, unless such facts were established in the court below.<sup>11</sup> And when matters were put

<sup>9</sup> *Davidson v. Dallas*, 15 Cal. 84.

<sup>10</sup> See section 7.

<sup>10a</sup> *Soule v. Dawes*, 14 Cal. 248;  
*Crowell v. Gilmore*, 17 Cal. 194.

<sup>11</sup> See section 296.

upon this basis the rule laid down in *Stearns v. Aguirre*, above quoted, was applied in all cases, both in equity or at law. Thus in *Hidden v. Jordan*,<sup>12</sup> which was an action to compel the conveyance of certain real property, Sawyer, J., delivering the opinion, said: "On the former appeal a new trial was ordered in general terms, and the case undoubtedly went back for trial upon all the issues of fact raised by the pleadings." So in *Ryan v. Tomlinson*,<sup>13</sup> which was an action of ejectment, Crockett, J., delivering the opinion, said: "There is no force in the suggestion that the decision of this court on the former appeal ended the case, so that it could not be retried. The order was 'judgment reversed and cause remanded.' Unless it was apparent from the opinion of the court that the adjudication was intended to be a final disposition of the cause, the effect of the reversal was only to set aside the judgment, that a new trial might be had."

In the recent case of *Davis v. Le Mesnager*,<sup>13a</sup> where the judgment and order denying a motion for a new trial were reversed, without direction, upon the going down of the *remittitur* the plaintiff moved for findings and judgment in his favor upon the prior judgment-roll and the opinion of the supreme court. The defendants objected to such a proceeding, and contended for a retrial of all the issues. But the court overruled these objections, granted the motion, and rendered judgment upon the judgment-roll, the *remittitur*, and the opinion of the appellate court. On a second appeal this was held to have been error, the court saying:

"The court below erred in disposing of the case in this summary manner. The judgment and the order denying a new trial were reversed by the supreme court upon the former appeal. This made it necessary to try the case again in the superior court. The error which made it necessary to reverse the case was an error of law occurring upon the trial, consisting of a ruling of the court as to the validity of a deed offered in evidence. The plaintiff could not prevail without offering evidence in support of his controverted allegation of ownership, and the court, in this method of procedure, gave him judgment without any evidence whatever."

The same rule applies to the reversal of an order denying a motion for new trial; that is to say, a general order of reversal sends the case back for a new trial on all the issues. In this regard,

<sup>12</sup> 28 Cal. 303; and look at *Cordier v. Schloss*, 18 Cal. 580.

<sup>13</sup> 39 Cal. 645. See, also, *Hess*

*v. Winder*, 34 Cal. 272; *Myers v. McDonald*, 68 Cal. 162, 8 Pac. 809.

<sup>13a</sup> 155 Cal. 519, 101 Pac. 910.

Wallace, C. J., delivering the opinion in *Irwin v. Towne*,<sup>14</sup> said: "In reversing the order denying the motion for a new trial, an opinion was filed in which a construction was given to the descriptive calls in the deed under which the plaintiff claimed, but the opinion intimated nothing as to what particular proceedings were to be had on the return of the cause to the court below. It concluded as follows: 'Order denying a new trial reversed, and cause remanded for further proceedings in accordance with this opinion.' Had the court below sustained the motion of the plaintiff for a new trial, no question could have arisen as to the proceedings to follow in the case. Had no appeal been taken from such an order, a new trial must have been the result, unless the plaintiff had dismissed the action. The order of this court reversing the order denying the motion, and remanding the cause for further proceedings in accordance with the opinion filed, places the case, *in point of the mere procedure to be followed* in the same situation as though the court below had itself directed a new trial, for, as we have said, there is nothing to be found in the opinion filed which would indicate that the proceedings to be had should be different from the proceedings in any other case in which an application for a new trial had been allowed."

This principle has been followed invariably.<sup>14a</sup> As stated below, the reversal of an order leaves the proceedings where they were when the order was made, and unless there is something in the opinion of the court restricting the operation of the words "reverse" and "remand," the trial court must proceed as though the order had not been made.<sup>14b</sup> If an order denying a new trial is reversed and remanded without anything to restrict the operation of those words, nothing remains to be done except to retry the case. If such an order is affirmed, judgment should be entered upon the verdict or findings made. If the order is one granting the motion, and it

<sup>14</sup> 43 Cal. 23. But a reversal of an order *granting* a new trial implies a direction to the court below to deny the motion, unless express directions are given in regard to the matter. The passing upon the motion after such reversal is a mere form, for it is to be heard upon the same record, and the rule as to the law of the case applies.

<sup>14a</sup> See *Chandler v. People's Savings Bank*, 65 Cal. 498, 4 Pac. 502;

*Myers v. McDonald*, 68 Cal. 165, 8 Pac. 809; *Westall v. Altschull*, 126 Cal. 165, 58 Pac. 458; *Eades v. Trowbridge*, 143 Cal. 25, 76 Pac. 714; and cases cited in last paragraph of section, note 21a et seq. See, also, cases cited in note 14c, below.

<sup>14b</sup> See *Myers v. McDonald*, 68 Cal. 165, 8 Pac. 809; *Eades v. Trowbridge*, 143 Cal. 25, 76 Pac. 714.

is reversed, entry of judgment is in order. If affirmed, a retrial is necessary.<sup>14a</sup>

Because of statutory enactment, the rule is slightly different in criminal practice. Section 1262, Penal Code, provides for the discharge of a defendant in cases where judgments of conviction are reversed without express directions for retrial.<sup>14a</sup> Otherwise, the rule is the same as in civil cases. Upon the reversal of a judgment and order denying a motion for a new trial, the case stands as though no trial has been held, and defendant is at once put upon his plea of not guilty.<sup>14a</sup>

But although a general order of reversal sends the case back for a retrial on all the issues, the retrial must be in accordance with the legal principles laid down upon the first appeal if the same case is made by the evidence; for, as has been explained, such principles constitute the law of the case.<sup>15</sup> But the parties may introduce new evidence, calling for the application of different legal principles,<sup>16</sup> and may even (upon good cause shown) change the issues made by

<sup>14a</sup> Where an order granting a new trial has been reversed, it is the duty of the trial court to enter judgment at once in accordance with the verdict or findings. It has no jurisdiction to do anything else. It can entertain no new plea, and can take no action whatever except to enter the judgment appropriate to the verdict or findings. Any other action or any order or judgment other than such a judgment would be null and void. *People v. Woods*, 84 Cal. 442, 23 Pac. 1119. The reversal of an order setting aside a verdict under section 662, Code of Civil Procedure, leaves the proceedings where they were when the order was made. The party in whose favor the verdict was rendered is entitled to entry of judgment thereon, and his adversary may then appeal therefrom in the usual way. *Eades v. Trowbridge*, 143 Cal. 25, 76 Pac. 714.

And see cases cited below, note 21a et seq.

<sup>14d</sup> See *People v. Hardisson*, 61 Cal. 378; *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028.

<sup>14e</sup> *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070.

<sup>15</sup> See section 291, *ante*. In *Chandler v. People's Sav. Bank*, 65 Cal. 498, 4 Pac. 502, it was said: "The court, having reversed the judgment because the testimony was insufficient to sustain the finding on any material point, cannot direct what judgment should be entered. If it did this, it would be finding facts which it has no authority to do. That is the province of the court below, with which this court cannot interfere. Where, under such circumstances, the cause is remanded for further proceedings, unless the order of this court is restricted, the cause goes back . . . to be retried, subject to the views expressed by this court." But if no further or other evidence is introduced, it would seem to be the duty of the trial court, by an appropriate instruction, to direct a finding the other way.

<sup>16</sup> See section 291, and *Kimball v. Semple*, 25 Cal. 455; *Sneed v. Osborn*, 25 Cal. 628, 629; *Ryan v. Tomlinson*, 39 Cal. 645; *Mitchell v. Davis*, 23 Cal. 383.



the pleadings.<sup>17</sup> And in such case the rule as to the law of the case has no application.<sup>18</sup>

It is to be noted, as a matter of course, that no issue can be retried affecting the interest of any party to the action who was not a party to the appeal. In *Little v. Superior Court*<sup>18a</sup> a writ of prohibition was issued to prevent such action. The appeal was prosecuted by one of the defendants from an adverse judgment upon a question of a priority of mortgages. The codefendants were not made parties to this appeal, but upon a reversal the court proceeded to retry all the issues involved. This was held error.

3. *The Reversal of a Judgment or Order Reverses Every Proceeding Dependent upon It.*—The old Practice Act expressly pro-

<sup>17</sup> *Phelan v. San Francisco*, 9 Cal. 15.

<sup>18</sup> *Meeks v. S. P. R. E. Co.*, 56 Cal. 513, 38 Am. Rep. 67; and see section 291.

As already noted, the phrase directing the trial court "to take such other and further proceedings in the matter," etc., does not alter this condition. In *Bull v. Rankin*, 23 Okl. 801, 101 Pac. 1105, where not only the supreme court of Oklahoma, but the supreme court of the United States, had passed upon some branch or feature of the litigation, in sending it back for retrial, the supreme court of Oklahoma, said:

"Where a cause is reversed and remanded by the supreme court with directions to the trial court to 'take such other and further proceedings in the matter as shall accord with said supreme court opinion, it stands in the court below the same as if no trial had been had. Pleadings could be amended, supplementary pleadings filed, and new issues formed under proper restrictions. . . . If the parties could amend their pleadings in such a way as to conform to the views of the supreme court in relation to the allegation of facts necessary to entitle them to the relief sought, they ought not to be deprived of that right merely because they and the trial court had previously been in error as to

the theory of the case. The court below, in justice to the parties, should permit such amendments upon such terms as to costs as it thought just, and it was reversible error to refuse to do so." See, also, *Consolidated etc. Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654, where it was held that when a judgment is reversed and the cause remanded generally, the cause stood the same as if no trial had been had. Pleadings could be amended, supplementary pleadings filed, and new issues formed, under proper restrictions," etc. To this rule there is but a single exception, viz., where there is an issue of fact already determined by an agreed statement of facts, such issue cannot be interfered with. Obviously, therefore, the direction of the appellate court "to take such other and further proceedings," etc., means no more than that the parties must begin anew from the initiation of the former trial, and proceed according to law, avoiding former errors. To this extent, therefore, it may be said that the rule of the law of the case does not apply, but not otherwise. The former result of the trial is nugatory, but the proceedings must assuredly be in accordance with the determination of the appellate court with reference to previous erroneous rulings or decisions.

<sup>18a</sup> 74 Cal. 219, 15 Pac. 731.

vided that where a judgment or order is reversed, the court "may set aside or confirm or modify any or all of the proceedings subsequent to or dependent upon such judgment or order."<sup>19</sup> These words were omitted from the provision of the Code of Civil Procedure.<sup>20</sup> Probably the omission was because the words were superfluous, and because they might be taken to imply that some affirmative action of the court was necessary.

In *McGarrahan v. Maxwell*,<sup>21</sup> where the court below gave judgment for the plaintiff in ejectment, and at the same time made a decree perpetually staying the commission of waste by him, it was held that the reversal of the judgment in ejectment on the ground that the title was in the defendant had the effect of setting aside the decree as to waste, although no special mention of it was made.

But the effect of the reversal does not extend beyond the proceedings which depend upon the portion reversed, where a part of a judgment only is reversed, leaving another part unaffected by the judgment of reversal. Thus in *Batchelder v. Brickell*,<sup>21a</sup> where a foreclosure judgment, containing a deficiency clause, was reversed as to the latter, it was held that a sale of the property covered by the mortgage and judgment of foreclosure was not affected, and would be allowed to stand.

4. *The Effect of Judgments of Reversal upon Subsequent Proceedings in the Trial Court—Effect of Judgments of Affirmance.*—The reversal of the judgment leaves the litigation in the situation it was in prior to entry thereof. The parties are in the same position as if no judgment had been rendered.<sup>21b</sup> "When the order . . . was reversed, it no longer had any vitality or force, and the result was to leave the proceeding where it stood before that order was made."<sup>21c</sup> When a decree is reversed, it is vacated, and the matter stands "as though no decree had ever been made."<sup>21d</sup> "When the order of the supreme court in the case of *London etc. Bank v. Bandmann*, 120 Cal. 220, was made, re-

<sup>19</sup> See section 309, *post*.

<sup>20</sup> Sections 53 and 957, Code of Civil Procedure.

<sup>21</sup> 28 Cal. 87.

<sup>21a</sup> 75 Cal. 374, 17 Pac. 441. As to restitution upon reversal, see section 300, *post*. Had the reversal extended to the reversal of the judgment for foreclosure, the sale must

have been set aside, under the well-established rule. See *Barnhart v. Edwards*, 128 Cal. 576, 61 Pac. 176.

<sup>21b</sup> *Carpy v. Dowdell*, 131 Cal. 499, 63 Pac. 780.

<sup>21c</sup> *Estate of Mitchell*, 126 Cal. 248, 58 Pac. 549.

<sup>21d</sup> *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624.

versing the judgment of the court below, that judgment was forthwith vacated, and until action was taken by the court below in pursuance of the mandate to enter another judgment in accordance with the opinion of the supreme court, there was no judgment in existence in the case.”<sup>21a</sup>

Nor is the effect essentially otherwise even though the judgment of reversal may be accompanied with modifying words. In the case of *Cowdery v. London etc. Bank*,<sup>21b</sup> already cited in this connection, it was held that the legal effect of a reversal of the judgment with directions to enter judgment in accordance with the view expressed is to vacate the decree so reversed, and leave it as if it had never been rendered, although the mandate is in form a modification, and the trial court has received no specific directions as to the particular form of modified decree authorized. It was further said that the appellate court might have modified the decree, but, as it did not, no vitality is left therein for any purpose, and a new decree must be entered. The case stands as an action pending with final judgment remaining to be entered.

The lower court must enter a *new* judgment—not a modified one. A *nunc pro tunc* order made for the purpose of preserving the validity of a sale of mortgaged premises under the decree so reversed is utterly void. There is no power in the trial court to do any act that will breathe vitality into the reversed judgment, whereby such an order might be supported; or, to make the new judgment relate back so as to preserve such vitality, for the purpose in question, or any other. As stated in the opinion of the supreme court, “that judgment was vacated by the reversal; it was ‘as if never rendered,’ and there was nothing in existence to modify.”<sup>21c</sup>

The reversal of an order granting a new trial reverses the judgment,<sup>22</sup> and the affirmance of an order granting a new trial vacates the judgment (if one has been entered), and an appeal therefrom should be dismissed;<sup>22a</sup> but the reversal of an order granting a new trial leaves the verdict and judgment standing.<sup>23</sup>

<sup>21a</sup> *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

<sup>21b</sup> 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

<sup>21c</sup> *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

<sup>22</sup> See *Kower v. Gluck*, 33 Cal. 407; and see concurring opinion of Rhodes, J., in *Martin v. Matfield*, 49 Cal. 45; and see section 2, *ante*.

<sup>22a</sup> *San Jose Bank of Savings v. Bank of Madera*, 121 Cal. 543, 54 Pac. 85.

<sup>23</sup> See *Pierce v. Birkholm*, 110 Cal. 669, 43 Pac. 205, for a consideration

Where one party appeals from the judgment and the other party appeals from the order granting a new trial, and the latter is affirmed on appeal, it is not necessary—it is useless—to consider an appeal from the judgment.<sup>44</sup>

§ 300. **Restitution on Reversal.**—Section 345 of the Practice Act of 1851<sup>1</sup> provided, among other things, that “. . . . when the judgment or order is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order. . . . .” This provision stood until the adoption of the Code of Civil Procedure. A similar provision was contained in section 8 of the “act concerning courts of justice in this state and judicial officers.”<sup>2</sup> And concerning this provision it was held in *Farmer v. Rogers*<sup>3</sup> that it did not authorize the court to interfere with the rights of third parties who had purchased under the judgment. This rule was incorporated in section 957 of the Code of Civil Procedure as amended in 1874,<sup>4</sup> which, after such amendment, read as follows: “

“Sec. 957. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. . . . .”

The sections above quoted empower the supreme court to order restitution in proper cases as a part of its judgment, or upon

of the effect of an order granting the motion; and see section 2, for more detailed view of the subject.

<sup>24</sup> *McCarty v. Southern Pacific Co.*, 144 Cal. 677, 78 Pac. 260.

<sup>1</sup> *Laws 1851*, pp. 105, 106.

<sup>2</sup> See *Laws of 1853*, p. 288. The provision of section 8 above referred to was omitted from the act of 1863, which took the place of the act of 1853. See *Laws of 1863*, p. 333.

<sup>3</sup> 10 Cal. 335.

<sup>4</sup> Prior to 1874 the provision of the code was the same as that of the old Practice Act above quoted.

<sup>44</sup> Corresponding provisions of other codes are to be found in section 4825, Revised Codes of Idaho; section 7119, Revised Codes of Montana (section 1743, Code of Civil Procedure); section 558, Lord's Oregon Laws; section 1742, Rem. & Bal. Code of Washington (section 6526, Bal. Code); section 5121, Compiled Statutes of Wyoming.

motion,<sup>5</sup> without putting the party to the expense and trouble of another action.<sup>5a</sup> As above stated, however, this cannot be done as against third parties who have purchased under the judgment. But in *Reynolds v. Harris*,<sup>6</sup> where the plaintiff himself purchased at the execution sale, and afterward assigned both the sheriff's certificate and the judgment to a third party, it was held that such party stood in the same position as the plaintiff, and that restitution could be ordered as to him.

If restitution be not ordered by the supreme court it may, in proper cases, be directed by the court below.<sup>7</sup> For it has been held that the power of the supreme court is not exclusive of the power of the court below.<sup>8</sup>

In the event of the reversal of an order of restitution the appellant is, in turn, entitled to be restored to the position he occupied with reference to the property, prior to execution of the writ.<sup>9a</sup>

The right of restitution under this section cannot be precluded against the losing party by the enforcement of the judgment prior to appeal, any more than the right of appeal can be nullified by enforced satisfaction. The right of appeal and of restitution upon reversal go hand in hand, and cannot be destroyed or disturbed by any adversary proceeding on the part of the successful litigant.<sup>9b</sup>

Section 957, Code of Civil Procedure, is not mandatory in its terms, but the power conferred thereby is to be exercised when the circumstances of the case call for the exercise of a judicial discretion.<sup>9c</sup>

It is not within the scope of this treatise to give the law which governs actions to obtain a restitution.<sup>9</sup>

<sup>5</sup> But in all probability such motion would have to be made before the issuance of the *remittitur*.

<sup>5a</sup> As to the extent of the power, see generally *Stockman v. Riverside L. & I. Co.*, 64 Cal. 57, 28 Pac. 116; *Ex parte Morris & Johnson*, 9 Wall. 605, 19 L. ed. 799. Also *Hewitt v. Dean*, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93.

<sup>6</sup> 14 Cal. 688. The restitution in this case was ordered by the court below upon motion.

<sup>7</sup> *Reynolds v. Harris*, 14 Cal. 668, 76 Am. Dec. 459; and look at *Pico v. Cuyas*, 48 Cal. 642; *Kennedy v.*

*Hamer*, 19 Cal. 386; also see *Heydenfeldt v. Superior Court*, 117 Cal. 348, 49 Pac. 210.

<sup>8</sup> See *Reynolds v. Harris*, 14 Cal. 668, 76 Am. Dec. 459.

<sup>9a</sup> *Hyde v. Boyle*, 105 Cal. 102, 38 Pac. 643.

<sup>9b</sup> *Kenney v. Parks*, 120 Cal. 24, 52 Pac. 40.

<sup>9c</sup> *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 222, 30 Pac. 218.

<sup>9</sup> As to persons over whom the power may be exercised, see generally *Ex parte Morris & Johnson*, 9 Wall. 605, 19 L. ed. 799.

§ 300a. *De Minimis Non Curat Lex*.—The judgment of a *nisi prius* court will not be reversed where the amount involved is infinitesimal by comparison with the labor and expense of a new trial resulting from such reversal, nor where the damages to be recovered are merely nominal—*damnum absque injuria*. Such is the rule or maxim, *de minimis non curat lex*. Errors in such cases will, as a rule, be disregarded, as immaterial.<sup>1</sup>

To this, as to all other rules, there are exceptions. Thus, where an injury itself of so little consequence as to be incapable of measurement by a money standard, is of a permanent character, threatening, if allowed to continue, to create an easement upon the inheritance; or, even though such threat be absent, where the act complained of is a nuisance *per se*, relief will be granted, notwithstanding the low estimate of the damage involved.<sup>2</sup> So, where the action is one against the directors of a corporation, and in behalf of the stockholders, although the amount of interest shown be small, in such a case, authorized by an act of legislature, the law "does care for small things."<sup>3</sup> So, also, an exception was held to exist in the matter of a small excess in a sale for taxes, the court saying that it was the void sale and not the amount involved that was the thing in controversy.<sup>4</sup>

It is probable that the rule applies only in actions *ex contractu*, and not to actions *ex delicto*. In any event, it has been held not to apply to actions for libel, or to nominal damages therefor. In *Lick v. Owen*,<sup>5</sup> upon this point, the court said:

"The rule may possibly be as stated in actions *ex contractu*, when, for the technical breach of a contract, the court can see that, as matter of law, the plaintiff would be entitled to only nominal damages. But in an action for libel the question of damages is for the jury, and the court cannot assume, as matter of law, that the plaintiff is entitled to only nominal damages."

<sup>1</sup> *Wilson v. McEvoy*, 25 Cal. 174; *Wolff v. Prosser*, 73 Cal. 219, 14 Pac. 852; *Moore v. Boyd*, 74 Cal. 169, 15 Pac. 670; *McAllister v. Clement*, 75 Cal. 183, 16 Pac. 775; *Kullman v. Greenbaum*, 92 Cal. 403, 27 Am. St. Rep. 150, 28 Pac. 674; *Clark v. Collier*, 100 Cal. 257, 34 Pac. 677; *Kenny v. W. U. Tel. Co.*, 100 Cal. 454, 35 Pac. 75; *Fox v. Mackay*, 125 Cal. 54, 57 Pac. 672; *McDougal v. Fuller*, 148 Cal. 521, 83 Pac. 701.

<sup>2</sup> See *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113, and cases cited; and *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, and cases cited.

<sup>3</sup> *Francis v. Sompa*, 92 Cal. 503, 28 Pac. 592.

<sup>4</sup> *Miller v. Williams*, 135 Cal. 184, 67 Pac. 788.

<sup>5</sup> 47 Cal. 252; and see *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392.

The reason for the exception would certainly apply to the question of damages in all other actions founded upon tort.

**§ 300b. Moot Questions.**—Mere moot questions will not be considered or decided by appellate courts.<sup>1</sup> Such questions are made up for submission, and the parties to the record are not actually adverse in interest. Neither the supreme court nor the district courts of appeal were organized for the purpose of answering questions, no matter how large a portion of the population of the state may be curious to know the answers thereto. Such courts sit only for the purpose of deciding real controversies.<sup>2</sup> "The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions. . . ."<sup>3</sup>

Section 1138 of the Code of Civil Procedure makes provision for the hearing and determination in advance of questions "in difference, which might be the subject of a civil action," but it is to be noted that there must be an affirmative showing by averment under oath that the controversy is real, and the proceedings entered into in good faith, for the purpose of the ultimate determination of the legal rights of the parties. Cases arising under this section will be reviewed by appellate courts as appeals in ordinary cases arising in course.<sup>4</sup> But the parties must be interested, and authorized and capable of litigating the question involved.<sup>4a</sup>

<sup>1</sup> *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60.

<sup>2</sup> See *People v. Wallace*, 91 Cal. 535, 27 Pac. 767.

<sup>3</sup> *Mendocino Co. v. Peters*, 2 Cal. App. 34, 82 Pac. 1124. And see *Streator v. Linscott*, 153 Cal. 285, 95 Pac. 42, where the supreme court said: "This court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way."

<sup>4</sup> The following cases illustrate the application of this provision: *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *San Diego v. Granniss*, 77 Cal. 511, 19 Pac. 875; *Prince v. Fresno*, 88 Cal. 407, 26 Pac. 606; *Green v. Fresno*, 95 Cal. 329, 30 Pac. 544; *In re Wetmore*, 99 Cal. 146, 33 Pac. 769; *Woodward v. Fruitvale etc. Dist.*, 99 Cal. 554, 34 Pac. 239; *Derby v. Modesto*, 104 Cal. 515,

38 Pac. 900; *Skinner v. Santa Rosa*, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512; *Los Angeles v. Loan etc. Co.*, 109 Cal. 396, 42 Pac. 149; *Market Street Ry. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *White v. Clarke*, 111 Cal. 425, 44 Pac. 164; *McHenry v. Downer*, 116 Cal. 20, 47 Pac. 779, 40 L. R. A. 737; *Board of Education v. Grant*, 118 Cal. 39, 50 Pac. 5; *Bailey v. Johnson*, 121 Cal. 562, 54 Pac. 80; *Kiernan v. Swan*, 131 Cal. 410, 63 Pac. 768; *Dodge v. City and County of San Francisco*, 135 Cal. 512, 67 Pac. 973; *Humboldt Co. v. Stern*, 136 Cal. 63, 68 Pac. 324; *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864; *San Diego v. Schwartz*, 145 Cal. 49, 78 Pac. 231; *Matter of De Lucca*, 146 Cal. 110, 79 Pac. 853; *Los Angeles Co. v. Kellogg*, 146 Cal. 590, 80 Pac. 861.

<sup>4a</sup> *Bailey v. Johnson*, 121 Cal. 562, 54 Pac. 80.

Akin to moot questions, so called, are questions arising out of litigation that has become merely abstract, the determination of which would be vain and frivolous. Thus where the suit was for an injunction to restrain a stockholder of a corporation from voting his stock at a corporation election, it was held to be an abstract question on appeal, after the election had been held.<sup>5</sup> So in a proceeding to annul the appointment of a receiver, the question became, after the discharge of the receiver, a mere moot question, the determination of which by the appellate court would be vain and frivolous.<sup>6</sup> With reference to such questions, of which it was said that their consideration was within the maxims, *lex nil frustra facit*, and *lex neminem cogit ad vana seu inutilia*, the court in *Foster v. Smith*<sup>7</sup> said, quoting from a New York case:<sup>8</sup> "The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions."

So in *Moore v. Morrison*,<sup>9</sup> which was a proceeding in mandate to compel a county auditor to draw his warrant for a sum of money in settlement of a demand against the county which had been duly allowed and ordered paid by the board of supervisors, after judgment against the auditor, appeal therefrom, and order staying proceedings under section 1058, Code of Civil Procedure, without a *supersedeas* bond, the auditor abandoned his appeal, and drew his warrant for the litigated demand. On a motion to dismiss the appeal the district attorney contended that the auditor could not bind the county by paying the demand voluntarily, and the supreme court inferentially agreed with him, but held that the county could not be prejudiced by the dismissal of an appeal that ought under all rules to be dismissed, since it was not estopped from bringing an action for the recovery of the money so paid. The motion to dismiss was granted, and on two grounds, close akin to each other, viz., because the litigation had become stale, and because the writ of mandate did not issue to compel an act that had already been performed in accordance with the prayer of the petition.

Again, in *Bradley v. Voorsanger*,<sup>10</sup> where a taxpayer brought suit to enjoin the holding of an election, where the election was

<sup>5</sup> *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591.

<sup>6</sup> *Visalia Water Co. v. Superior Court*, 120 Cal. 219, 52 Pac. 485.

<sup>7</sup> 115 Cal. 611, 47 Pac. 591.

<sup>8</sup> *In re Manning*, 139 N. Y. 446, 34 N. E. 931.

<sup>9</sup> 130 Cal. 80, 62 Pac. 268.

<sup>10</sup> 143 Cal. 214, 76 Pac. 1031. And see *Weaver v. Reddy*, 135 Cal. 430, 67 Pac. 683.



held after judgment for defendant and before the appeal could be heard, the latter was dismissed, because it was said to raise a mere moot question, and no judgment could afford plaintiff any relief.

So in criminal cases, where counsel for the people confess error and there can be no new trial, the court will not determine questions which are no longer vital.<sup>11</sup>

So in a certain class of cases arising in criminal proceedings, where the trial court has advised and directed the jury to acquit, the same rule is applied. "Jeopardy" having attached, and there being an acquittal, the determination of the correctness of such instructions would be futile.<sup>12</sup>

**§ 300c. Disposition of Cases Concerning Which the Appellate Court is Equally Divided.**—The Constitution requires the concurrence of four justices of the supreme court, and three of the district courts of appeal, to pronounce judgment. In cases, therefore, where a justice of either court is disqualified, or absent, it may happen that no judgment can be pronounced, however important the case may be, by reason of an equal division of the court. If such a difficulty should arise in the district courts, it may be met by a transfer of the case to the higher court. But when it happens in the supreme court, the remedy is not so simple. The general rule is that when the court is equally divided upon a case, and the conditions are such as to render the possibility of a change in the membership of the court remote, a judgment of affirmance follows such a division, *ex necessitate rei*. The reason of the rule has been described, and is, an argument *ab inconvenienti*. There is no other reason. In *Luco v. De Toro*,<sup>1</sup> where the point arose, the court said:

"It is said that if this rule is not followed, the case might be continued for four years, until a change in the membership of the court occurs; 'and then, again, the same condition of things might still continue, and this would require a further continuance; and thus it might happen that the case would never be decided.' "

<sup>11</sup> *People v. Lewis*, 127 Cal. 207, 59 Pac. 830.

<sup>12</sup> *People v. Horn*, 70 Cal. 17; 11 Pac. 470; *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v.*

*Terrill*, 132 Cal. 497, 64 Pac. 894; *People v. Hill*, 146 Cal. 145, 79 Pac. 845.

<sup>1</sup> 88 Cal. 26, 25 Pac. 983, 11 L. B. A. 543.

In the same case, at the time the motion for an affirmance, under the rule, was made, it was evident that at least three, and possibly four, members of the supreme court, including the member disqualified in the case, would give place, on the bench, to their successors, and the motion was denied on the ground that the probability of a change in the personnel of the court, and a consequent probability of a concurrence of the required number to pronounce judgment, was not sufficiently remote to justify affirmance, *ex necessitate rei*. In *Frankel v. Deidesheimer*,<sup>2</sup> however, a different state of facts existed, the probability of a change was sufficiently remote, and repeated consultations ended in the same disagreement, and the court thereupon granted the motion to affirm.

The rule doubtless originated in jurisdictions presided over by judges holding for life, or for terms so great as to make the probability of a change exceedingly remote. In such jurisdictions the reason of the rule is better founded, perhaps, than it is in a jurisdiction where changes, involving nearly a third of the court every two years, frequently occur. It is at best a rule of expediency as heretofore suggested, though resting in considerations of both public policy and private interest. The justices who favor a reversal merely yield their views to such considerations, supported by the presumption of the correctness which may be said to attach to the judgment of the lower court, waive whatever insistence of opinion may have arisen, and unite with their associates in affirming the judgment. In doing so they do not in any way relinquish their convictions. The decision carries with it no dignity as a

<sup>2</sup> 93 Cal. 73, 28 Pac. 794; and see *Santa Rosa etc. Co. v. Railway Co.*, 112 Cal. 436, 44 Pac. 733; *McCauley v. Brooks*, 16 Cal. 11; *McCracken v. San Francisco*, 16 Cal. 591; *Ayres v. Bensley*, 32 Cal. 632; *Gas Light Co. v. Dunn*, 8 Pac. C. L. J. 28.

In *Livesley v. Krebs Hop Co. (Or.)*, 112 Pac. 1, the court was equally divided, and the decree of the trial court was, for that reason, affirmed. In *Daggs v. Daggs (Ariz.)*, 108 Pac. 458, the justices sitting were equally divided, therefore the judgment was affirmed "without a discussion of the assignments of errors made by appellants."

In *Grand Lodge v. Hobbie*, 23 Okl. 479, 100 Pac. 540, where two

members of the supreme bench believed that the judgment ought to be affirmed, two that it ought to be reversed, and one was disqualified, it was held, by reason of the provision of the Constitution (article 7, section 3) providing that the concurrence of a majority of the court shall be necessary to decide any question before it, and the further provision (article 7, section 5) requiring the court to render a written opinion in six months after submission, that where a majority of the court cannot agree upon a question before it for determination within six months after the submission of the cause, the same shall be dismissed.

judicial precedent. It is sufficiently labeled to preclude any future application of it under the doctrine of *stare decisis*. It is nothing more than a conclusion of the particular litigation, and amounts to nothing more than a bar to any further action for the same cause.

## CHAPTER LI.

## RELIEF IN EQUITY AGAINST JUDGMENTS AND DECREES.

- § 301. Kind of relief afforded—Practice in California.
- § 302. Same subject continued—Scope of chapter.
- § 303. Cases in which relief may be had in equity against judgments and decrees.
- § 304. Limitations upon the power of the court to grant relief.
- § 305. Courts which may grant the relief.
- § 306. Miscellaneous matters.

§ 301. **Kind of Relief Afforded—Practice in California.**—One of the settled<sup>1</sup> heads of the jurisdiction of the English court of chancery is the injunction of judgments at law in certain cases. The decree of injunction, however, did not operate directly upon the judgment of the court of law, but only upon the party in whose favor it was rendered. This doctrine was put upon the ground that courts of law constituted a separate and independent jurisdiction over which courts of equity had no control. The rule is stated by Story as follows:

“As courts of law constitute a jurisdiction altogether independent of and foreign to that of courts of equity, the control which courts of equity assume to exercise over the judgments of such courts is very much the same which it exercises over the judgments of courts altogether foreign to the forum where the court of equity exists. . . . Equity never attempts to act upon a court of law itself, and does not claim any supervisory power over such courts or the proceedings therein. It acts solely upon the party, and will enjoin him from pursuing any claim in a court of law, over which the courts of equity have a concurrent jurisdiction, and a more perfect means of doing complete justice. This it never attempts to accomplish, after judgment, in a matter where the court of law had concurrent jurisdiction, by declaring the judgment void, or setting it aside, but only by enjoining the party from proceeding. . . . And although some of the earlier decisions look almost like granting new trials in equity, in regard to all matters ad-

<sup>1</sup> It seems to have been definitely settled in Lord Coke's time. See *High on Injunctions*, sec. 84.

judicated at law where there has been surprise at the trial, or newly discovered evidence, the more recent and better considered cases will justify no such proposition. The new trial is never granted in terms. There can be in no such case anything like another trial in the court of law. The case is effectually ended there. But where there was a distinct and decided fraud in the proceedings by which the judgment at law was obtained, as by putting in testimony which the party believed to be false;<sup>2</sup> by giving no notice of the suit, or one calculated to mislead the defendant, and thus deprive him of an opportunity to be heard in the trial at law; or in any similar mode, making the trial at law fictitious and fallacious, and also where the defendant at law, through accident and mistake, and without default in the proper degree of watchfulness and care required of careful men in their own concerns of equal importance, fails to present his defense fully; courts of equity will, in their discretion, grant relief by re-examining the case upon its merits, and either enjoining the party from pursuing the judgment at law, or, where some portion of the claim is due, granting such an injunction as to a portion of it; or upon condition that the plaintiff shall pay into court whatever sum is due upon the judgment with reasonable costs."<sup>3</sup>

The foregoing applies only to judgments at law. It had no application where relief was sought against judgments other than at law. Such judgments in many cases execute themselves, or more correctly, require no execution, and hence it would be of no manner of use to enjoin the parties from executing them. Thus, for example, where a decree quieting title, or a decree of divorce, is made, there is nothing to be done by the parties in the way of executing it, and consequently it would do no good to enjoin them from "executing" it. Relief can be regularly given only by setting the decree aside; and such was the practice.<sup>4</sup>

In California the rule laid down by Judge Story has no application even to judgments at law. The reason upon which the rule was founded, viz., that courts of law were of a jurisdiction entirely foreign to and independent of that of courts of equity, has ceased. With us both law and equity is administered by the same tribunal, proceeding according to one uniform system of practice, and both

<sup>2</sup> But see subdivision 1, section 304.

<sup>3</sup> Story's Equity Jurisprudence, secs. 1570, 1571, 1574.

<sup>4</sup> See Story's Equity Pleadings, secs. 403-420.

legal and equitable relief may be had in the same cause. Hence there is no difficulty in the action of a court of equity directly upon the judgment itself. And although in many cases relief may be had by enjoining the judgment, it is quite common to set such judgment aside and grant a new trial. This is productive of no conflict of jurisdiction for the reason above stated, and because the action must be brought in the court which rendered the judgment.\*

§ 302. **Same Subject Continued—Scope of Chapter.**—As stated in the preceding chapter, superior courts in California, in the exercise of their equitable jurisdiction, may, in proper cases, grant relief against a judgment, whether at law or in equity. This may be done by enjoining its execution, by adjudging the creation of a trust thereby, or by setting it aside altogether and granting a new trial, according to the exigencies of the particular case. The remedies may, therefore, be said to be to a certain extent concurrent—but only to a certain extent. The remedy by injunction and that of declaring a trust is much more extensive in its action than that by action to set aside. Proceedings may be enjoined before a judgment has been rendered,<sup>1</sup> or after judgment has been rendered, the subsequent proceedings may be enjoined for a cause not affecting the validity of the judgment as rendered. Thus a party may be enjoined from executing a judgment upon a particular piece of property,<sup>2</sup> or because it has been satisfied,<sup>3</sup> or become barred by lapse of time.<sup>4</sup> In the language of Story: “Injunctions of this sort are sometimes granted to stay trial; or after verdict, to stay judgment; or after judgment, to stay execution; or if execution has been affected, to stay the money in the hands of the sheriff; or, if part only of the judgment debt has been levied by a *pieri facias*, to restrain the suing out of another *fi. fa.* or a *ca. sa.*

\* See section 305, *post*.

<sup>1</sup> See *High on Injunctions*, c. 2.

<sup>2</sup> *Instances*: *Low v. Henry*, 9 Cal. 538; *Macovich v. Wemple*, 16 Cal. 104; *Englund v. Lewis*, 25 Cal. 337; *Marriner v. Smith*, 27 Cal. 649; *Seaton v. Son*, 32 Cal. 481; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Peck v. Strauss*, 33 Cal. 678; *S. F. & N. P. R. R. Co. v. Bee*, 48 Cal. 398; *Bracia v. Nelson*, 42 Cal. 107.

As to actions by creditors to enjoin judgments fraudulently suffered by debtor, see note 22 to section 339.

<sup>3</sup> As to which see *Story's Equity Jurisprudence*, sec. 876; *Meyer v. Tully*, 46 Cal. 70; *Wood v. Currey*, 49 Cal. 359. Satisfaction by subsequent agreement. *Ransom v. Farish*, 4 Cal. 386; but compare *Mitchell v. Hackett*, 14 Cal. 661. As to subrogation, see *Coffee v. Tevis*, 17 Cal. 239.

<sup>4</sup> *Stout v. Macy*, 22 Cal. 647, and see *Bensley v. Mountain Lake Co.*, 13 Cal. 306, 73 Am. Dec. 575.

according to the exigencies of the particular case.”<sup>5</sup> And where the judgment or order assailed is of such a character that an injunction cannot be interposed, and it cannot properly be set aside, the court may, nevertheless, for the purpose of preventing an inequitable advantage, adjudge the beneficiary thereunder to be a trustee for the defrauded party.<sup>5a</sup> But it is obvious that a judgment cannot be set aside and a new trial ordered until after rendition, and then only for causes which directly affect its validity or for causes which are well-defined statutory grounds.<sup>5b</sup>

This treatise has to do only with the different modes of attack upon judgments. It is not within its scope to consider injunctions upon proceedings before judgment, or upon subsequent proceedings not affecting the validity of the judgment. Accordingly this chapter will be confined to a consideration of the cases in which a separate action may be maintained to set aside a judgment at law, or a decree in equity, or to enjoin it for causes affecting its validity.

**§ 303. Cases in Which Relief may be Had in Equity Against Judgments and Decrees.**—The general principle was stated by Marshall, C. J., delivering the opinion in *Marine Ins. Co. v. Hodgson*,<sup>1</sup> as follows: “Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of

<sup>5</sup> Story's Equity Jurisprudence, sec. 874.

<sup>5a</sup> See *Campbell etc. v. Campbell*, 152 Cal. 201, 92 Pac. 184.

<sup>5b</sup> Relief by motion is hereafter considered. The most prolific source of equitable attacks upon judgments is fraud, and fraud is not a ground for relief under either section 473 or section 657, Code of Civil Procedure.

<sup>1</sup> 7 Cranch (U. S.), 336, 3 L. ed. 362. In *Quinn v. Wetherbee*, 41 Cal. 247, the supreme court of California, per Temple, J., stated the rule as follows: “There seems to be no conflict in the authorities as to the principles upon which courts of equity interfere to grant relief against judgments recovered at law. It must

appear that the party could not avail himself of his defense in the action at law, or that he was prevented from doing so by fraud, accident, or mistake, without fault or negligence on his part.” And see *Champion v. Woods*, 79 Cal. 17, 12 Am. St. Rep. 126, 21 Pac. 534, where the court said: “If the judgment has been brought about by the carelessness of the injured party, he will not be relieved therefrom.” And see *Curtis v. Schell*, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951, and *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317, where similar *dicta* were made use of.

And see section 304, *post*, subdivisions 2 and 3.

which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." This statement of the general rule was approved in several subsequent cases by the court of which the distinguished judge was so long an ornament;<sup>2</sup> it was adopted by Story in his work on Equity Jurisprudence,<sup>3</sup> and has been approved by other writers;<sup>4</sup> and it is believed to be correct. Aside from the fact that the judgment must be "against conscience" (which is considered elsewhere<sup>5</sup>), the essential element of the statement above quoted is the inability of the party to present the matter, upon which he founds his claim for relief in equity, to the consideration of the tribunal which rendered the judgment. Such inability is the corner-stone upon which the jurisdiction of courts of equity in such cases is founded. It may arise from some limitation upon the power of the tribunal which rendered the judgment, or it may be the result of some fraudulent act or omission of the prevailing party, or of some accident or mistake which ordinary prudence could not have guarded against.<sup>6</sup> The cases covered by the general principle above stated may conveniently be divided in the following classes, subject to the limitations stated in the next section.

1. *Inability of the Tribunal to Give Relief.*—Applications for relief upon this ground were very common where law and equity were administered by separate and independent tribunals. But even under those conditions the mere fact that the jurisdiction of the tribunal entering the judgment was defective did not justify the interference of equity.<sup>7</sup> The party applying for relief had to

<sup>2</sup> See *Crim v. Handley*, 4 Otto (U. S.), 658, 24 L. ed. 216; *Kibbe v. Benson*, 17 Wall. (U. S.) 628, 21 L. ed. 742; *Truly v. Wanzer*, 5 How. (U. S.) 142, 12 L. ed. 88; *Humphreys v. Leggett*, 9 How. (U. S.) 313, 13 L. ed. 145.

<sup>3</sup> See section 887.

<sup>4</sup> See *Freeman on Judgments*, 2d ed., sec. 486.

<sup>5</sup> See subdivision 4, section 304.

<sup>6</sup> In a late case the supreme court gave proper emphasis to the principle, so often overlooked, that the equitable jurisdiction of our courts is available in cases of pure mistake,

where such mistake is unmixed with fault or negligence traceable either to the petitioner or his agent, and is not limited to cases which rest upon fraud. *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317. And see cases there cited. It is probable, however, that the mistake here referred to is the mistake for which some other individual or official is responsible, and not the applicant for relief, who might apply for relief under section 473, Code of Civil Procedure, but this is not settled.

<sup>7</sup> *Story's Equity Jurisprudence*, sec. 898; *High on Injunctions*, sec. 88.



show in addition that he had a meritorious defense which he could not have presented to such tribunal. In California, where both law and equity are administered by the same tribunal, proceeding under one uniform system of rules, and where both legal and equitable relief may be had in the same action, there can seldom, if ever, be a case in which the party is prevented from obtaining relief, to which he is entitled, by reason of the defective jurisdiction of the court.

2. *Where There has Been No Valid Service of Summons.*—As shown in the next section where a judgment is void on its face, relief may be had at any time upon motion in the court which rendered the judgment, and such being the case, relief cannot be had in equity.\* The mere fact that the record does not affirmatively show service of summons does not make the judgment void on its face, because the presumption arising upon a record silent as to service is in favor of the court's jurisdiction.<sup>9</sup>

If the record, however, falsely recites service of summons, or if, in the case of a silent record, the fact is that no service of summons was made on the defendant, he may have an action in equity to set aside or enjoin the judgment, as, in such case, he has had no opportunity to present his defense, and can avail himself of the principle stated at the beginning of this section.

Whether the defendant can obtain relief in equity in spite of the fact that he might have obtained it by motion in the court rendering the judgment is discussed in subdivision 3 of the next section.

The want of a valid service of summons is a sufficient ground for relief although there be no fraud. But the two grounds frequently concur. The case of *Hayden v. Hayden*<sup>10</sup> is an instance of this. In that case the judgment was obtained upon a service by publication. The complaint alleged that the widow of a person who died the owner of certain real estate, well knowing that she was entitled only to an undivided interest therein, commenced an action against the other heirs, who were nonresidents of the state, to quiet her title to the whole property; that well knowing the residence of said heirs, and having previously written to them to say that the de-

\* See section 304, subdivision 3, post; and see *Logan v. Hillegass*, 16 Cal. 200; *Comstock v. Clemens*, 19 Cal. 77.

<sup>9</sup> In re *Eickhoff*, 101 Cal. 600, 33 Pac. 11; *Eickhoff v. Eickhoff*, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24.

<sup>10</sup> 46 Cal. 332.

ceased left no property, she made a false affidavit, to the effect that she did not know their residences, and thereby procured an order for publication of summons, without a direction for a deposit in the postoffice of a copy summons addressed to the heirs; and that the defendant took whatever rights they had with notice of the foregoing facts. Upon these facts the supreme court held that a proper case was presented for the interposition of equity.

It is a familiar rule that an appearance dispenses with service of summons, and by the ancient common law it made no difference that the appearance of the attorney was entirely unauthorized, provided there was no collusion between the plaintiff and the attorney, and the attorney was solvent and responsible. But so monstrous a doctrine could not stand the test of criticism, and it seems that in most of the United States a judgment obtained upon the unauthorized appearance of an attorney will be set aside in equity irrespective of the question whether the attorney is responsible or not.<sup>11</sup> In California the early case of *Suydam v. Pitcher*<sup>12</sup> seems to be in affirmance of the old rule. It does not distinctly appear from the report of the case whether the appearance was authorized or not. But the inference is that it was not. The supreme court reversed an order granting a motion to set aside, and Murray, C. J., delivering the opinion, said: "An appearance entered by attorney, *whether authorized or not*, is a good and sufficient appearance to bind a party, except in cases where fraud has been used, or it is shown that the attorney is unable to respond in damages." There is a *dictum* to the same effect in *Holmes v. Rogers*,<sup>13</sup> but no other case upon the precise point has been found.

Although there may be no actual fraud in connection with the rendition of a judgment *ex parte*, and without proper notice to the party interested, it is seldom the case that such a proceeding is free from constructive fraud. Thus in *Herd v. Tuohy*,<sup>14</sup> where there was an amendment to the original judgment, entered without notice, and *ex parte*, the court said:

"This, if not fraud, was one of those cases that, in the words of a leading authority, 'ought to be treated as fraud' (2 Daniells' Chancery Practice, 1584)—that is, it is a constructive or *quasi* fraud, having the actual consequences, and all the legal effects of fraud. Nor are courts, in granting relief against a judgment,

<sup>11</sup> See Freeman on Judgments, *sec.* 499.

<sup>12</sup> 4 Cal. 280.

<sup>13</sup> 13 Cal. 191.

<sup>14</sup> 133 Cal. 55, 65 Pac. 139.

confined to cases of fraud, actual or constructive. (Black on Judgments, section 380 et seq.) A judgment will never be interfered with for mere error of the court; but want of notice to the defendant, and his consequent inability to be heard against the ruling, may be a sufficient ground for equity to interpose, even where 'his failure to defend is not chargeable to the plaintiff,'; and *a fortiori*, where it is so chargeable."

Where it is sought, by motion, in the tribunal where it was rendered, to set aside a judgment for want of jurisdiction in failing to serve process, the moving party need go no further than proof of failure of service, unless it is sought to explain or excuse such failure, when, as a matter of course, he must meet such attempt; but when relief is sought in equity, by a separate suit, to evade the effect of a judgment rendered *ex parte*, or by default, for want of an opportunity to appear and defend, whether there was fraud or not, the complainant must aver and prove facts showing that he has a good defense on the merits.<sup>15</sup> In *Parsons v. Weiss*<sup>15a</sup> the rule was thus expressed:

"Courts of equity will relieve a party from an unjust judgment entered against him by another tribunal through fraud, or when, without service of process, either actual or constructive, no opportunity has been given him to be heard in his defense. (Eichhoff v. Eichhoff, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24.) . . . Equity will not, however, set aside the judgment merely upon the ground of some irregularity or defect in the service of process, unless there is also presented some equitable ground of relief. . . . A party who would invoke the aid of equity for relief from a judgment must not only set forth the matters wherein the judgment is unjust, or was fraudulently obtained, but he must also allege that he has a meritorious defense to the action."

3. *Where the Losing Party was Prevented from Presenting His Case by the Fraudulent Contrivance of His Adversary.*—If the losing party was prevented from presenting his claim or defense by the fraudulent contrivance of his adversary, the case clearly falls within the general principle stated at the beginning of this section. It is not every fraud, however, which is ground for relief in equity,

<sup>15</sup> Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Gibbons v. Scott, 15 Cal. 284; Logan v. Hillegass, 16 Cal. 200; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Eldred v.

White, 102 Cal. 600, 36 Pac. 944; Burbridge v. Rauer, 146 Cal. 21, 79 Pac. 526; and see section 304, subdivision 3, *post*.

<sup>15a</sup> 144 Cal. 410, 77 Pac. 1007.

but only a fraud by which the losing party *was prevented from presenting his case, without fault on his part*. As is shown in the next section, a court of equity cannot interpose if the matter was litigated before the tribunal whose judgment is complained of; or if it might have been litigated there by the exercise of due diligence, no matter how fraudulent the conduct of the prevailing party may have been. For this reason a judgment which is obtained on perjured testimony, suborned by the successful party, or upon forged documents, cannot be attacked in a court of equity if the losing party had an opportunity to contest the case.<sup>16</sup> But if the fraud was such as to prevent the losing party from presenting his case, and he was not guilty of negligence, he may have relief in equity. There are several illustrations of this in the California reports. Thus where a party, for a valuable consideration, released her cause of action, and promised to have her suit dismissed, and the defendant relying on such promise paid no further attention to the matter, and the plaintiff instead of dismissing the suit took judgment by default, and withheld execution until after the adjournment of the term, the judgment was perpetually enjoined.<sup>17</sup> So where a trustee secretly purchased obligations of his *cestui que trust*, and caused suit to be brought upon them in the name of another, and caused execution on the judgment in such suit to be levied on the trust property, it was held that execution of the judgment must be enjoined.<sup>18</sup> So where a decree is suffered by a guardian *ad litem* in fraud of the rights of infant heirs, it will be set aside in equity.<sup>19</sup> So where a party by means of a false affidavit evaded some of the steps necessary to a publication of summons, in consequence of which the defendants had no actual notice of the suit, it was held to be a proper case for the interference of equity.<sup>20</sup> So where a debtor suffers a collusive judgment for the purpose of defrauding his creditors, it will be enjoined at the suit of a creditor whether it was given by way of confession<sup>21</sup> or in a

<sup>16</sup> United States v. Throckmorton, 8 Otto (U. S.), 61, 25 L. ed. 93; and see Riddle v. Baker, 13 Cal. 295.

<sup>17</sup> McGregor v. Shaw, 11 Cal. 47; and compare Bidleman v. Kewen, 2 Cal. 248.

<sup>18</sup> Page v. Neglee, 6 Cal. 241.

<sup>19</sup> Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212; and look at Joyce v. Joyce, 5 Cal. 161; Bank of

United States v. Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890.

<sup>20</sup> Hayden v. Hayden, 46 Cal. 332.

<sup>21</sup> Ryan v. Daly, 6 Cal. 238; Scales v. Scott, 13 Cal. 76; Meeker v. Harris, 19 Cal. 278, 79 Am. Dec. 215; Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66. But see Richardson v. MacMillan, 6 Cal. 419, 65 Am. Dec. 521; Cordier v. Schloss, 12 Cal. 143; S. C., 18 Cal. 576; Pond v. Davenport, 44 Cal. 481.

regular action.<sup>22</sup> So where a party fraudulently altered a justice's docket so as to include a defendant who was not served with summons, and who did not appear at the trial, and was proceeding to execute such judgment, relief was granted in equity.<sup>22a</sup> So where an administratrix of an estate, "by false and fraudulent acts and proceedings," and by procuring the appearance of an attorney to represent the interested party, without authority, imposed upon the probate court, and procured a decree distributing to her the share of the estate belonging to him, relief was granted in equity.<sup>22b</sup> So where a plaintiff stipulated to dismiss an action against defendant, but fraudulently procured judgment without the latter's knowledge, the judgment was relieved against.<sup>22c</sup> So where a party was prevented by fraudulent and deceitful representations upon the part of plaintiff from interposing a meritorious defense, and lost the right to move for a new trial by similar means, it was held a proper case for relief in equity.<sup>22d</sup> So where, by means of false and fraudulent representations and the collusive assistance of a justice of the peace, a judgment was entered against defendant without his knowledge, it was held to be a proper case for the interposition of equity.<sup>22e</sup> So in other cases.<sup>22f</sup>

It seems that fraud in obtaining probate of a will constitutes an exception to the general rule that judgment may be set aside

<sup>22</sup> *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519; *Crane v. Hirschfelder*, 17 Cal. 467. The theory upon which actions by a creditor to enjoin a fraudulent judgment suffered by a debtor are maintained is that there will not be enough property left to pay the creditor's claim. None but a creditor can maintain the suit. *Lee v. Fig*, 37 Cal. 328, 99 Am. Dec. 271. And it is held in California that the creditor must either have reduced his claim to judgment and had execution issued thereon and returned unsatisfied, or must have levied an attachment. See *Thornburgh v. Hand*, 7 Cal. 554; *Castle v. Bader*, 23 Cal. 75; but compare *Freeman on Judgments*, sec. 94. It would seem, however, that where the suit is by an attaching creditor it must be shown that the debtor is insolvent. See *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519; *Domec v. Stearns*, 30 Cal. 114; *Scales v. Scott*, 13 Cal. 76; *Baker v. Bartol*, 6 Cal. 483. As to whether tak-

ing judgment before it is due or for more than is due is fraud, see on the one hand, *Patrick v. Montader*, 13 Cal. 434; *Brewster v. Bours*, 8 Cal. 501; *Gamble v. Voll*, 15 Cal. 507; *Murdock v. De Vries*, 37 Cal. 527; *Pond v. Davenport*, 44 Cal. 481; and on the other, *Taafé v. Josephson*, 7 Cal. 352; *McKenty v. Gladwin*, 10 Cal. 227; *Scales v. Scott*, 13 Cal. 76.

<sup>22a</sup> *Chester v. Miller*, 13 Cal. 558.

<sup>22b</sup> *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232; and see *Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853, where a trust was declared under similar circumstances.

<sup>22c</sup> *Cal. Beet Sug. Co. v. Porter*, 68 Cal. 369, 9 Pac. 313.

<sup>22d</sup> *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752.

<sup>22e</sup> *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786.

<sup>22f</sup> See cases cited in note 19 et seq., above; and cases cited in notes below, and in section 304, as to extrinsic fraud.

for fraud. This was held by the supreme court of California in *State v. McGlynn*.<sup>23</sup> The same doctrine was laid down by the supreme court of the United States to which the case was taken, the latter court saying: "It is undoubtedly the general rule established both in England and in this country that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Kerrick v. Bransby*,<sup>24</sup> decided by the house of lords in 1727, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence is that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master and subject to all manner of claims, should at once devolve to a new and competent ownership, and consequently that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud, and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. The objects are generally accomplished by the constitution and powers which are given to the probate courts and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief."<sup>25</sup>

<sup>23</sup> 20 Cal. 233, 81 Am. Dec. 118.

<sup>24</sup> 3 Brown Parl. C. 388.

<sup>25</sup> Case of *Broderick's Will*, 21 Wall. 509, 22 L. ed. 599. But in one case (*Barnesley v. Powell*, 1 Ves. Sr. 284), while recognizing want of jurisdiction to set aside the probate of a will, an English court of chancery decreed the party claiming under such probated will to go into the probate court and consent to the probate being set aside. And

it has sometimes been decreed by courts of chancery, in their efforts to defeat fraudulent practices, that parties claiming under fraudulent wills be deprived of the benefit thereof by decreeing that such parties shall hold the property under the will in trust for the rightful beneficiaries. *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118. This is not very efficacious, however, since it can only affect personal estate.

Of the later cases, *McDaniel v. Pattison* <sup>25a</sup> was a suit in equity to annul certain alleged fraudulent deeds executed by plaintiffs, who claimed interests in the property conveyed both as heirs and as devisees; the supreme court reversed the judgment and order of the lower court with directions to allow the plaintiffs to amend their complaint if so advised, so as to appear solely as heirs, and not as devisees, holding that if the suit was under the will, and the plaintiffs proposed to maintain it as devisees under the will, the court of equity was without jurisdiction, the jurisdiction of the probate court in the matter of the proving and establishment of the will being exclusive, even though, as in the case at bar, the will itself had been lost and destroyed.

In *Langdon v. Blackburn* <sup>25b</sup> it was specifically held that equity was without jurisdiction to charge an executor of a will, or a legatee thereunder, with a trust in favor of a third person claiming to have been defrauded by a forged and fraudulent will, the court of probate possessing exclusive jurisdiction of the subject matter.

But where collusion was charged between the administrator and the probate judge it was held the heirs could maintain a suit in equity to have certain of the proceedings set aside.<sup>26</sup> And where an estate had no valid title to certain lands, but had the appearance of title, and was carried into the probate court by certain parties who combined together for the purpose of getting an order of sale of the property to pay certain fraudulent claims which they set up, it was held that the real owner of the property was entitled to have the sale enjoined to prevent a cloud being cast upon his title.<sup>27</sup>

Aside from matters relating to the probate of a will, however, there seems to be no doubt that courts of equity may exercise the jurisdiction here outlined in dealing with probate decrees in general.<sup>27a</sup> Section 1666, Code of Civil Procedure, relating to the

<sup>25a</sup> 98 Cal. 86, 27 Pac. 651, 32 Pac. 805. See in this case the very interesting dissenting opinion of the learned chief justice (Beatty), acquiesced in by Justice De Haven, on the distinction suggested by the court between heirs and devisees.

<sup>25b</sup> 109 Cal. 19, 41 Pac. 814. It was conceded, though not decided, in this case that equity had jurisdiction to set aside probate judgments and decrees other than the probate of a will for extrinsic and collateral

fraud. See, also, *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49.

<sup>26</sup> *Sandford v. Head*, 5 Cal. 297.

<sup>27</sup> *Larue v. Friedman*, 49 Cal. 278.

<sup>27a</sup> See *O'Connor v. Flynn*, 57 Cal. 293; *Olivas v. Olivas*, 61 Cal. 382; *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232; *Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853; *Buckley v. Superior Court*, 102 Cal. 6, 41 Am. St. Rep.

conclusiveness of probate decrees, has been construed as providing merely against collateral attack, or attack otherwise than by appeal, and not to interfere with the constitutional jurisdiction of courts of equity, or rather of the courts sitting in equity.<sup>27b</sup> A potent reason for the interference of equity in probate matters on the ground of fraud is to be found in the fact that the probate court does not, except in the single matter of attacks upon wills, possess the requisite machinery for dealing with questions of this description; while it has always been the peculiar province of courts of equity to protect the litigant from injustice and fraud perpetrated under the guise of legal forms.<sup>27c</sup>

In all cases where the aid of a court of equity is sought on the ground of fraud the facts constituting the fraud must be set out; a general averment of fraud is insufficient.<sup>28</sup> General averments are seldom more than mere conclusions of the pleader. They embrace nothing that may be regarded as issuable. They are not substantive in character, facts, which, if admitted by demurrer, would sustain a judgment. The use of the words "fraudulent and corrupt," without making some specific application thereof amount to nothing. In the case of *Van Weel v. Winston*,<sup>28a</sup> the supreme court of the United States, passing on this question, said:

"It [the bill in equity] is full of the words 'fraudulent and corrupt,' and general charges of conspiracy and violation of trust

135, 36 Pac. 360; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Campbell etc. v. Campbell*, 152 Cal. 201, 92 Pac. 184; and see cases cited below.

In *Sohler v. Sohler*, *supra*, the court seemed to take the ground that a decree of distribution could not be set aside, but the distributees would be held to be trustees. But see *Bacon v. Bacon* as to this point.

<sup>27b</sup> To hold otherwise would be to hold that section 473, California Code of Civil Procedure, would also be ineffectual to provide relief. See *Estate of Hudson*, 63 Cal. 454; *De Pedrorrena v. Superior Court*, 80 Cal. 144, 22 Pac. 71; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317.

<sup>27c</sup> See *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760; *Curtis v. Schell*, 129 Cal. 208, 79 Am. St. Rep. 107.

The reason for excepting wills from the operation of the rule was described by Chief Justice Beatty in *Bacon v. Bacon*, *supra*, as having been generally declared to be "unsatisfactory and illogical," but that the discussions with reference thereto usually end with the statement that it is firmly established and must be adhered to.

<sup>28</sup> *Kinder v. Macy*, 7 Cal. 206; *Meeker v. Harris*, 19 Cal. 278, 79 Am. Dec. 215; *Castle v. Bader*, 23 Cal. 75; *Harwood v. Railroad Co.*, 17 Wall. (U. S.) 81, 21 L. ed. 558; *United States v. Atherton*, 12 Otto (U. S.), 372, 26 L. ed. 213; but look at *Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

<sup>28a</sup> 115 U. S. 228, 6 Sup. Ct. Rep. 22, 29 L. ed. 384; and see, also, *Heiler v. Dyerville*, 116 Cal. 127, 47 Pac. 1016.



obligations, mere words in and of themselves, and even as qualifying adjectives of more specific charges are not sufficient grounds of equity jurisprudence, *unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief.*"

4. *Newly Discovered Evidence.*—It is stated by Story that newly discovered evidence is one of the grounds upon which a decree in equity may be set aside on a bill of review,<sup>29</sup> and that "the ground for a bill to obtain a new trial after judgment in an action at law must be such as would be the ground for a bill of review of a decree in a court of equity upon the discovery of new matter."<sup>30</sup> An instance where such a bill was maintained is to be found in the case of *Easley v. Kellom*,<sup>31</sup> decided by the supreme court of the United States. There appears to be no good reason why the rule in this regard prevailing in other courts should not prevail in the courts of California. No case has been found in our reports, however, in which relief has been granted in equity upon the sole ground of newly discovered evidence. But there are several cases in which the existence of the rule has been recognized, although relief was denied because the facts presented did not warrant it. Thus in *Buckelew v. Chipman*,<sup>32</sup> relief was refused because the newly discovered evidence was not of a conclusive character. In *Butler v. Vassault*,<sup>33</sup> it was held that diligence must be shown, and that a general averment that the party had used diligence was not sufficient. In *Mulford v. Cohn*,<sup>34</sup> the showing was held to be insufficient, and Baldwin, J., delivering the opinion, said: "It must be shown distinctly in such a bill that the facts are of controlling force; that they were not known to the defendants at the time of the trial; that the defendants used all proper diligence in preparing their case for trial, and to procure the evidence, and that they were unable without fault or negligence on their part to procure it; that the testimony is now within

<sup>29</sup> Story's Equity Pleading, 9th ed., sec. 412 et seq.

<sup>30</sup> Story's Equity Jurisprudence, 12th ed., sec. 888; and see High on Injunctions, sec. 87.

<sup>31</sup> 14 Wall. (U. S.) 279, 20 L. ed. 890; and see *Davis v. Tileston*, 6 How. (U. S.) 116, 12 L. ed. 366.

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<sup>32</sup> 5 Cal. 399; and see *Southard v. Russell*, 16 How. (U. S.) 569, 14 L. ed. 1062.

<sup>33</sup> 40 Cal. 74. In like manner a general averment of ignorance is insufficient. *Harwood v. Railroad Co.*, 17 Wall. (U. S.) 81, 21 L. ed. 558; *Stokes v. Geddes*, 46 Cal. 17.

<sup>34</sup> 18 Cal. 42; and see *Allen v. Currey*, 41 Cal. 318.

their control, and that they will be able to procure it on another trial. The bill should state particularly the facts to be proved, the names of the witnesses, and show the bearing and relevancy of the proposed proofs. It should also show when and how the facts discovered came to the knowledge of the plaintiffs, and why no motion for a new trial was made in the court trying the case and before lapse of the term."

The requirements stated in the foregoing extract are the same (except as to the time and form of the application) as are essential to a showing on a motion for new trial on the ground of newly discovered evidence. And it is thought that where the newly discovered evidence is such that a motion for new trial would have been granted if it had been made in time, and the losing party has not been guilty of laches in bringing his suit, relief will be granted in equity. And, on the contrary, if the evidence is such as might, with due diligence, have been presented at the original trial, or the failure to produce the evidence was not traceable to any fraudulent or corrupt act or practice of the successful party or his agents, or if it does not appear with reasonable certainty that a result more favorable to the losing party than the judgment sought by him to be set aside, or there is any indication of laches on his part, relief will not be granted.<sup>34a</sup> The relief offered under the provisions of section 657 of the Code of Civil Procedure is of so liberal a character that nothing short of a showing of absolute fraud, extrinsic in character, and therefore collateral to the original inquiry, will be held to justify a court of equity in granting a practical extension of that relief.<sup>34b</sup>

The rules governing motions for new trial on the ground of newly discovered evidence have been considered in another part of this treatise.

5. *Accident or Surprise Which Ordinary Prudence Could not have Guarded Against.*—Where a party is prevented from presenting his claim or defense by some accident or surprise which ordinary prudence could not have guarded against, the case comes within the general principle stated at the beginning of this section. The

<sup>34a</sup> See *Davis v. Chalfant*, 81 Cal. 627, 22 Pac. 972; *In re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; *Whitney v. Kelley*, 94 Cal. 146, 28 Am. St. Rep. 106, 29

Pac. 624, 15 L. R. A. 813; *Steen v. March*, 132 Cal. 616, 64 Pac. 994; *Painter v. Painter*, 133 Cal. 129, 65 Pac. 311.

<sup>34b</sup> See section 304, *post*, as to the doctrine of extrinsic fraud.

rule is laid down by Story, as follows: "In general it may be stated that in all cases where by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained."<sup>25</sup> This language was quoted with approval in *Bibend v. Kreutz*.<sup>26</sup> In that case the facts were as follows: The complainant in the equity suit was a German, understanding little of the English language and nothing of the forms of law. Upon being served with summons in an action brought against him he employed an attorney to defend him, and in due course judgment was rendered in his favor. His attorney then told him that the matter was at an end and he paid no further attention to it, and knew nothing of the appeal, which was taken, or of any of the subsequent proceedings. On appeal the judgment was reversed, and upon the coming down of the *remittitur* an order was made that the defendant should answer within ten days. No personal notice was given of this order, and judgment was taken by default. In the meantime the defendant had removed from the county and his attorney had left the state. The first information he had of the judgment was a telegraphic despatch, received after the adjournment of the term, saying that execution had been levied upon his property. Upon these facts, coupled with a showing as to merits, the supreme court held that the judgment should be set aside on the ground of surprise.

So where, in an action in a justice's court, a defendant answered, the case was set for trial, and, on the morning of the trial, an agreement was entered into between the parties for a transfer of the cause, but the plaintiff, in collusion with the justice, procured a judgment to be entered without the knowledge of the defendant, who permitted the time to pass within which an appeal might have been taken and prosecuted to the superior court, in the belief, fostered by divers representations on the part of plaintiff's attorneys, that steps were being taken to transfer the cause in accordance with the agreement that had been entered into, and that, in

<sup>25</sup> Story's Equity Jurisprudence, 12th ed., sec. 885; see, also, High on Injunctions, sec. 119 et seq., and Freeman on Judgments, sec. 500.

<sup>26</sup> 20 Cal. 109; and see *Metcalf v. Williams*, 14 Otto (U. S.), 93, 26 L. ed. 665.

the meantime, the litigation remained in the condition it was in when the case was set for trial. It was held that such a judgment, so entered, was the result of a fraud against which defendant could not with reasonable prudence have guarded against, and that equity would intervene to enjoin its enforcement.<sup>36a</sup>

But in every case where application is made for relief in equity it must be shown that the applicant has exercised due diligence. If he has not, relief cannot be granted him. In *Borland v. Thornton*<sup>37</sup> the facts were as follows: Borland was served with summons in San Joaquin county, the action being pending in the court at Stockton in said county. He sent the copy of summons and complaint to his attorneys at Sacramento with such information as he thought necessary to enable them to put in an answer. The attorneys thought it advisable to see Borland before putting in an answer, and drew a demurrer (which, however, was without merit), and sent it to attorneys of their acquaintance at Stockton with a request to have the demurrer served and filed, and to obtain time to answer if it should be overruled. The Stockton attorneys saw the plaintiff as soon as business engagements permitted, but in the meantime the demurrer had been overruled and judgment by default taken. Upon these facts the supreme court held that equity could not interfere. In *Mastick v. Thorp*,<sup>38</sup> the facts were as follows: The applicant for relief purchased a lot of land, concerning the title to which a suit was pending between his grantor and other persons. The purchaser knew of the existence of the suit, but neither requested the attorneys of his grantor to continue to look after the case nor employed any other attorney, and no one appearing on his behalf at the trial, judgment went against him. Thereupon he brought suit for relief in equity on the ground that he had no knowledge of the trial, and supposed the former attorneys would continue to look after the case, and that he had a good defense. But the supreme court held that there had been gross negligence, and that relief could not be granted.<sup>39</sup>

<sup>36a</sup> *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786. And see *Merrill v. First Nat. Bank*, 94 Cal. 59, 29 Pac. 242; *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777; and *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081. Cases of accident, surprise, etc., are sometimes not distinguishable in principle from cases where the judgment was taken without notice. For exam-

ple, the case of *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232, presents a state of facts similar in detail to the cases cited in the text. See, also, *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317.

<sup>37</sup> 12 Cal. 440.

<sup>38</sup> 29 Cal. 444.

<sup>39</sup> See, also, *Boston v. Haynes*, 33 Cal. 31; *Crim v. Handley*, 4 Otto (U. S.), 659, 24 L. ed. 216.

The rules governing applications for relief in equity upon the ground of accident or surprise, etc., seem to be substantially the same, except as to the time and form of the application, as where a motion for new trial upon the same ground is made in the court in which the action is pending. Where, therefore, a motion for new trial upon the ground of accident or surprise has been granted, if made in time, but the time to move has gone by without laches on the part of the losing party, and there is a meritorious claim or defense, equity will grant relief. The subject of motions for new trial upon this ground has been considered in another part of this treatise.

**§ 304. Limitations upon the Power of a Court of Equity to Grant Relief.**—The general principle upon which courts of equity grant relief against judgments, and the classes of cases in which such relief is granted, have been considered in the preceding section. What is there said must be taken subject to the limitations stated herein. These limitations apply equally, whether the action is for relief against a judgment at law or a decree in equity. They are as follows:

1. *No Relief can be Granted Where the Matter upon Which the Claim to Relief is Founded was Litigated in the Original Action.*—There must be an end of litigation, and there never would be, if a party could retry upon a bill in equity what had been already tried in a court of competent jurisdiction. For he could, with equal reason, bring a second bill to review the conclusion arrived at on the first, and so on *ad infinitum*. Accordingly, it is agreed by writers of authority that a bill in equity cannot be maintained to set aside or enjoin a judgment for mere errors of law or fact, however gross.<sup>1</sup> The rule has been frequently laid down by the supreme court of the United States,<sup>2</sup> and prevails in California. Thus in *Collins v. Butler*,<sup>3</sup> where the losing party in an action of trespass, after appealing to the supreme court with-

<sup>1</sup> See Story's Equity Jurisprudence, sec. 984; Freeman on Judgments, sec. 487; High on Injunctions, secs. 96, 129, 180.

<sup>2</sup> *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.), 336, 3 L. ed. 362; *Ballance v. Forsyth*, 24 How. (U. S.) 183, 16 L. ed. 733; *Tilton v. Coffield*, 3 Otto (U. S.), 167, 23 L. ed. 858; *Crim v. Handley*, 4 Otto (U. S.), 658,

24 L. ed. 216; *United States v. Throckmorton*, 8 Otto (U. S.), 61, 25 L. ed. 93.

<sup>3</sup> 14 Cal. 223; see, also, *Shinn v. Young*, 57 Cal. 525; *Barnett v. Kilbourne*, 3 Cal. 327; and look at *Riddle v. Baker*, 13 Cal. 295; *Daly v. Pennie*, 86 Cal. 552, 21 Am. St. Rep. 61, 25 Pac. 67; *Wickersham v. Comerford*, 104 Cal. 494, 38 Pac. 101.

out success, brought a suit in equity to have the judgment set aside for reasons which had been litigated in the original action, the bill was ordered dismissed, and Baldwin, J., delivering the opinion, said: "We do not think it can seriously be contended that chancery will give relief by way of appeal from the law side of the district court, much less from the judgment of this court, upon the same facts passed upon in judgment by the law court and this court. The district court, sitting upon the trial below, had full power to act in the premises; and this matter, if sufficient at all, was matter for relief at law. There can in such case be as little necessity as authority for the interposition of a court of equity. Litigation would be unnecessarily protracted, if in every case in which a party moved for a new trial and failed, he could then upon the same facts apply to the same judge for an injunction, and retry his case in equity; and there would be a singular inconsistency in holding that the same judge, with full jurisdiction and capacity to pass upon given facts, and grant the appropriate relief, should apply one measure of relief or one set of rules in one character, and another and different measure or set in another character."

In the foregoing case relief was sought against a judgment at law. The same rule applies where relief is sought against a decree in equity. In *Allen v. Currey*<sup>4</sup> the facts were as follows: Currey brought a suit in equity to have Allen declared a trustee and for a conveyance. Upon the trial of this suit the question was whether, in bidding in the property at an execution sale, Allen acted for himself or as Currey's agent. Upon this question both parties testified, and judgment was given for Currey. Allen moved for a new trial, and appealed to the supreme court without success. He then brought a suit in equity to have the decree set aside on the ground that since the trial he had ascertained that many months prior thereto, Currey had admitted to one Emeric that Allen was not acting as his agent. The supreme court held that the suit could not be maintained for several reasons, one of which was that the question had been litigated in the former suit, and Crockett, J., delivering the opinion, said: "It is not pretended that any new fact has occurred since the former trial to vary the rights of the parties, nor that the plaintiff was then ignorant of

<sup>4</sup> 41 Cal. 318; and see *Southard v. Russell*, 16 How. (U. S.) 547, 14 L. ed. 1052. And the same rule has been

applied in probate matters. See *In re Griffith*, 84 Cal. 107, 23 Pac. 525, 24 Pac. 381.

the facts of the transaction. All that he has since discovered is some additional testimony tending to sustain his theory of the facts, and to rebut that of the defendant. But it is quite evident that if a judgment could be set aside as fraudulent on such a showing as this, litigation would be interminable. If on another trial the plaintiff should still fail to maintain his case, he might on the same theory thereafter institute a new action on the discovery of additional evidence, and so on *ad infinitum*. If the losing party were permitted to assail the judgment as fraudulent, on the ground that his adversary knew the facts to be as he claimed them to be at the trial, and failed to disclose them, and that he has since discovered some additional evidence tending to prove them, a judgment instead of being a 'final determination of the rights of the parties,' as defined by the statute, would be little else in its legal effect than an order to show cause why it should not be set aside."

The same doctrine was laid down by the supreme court of the United States in the case of *United States v. Throckmorton*.<sup>\*</sup> That was a bill brought in the United States circuit court to set aside a confirmation of a claim under a Mexican grant by the board of land commissioners, and the decree of the United States district court approving such confirmation. The bill charged that the person whose claim had been so confirmed had procured the confirmation upon documents which he had fraudulently caused to be antedated, and upon perjured testimony suborned by him. Such documents and testimony, however, were passed upon by the tribunals whose decisions were sought to be set aside, and mainly upon this ground the supreme court held that the bill could not be maintained, and Miller, J., delivering the opinion, said: "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest, reipublicae, ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa*. . . . But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception prac-

<sup>\*</sup> 8 Otto (U. S.), 61, 25 L. ed. 93.

ticed on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. (See Wells on Res Adjudicata, sec. 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. Ch. 320; *De Louis v. Meek*, 2 Iowa, 55.) In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud, practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. . . . We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying every case in which the judgment or decree was rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterward ascertained to be forged or fraudulent, would be greater by reason of the endless nature of the strife than any compensation arising from doing justice in individual cases."

The principle enunciated in the Throckmorton case has served as a guide throughout the years since the great jurist (Justice Miller) gave expression to it. So clear and comprehensive is the language used that it leaves nothing uncovered in the entire scope of its application in equity jurisprudence. It may not be out of place, how-



ever, to quote from some of the decisions which were made upon the authority of that case. Referring to that portion of the Throckmorton decision where it is said, "The acts for which a court of equity will, on account of fraud, set aside or annul a judgment," etc., the California supreme court, in *Re Griffith*,<sup>5a</sup> said: "The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy." So in *Pico v. Cohn*,<sup>5b</sup> where relief in equity was sought from a judgment alleged to have been obtained by forged documents, perjured testimony, and by bribing a witness to swear falsely, the court said:

"That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of the rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. . . . In all such instances the successful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or the falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong

<sup>5a</sup> 84 Cal. 107, 23 Pac. 528, 24 Pac. 381. See, also, *Weir v. Vail*, 65 Cal. 466, 4 Pac. 422; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9

Pac. 313, where the *Throckmorton* case was also followed.

<sup>5b</sup> 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336.

in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evils to be remedied. Endless litigation in which nothing was ever determined would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based upon perjured testimony; for if this could be done once, it could be done again and again *ad infinitum*."

In *Dunlap v. Steere*<sup>60</sup> the following language was used, expressive not only of the principle involved, but of the application to the particular facts, and the facts themselves:

"It is claimed, however, that the fraud here complained of is concluded by the judgment itself; that whether the defendant had a good title to the land in controversy was the very matter involved in the former action, and the judgment therein is conclusive upon the plaintiff; and in support of that, the case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, and other similar cases, are cited. But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs. The case just mentioned was one in which a retrial of an action which had been once fully tried was asked, and can have no kind of bearing here, where the plaintiff never had his day in court, or any opportunity to make his defense to the false and

<sup>60</sup> 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361. In this case, quoting from *Tomkins v. Tomkins*, 11 N. J. Eq. 512, it was said: "The usual ground upon which a court of equity refuses to interfere with a judgment is because the defendant should have protected himself in the court where the judgment was obtained." And quoting from *Irvine v. Leyh*, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10, as follows: "The principle thus so strongly stated [referring to the *Throckmorton* case] in the cases cited proceeds upon the ground that the party had an opportunity to appear and interpose the defense in the suit in which the judgment complained of was rendered. The cases before cited are those in which the

defendant in the first suit appeared, or had actual notice of the suit, and might have interposed the fraud as a defense. In all such cases the issues made by the pleading, or which might have been made, are justly regarded as settled and merged in the judgment, leaving collateral matters only open to investigation. But in our opinion, the rule of the cases cited cannot be applied in all its strictness to a case where the defendant has been brought in by a newspaper notice only, and had no actual notice of the suit, and, as a consequence, had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application."

fraudulent claim upon which the judgment against him was based. Not having any knowledge of the pendency of that action, it was an absolute impossibility for him to protect his rights therein, and his failure to defend was not a negligent omission on his part. It is this difference in the facts which brings the plaintiff here within the exception to the general rule which was acted upon in *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93."

In *Fealey v. Fealey*,<sup>54</sup> it was said:

"The demurrer to the complaint ought to have been sustained. The fraud which is set forth as the basis of the plaintiff's cause of action relates to the alleged falsity of defendant's statement made in her petition for the order setting aside the homestead, and again repeated in her testimony upon the hearing of such petition, concerning the nature of the title to the land set apart to her as a homestead; but the question of title thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. The plaintiff had notice of the pendency of that proceeding, and no fraud was practiced upon her by which she was prevented from appearing therein and contesting the allegation of defendant's petition, or showing that the testimony given by her was unworthy of credit. Under these circumstances that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved and settled by that judgment. The case made by the complaint here falls exactly within the rule declared in *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Griffith's Estate*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381, and *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336."

In *Langdon v. Blackburn* <sup>55</sup> it was said:

"The cases in which a court of equity is authorized to interfere and set aside a former judgment on the ground of fraud are those only where the fraud was extrinsic and collateral to the matter

<sup>54</sup> 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49.

<sup>55</sup> 109 Cal. 19, 41 Pac. 814.

tried." Citing authorities cited in preceding quotation from *Fealey v. Fealey*.

Similar language was used in *Hanley v. Hanley*,<sup>48</sup> *Estudillo v. Security etc. Co.*,<sup>49</sup> *Bacon v. Bacon*,<sup>50</sup> and in *Flood v. Templeton*,<sup>51</sup> a comparatively recent decision, the court said:

"The rule is well settled in this state as to when equity will or will not relieve a party from the effect of a judgment claimed to have been obtained by fraud. The rule is that it will not relieve when the fraud charged relates to matters upon which the judgment was regularly obtained and where an opportunity was given to the party against whom it was entered to contest the matters in issue, or present any defense which was available; fraud which was directed to or bore upon the claim or issue which was before the court for determination, as when a judgment is entered upon a fraudulent claim, or is procured by false testimony, where the party had an opportunity to be heard as to these matters. This is the rule laid down in *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, denying the right to relief when the fraud is of that character, and is the rule followed and applied in this state in the cases of *In re Griffith*, 84 Cal. 107, [23 Pac. 528, 24 Pac. 381], and *Pico v. Cohn*, 91 Cal. 129 [25 Am. St. Rep. 159, and note, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336]. This rule, however, has no application to extrinsic or collateral fraud, which is defined to be 'actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.' (*Patch v. Ward*, L. R. 3 Ch. App. 207.) In the *Throckmorton* case the supreme court of the United States, after laying down this general rule to which we have referred, declares what constitutes collateral fraud and the right of a party to be relieved from a judgment obtained through it. [Quoting as above.] . . . Such fraud operates not upon matters pertaining to the judgment itself, but to the manner in which it is procured.

<sup>48</sup> 114 Cal. 690, 46 Pac. 736. In this case, besides citing the cases above referred to, the court referred to *Gruwell v. Seybolt*, 82 Cal. 7, 22 Pac. 938, where it was held that in the absence of fraud or device resorted to to prevent the prosecution of an appeal from a decree setting

apart a homestead, such a decree was conclusive. The case of *In re Moore*, 96 Cal. 522, 31 Pac. 584, was also cited to the same effect.

<sup>49</sup> 149 Cal. 556, 87 Pac. 19.

<sup>50</sup> 150 Cal. 477, 89 Pac. 317.

<sup>51</sup> 152 Cal. 148, 92 Pac. 78, 13 L. R. A., N. S., 579.

It will be observed that the principle ground upon which equity affords relief, as announced in the Throckmorton case, is that by reason of the fraud practiced on the plaintiff against whom the judgment was obtained, there was no adversary trial of the issues in the action; and that he was prevented through such fraudulent act of his adversary, and without any fault on his own part, from presenting a meritorious defense to the action brought against him."

In *Campbell-Kawannanako v. Campbell*,<sup>51</sup> quoting from the Throckmorton case, and that of *Pico v. Cohn*, and comparing the fraud alleged in the case at bar with that of those cases, the supreme court said:

"The fraud here alleged, however, was extrinsic or collateral, within the meaning of the rule. We are not confronted with a case where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented or determined, which is perhaps the most common form of what is held to be extrinsic fraud." (Citing various cases.)

No distinction is recognized in the above decisions between extrinsic and collateral fraud, so called, and fraud which consists in imposing upon the jurisdiction of the court; since the two classes are manifestly one in effect.<sup>52</sup> Nor is there any real difference in effect between fraud extrinsic and collateral to the original action, and fraudulent practices committed in the very act of obtaining the judgment.<sup>53</sup> Gathered from the above decisions, therefore, the controlling principle may be concisely stated as follows: Equity will not interfere to relieve from an unconscionable judgment, on the ground of fraud in its procurement, where the matter to which the alleged fraud relates was litigated in the original action, unless the jurisdiction of the court was imposed upon, or the prevailing party,

<sup>51</sup> 152 Cal. 201, 92 Pac. 184.

<sup>52</sup> An instance—the most common—of fraudulent imposition upon the court, is an action brought in a jurisdiction foreign to the residence of defendant, upon a fraudulent demand, and prosecuted by publication of summons procured by a false affidavit, and culminating in a judgment by default. See *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361, and cases cited

in note 5c, *supra*. And see *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760, and *Campbell v. Campbell*, 152 Cal. 201, 92 Pac. 184, for instances of imposition upon the jurisdiction of the court. Also see *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358.

<sup>53</sup> See *Zellerbach v. Allenberg*, 67 Cal. 296, 7 Pac. 908; *Anderson v. Bank of Lassen*, 140 Cal. 695, 74 Pac. 287.

by some extrinsic or collateral fraud, has prevented a fair submission of the controversy and an adversary trial thereof, or the fraud was practiced in the very act of obtaining the judgment.

Inasmuch as this rule applies only to facts which were actually litigated before the tribunal whose judgment is attacked, it is important to know in what such litigation consists, as well as what facts may be regarded as subject to litigation. A fact is deemed to have been litigated within the meaning of the rule where evidence in relation thereto is introduced, even though such evidence be *ex parte*.<sup>6</sup> But, if such *ex parte* evidence follows fraudulent publication of summons, as a result of practices which have kept the defendant in utter ignorance of the action against him, and culminates in a judgment taken by default and without an adversary trial, the effect can hardly be regarded as essentially different from extrinsic or collateral fraud, strictly so called.<sup>7</sup> Nor is it otherwise where there is a fraudulent concealment,<sup>8</sup> but such fraudulent concealment must be actual, willful and intentional. Mere silence cannot be regarded as active concealment. There must be, added to silence, some active, willful concealment, with intent to commit a fraud upon the court.<sup>9</sup> Nor, as stated in *Allen v. Currey*,<sup>10</sup> can the losing party maintain a suit in equity to set aside a judgment merely because he has subsequently ascertained "that his adversary knew the facts to be as he claimed them to be at the trial, and failed to disclose them." Most of the cases where relief has been granted on the ground of fraudulent concealment will be found to be cases where a new trial was proper on the ground of newly discovered evidence, which ground is often mingled or confused with fraud.<sup>11</sup> But a party is "not bound to furnish evidence for

<sup>6</sup> See *Riddle v. Baker*, 13 Cal. 295.

<sup>7</sup> See note 5c, *supra*.

<sup>8</sup> *Freeman on Judgments*, sec. 491.

<sup>9</sup> See *Wickersham v. Comerford*, 92 Cal. 433, 31 Pac. 358.

<sup>10</sup> 41 Cal. 318.

<sup>11</sup> The case of newly discovered evidence may seem to constitute an exception to the rule above considered. It is to be remembered, however, that relief cannot be granted on this ground where the new evidence is merely cumulative. But probably in cases where the new evidence consists of a writing (as in *Easley v. Kellom*, 14 Wall. (U. S.) 279, 20 L. ed. 890), as, for example, a release, the rule suffers an exception.

It will probably occur to the learned reader in this connection that the rule above stated, viz., that equity will not interfere where the question has been litigated before a competent tribunal, or, in other words, for the correction of an error of law or fact, is at variance with the rule of chancery practice that a bill of review may be brought for the correction of errors apparent upon the face of the record. As to this rule, see *Story's Equity Pleadings*, sec. 404 et seq.; *Clark v. Killian*, 13 Otto (U. S.), 766, 26 L. ed. 607; *Davis v. Speiden*, 14 Otto (U. S.), 83, 26 L. ed. 660. But it may be doubted whether a bill of review, strictly so

his adversary unless called upon to testify as a witness";<sup>12</sup> and mere concealment, unaccompanied by active fraud, has never been recognized as a ground for relief, either by motion or in equity.

The cases themselves, most of which are quoted in this subdivision, must be resorted to for illustrations of extrinsic and collateral fraud, and for examples of the rule and exceptions above stated. In *Pico v. Cohn*, *supra*, the following were mentioned as proper grounds for equitable interference: "Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client." But there are many others.

If the form of the issue is so vague as to leave in doubt the questions of fact determined in the original action, and so indirectly, what may be properly recognized as extrinsic or collateral thereto, parol testimony is admissible to determine what questions were actually passed upon.<sup>13</sup>

2. *No Relief can be Granted Where the Matter Might have Been Litigated at the Former Trial by the Exercise of Due Diligence.*—It has been shown in the preceding subdivision that equity will not grant relief where the matter on which the claim to its interposition is founded was litigated before the tribunal whose judgment is attacked. Not only is this true, but it is also true that relief will not be granted where the matter might have been there litigated by the exercise of due diligence. If this were not the rule it would be to the interest of every party to leave a few

called, is admissible under our practice.

A bill of review, strictly so called, was only for relief against decrees in equity. It was in the nature of a writ of error. Story's Equity Pleadings, sec. 403. There were but two cases in which it could be brought, viz., for error apparent upon the face of the record and for newly discovered evidence. Story's Equity Pleadings, sec. 404. And it has even been said by the supreme court of the United States that "pure bills of review" are only for matters apparent upon the face of the record, and not for newly discovered evidence. *Buffington v. Harvey*, 5 Otto (U. S.), 103, 24 L. ed. 381. As stated in the

text, a bill does not lie under our practice for the correction of error apparent upon the face of the record. Under the old chancery practice the decree must be obeyed before a bill of review could be brought. See cases cited in note 9 to section 342 of this treatise.

At any rate, it has been decided in this state that a suit cannot be maintained for the correction of errors apparent on the face of the judgment-roll. *San Francisco S. & L. Soc. v. Thompson*, 34 Cal. 76; and look at *Ziel v. Dukes*, 12 Cal. 479.

<sup>12</sup> *Butler v. Vassault*, 40 Cal. 76.

<sup>13</sup> *Miles v. Caldwell*, 2 Wall. (U. S.) 43, 17 L. ed. 755.

questions unlitigated in order that he might have something to fall back upon in case of defeat. Accordingly, it is well settled that the applicant for relief in equity must show that the failure to present the matter on which he relies to the tribunal whose judgment he attacks was not the result of his own negligence, but was owing to some one of the causes considered in the preceding section. The decisions of our supreme court fully establish this proposition. Thus in *Williams v. Price*,<sup>14</sup> where a petition was filed in the probate court to set aside the allowance of a claim, and a direction for its payment in the decree of distribution, on the ground that facts had subsequently come to the petitioner's knowledge showing that the claim ought not to have been allowed, the supreme court held that it was improper to grant the petition, and Baldwin, J., delivering the opinion, said: "It would not be sufficient in an ordinary case of a bill for a new trial to aver that the party thus represented [at the trial] was ignorant at the time of the trial (or settlement) of the facts. The bill must go further and show that he could not with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. It is never tolerated to a party that he may go on and take his chances of a trial, and after it has gone against him move to set it aside on grounds which he might have availed himself of by the exercise of a proper degree of diligence. Litigation would be endless if this were so, and a party encouraged in supineness and negligence." The same rule was laid down in *Markley v. Rand*.<sup>15</sup> In that case the facts were as follows: Markley, one Baldwin, and several others were sued as members of a joint stock association on a debt due by the association. Baldwin appeared in person, putting in an answer for himself, denying that he was a member of the association, and another answer for all the defendants. No other answer appears to have been put in, but the other defendants were represented by counsel. At the trial the plaintiff dismissed the suit as to Baldwin, whereupon he withdrew the answers put in by him, and judgment passed against the other defendants. One of them, Markley, brought a bill in equity to set aside the judgment by reason of the occurrence above mentioned, but the supreme court held that it could not be maintained, and Baldwin, J., delivering the opinion, said: "There was full opportunity to

<sup>14</sup> 11 Cal. 212.<sup>15</sup> 12 Cal. 275.



contest every fact while the trial was going on or before the court lost jurisdiction of the case, and the plaintiff cannot retry the case by bill in equity. If this were so in every case where by the neglect of the party, or his attorney, a judgment was rendered against him, the case could be taken from the court of law into a court of chancery." So in *Dutil v. Pacheco*<sup>16</sup> the same rule was laid down. The facts of that case were as follows: The sheriff, by virtue of an execution in favor of Dutil and against one Andegue, levied upon and sold certain personal property of Pacheco, which he had purchased from Andegue. Pacheco then sued the sheriff and recovered judgment against him, the suit being defended by Dutil, who had indemnified the sheriff. Dutil then brought a suit in equity to have the judgment against the sheriff set aside on the ground of fraud in the sale from Andegue to Pacheco. But the supreme court held that it could not be maintained, and Norton, J., delivering the opinion, said: "The alleged fraud in the sale of the property of Andegue to Pacheco, which is the basis of the present action, might have been litigated in that action, and would, if proved, have defeated the action. Where courts of law and equity have concurrent jurisdiction, if a court of law has first acquired jurisdiction and decided a case, a court of equity will not interfere to set aside the judgment unless the party has been prevented by some fraud or accident from availing himself of the defense at law." So in *Beaudry v. Felch*,<sup>17</sup> it was held that want of consideration for a note should have been set up in the action on the note, and not having been so could not be made the ground of a suit in equity, the court, per Belcher, J., saying: "When the note was put in suit no valid defense was interposed, and judgment passed in favor of the plaintiff. If there was a good defense to it—and there probably was—it should have been made at that time. It was too late in this action to bring forward a defense which might have been made then." So in *Rahm v. Minis*,<sup>18</sup> where Rahm obtained his discharge in insolvency after the commencement of an action against him, but before judgment, it was held that he could not maintain an action to enjoin the judgment, the court, per Rhodes, C. J., saying: "Rahm was entitled to plead his discharge in insolvency in bar of the action by supplemental answer. If that fact was pleaded the judgment of the court is conclusive that the

<sup>16</sup> 21 Cal. 438, 82 Am. Dec. 749.<sup>18</sup> 40 Cal. 421.<sup>17</sup> 47 Cal. 183.

plaintiff was entitled to his judgment, notwithstanding the alleged discharge in insolvency. If he omitted to plead the discharge in insolvency the judgment is equally conclusive upon him as it would be had his defense been accord and satisfaction, payment, etc., which he had neglected to plead." So in *Johnson v. Reed*,<sup>18a</sup> where the applicant for relief might have prosecuted a motion for a new trial, and thereafter, in the event of failure to obtain the same, have had an appeal from both judgment and order of denial, in which proceedings the errors complained of might have been completely litigated, the suit was dismissed, the court saying:

"The correctness of a judgment cannot be reviewed in an independent action upon grounds which were available to the litigant in the original action."

And in *Hollenbeak v. McCoy*,<sup>18b</sup> where the plaintiff in equity was aware of the facts relied upon as a ground for relief there so soon after the rendition of the judgment that he might have availed himself thereof upon an appeal, and upon a trial *de novo* in the superior court, the relief was denied, the court saying:

"His failure to take such appeal until more than thirty days after the rendition of the judgment was his own negligence, and cannot be invoked as a ground for the interference of equity."

And so in other cases.<sup>19</sup> And it is not enough to merely *allege* that the party used diligence; he must set forth the facts showing the diligence.<sup>20</sup> What constitutes diligence must be determined upon the circumstances of each case. But it has been held that "the allegation of ignorance in making the necessary averments or of insufficient conduct in the prosecution of the first suit do not constitute grounds for relief in equity."<sup>21</sup> So an allegation that the party "made a mistake" in not setting out a fact in an affidavit is insufficient.<sup>22</sup> And an allegation that the right of appeal from the judgment sought to be relieved against was lost through the carelessness of plaintiff's attorney's clerk was held insufficient.<sup>22a</sup>

The general rule above stated has been uniformly acted upon by the supreme court of the United States,<sup>23</sup> and is laid down by Story,

<sup>18a</sup> 125 Cal. 74, 57 Pac. 680.

<sup>18b</sup> 127 Cal. 21, 59 Pac. 201.

<sup>19</sup> See *Mastick v. Thorp*, 29 Cal. 444; *Boston v. Haynes*, 33 Cal. 31; *Quinn v. Wetherbee*, 41 Cal. 247.

<sup>20</sup> *Butler v. Vassault*, 40 Cal. 74.

<sup>21</sup> *Barnett v. Kilbourne*, 3 Cal. 327.

<sup>22</sup> *Douglass v. Brooks*, 38 Cal. 670.

<sup>22a</sup> *Daly v. Pennie*, 86 Cal. 552, 21 Am. St. Rep. 61, 25 Pac. 67.

<sup>23</sup> *Truly v. Wanzer*, 5 How. (U. S.) 141, 12 L. ed. 88; *Creath v. Sims*, 5 How. (U. S.) 192, 12 L. ed. 111; *Walker v. Robbins*, 14 How. (U. S.) 584, 14 L. ed. 552; *Sample v. Barnes*, 14 How. (U. S.) 70, 14 L. ed. 330;

who says with respect to it: "This doctrine is not limited to mere cases decided in courts of common law; but it is applicable to all cases where the matter of the controversy has been already decided on by another court of competent jurisdiction, even though it be a foreign court, or where it might have been made available in that court as a matter of claim or defense in a suit pending in such court. For it has been truly said not to be the practice of courts of equity to assume jurisdiction in favor of parties, who having had an opportunity of asserting their title in another court, where the matter has been properly the subject of adjudication, have either missed that opportunity, or have not thought proper to bring their title forward."<sup>24</sup>

But what is said in the preceding part of this subdivision applies only where the suit in equity is to set aside or enjoin a judgment, or, in other words, where a direct attack is made on the judgment. It does not apply where the judgment is not attacked, but the subsequent suit is *independent* of it. Cases may arise at law in which equitable defenses may be set up. Thus in California the defendant in ejectment may set forth in his answer any equitable defense he may have. If he does set it up, and it is passed upon, the judgment is conclusive upon the question of its validity. But he is not compelled to set it up. He may let judgment go at law, and assert his equitable right in a subsequent proceeding, the judgment at law not being a bar.<sup>25</sup> In such cases the equitable matter is not necessarily involved in the action at law, and not being actually passed upon, is not concluded by the judgment. This, however, does not militate against the rule above laid down because the first judgment is not attacked or impaired in any way.

**3. No Relief will be Granted in Equity Where It Could have Been Obtained upon Motion in the Court Which Rendered the Judgment.**—It seems that in many states the remedy by motion and that by suit in equity are concurrent, and that the party may

Hendrickson v. Hinckley, 17 How. (U. S.) 445, 15 L. ed. 123; McMicken v. Perine, 22 How. (U. S.) 282, 16 L. ed. 259; Ballance v. Forsyth, 24 How. (U. S.) 184, 16 L. ed. 733; Kibbe v. Benson, 17 Wall. (U. S.) 624, 21 L. ed. 741; Brown v. Buena Vista County, 5 Otto (U. S.), 159, 24 L. ed. 422; Life Ins. Co. v. Bangs, 13 Otto (U. S.), 780, 26 L. ed. 608.

<sup>24</sup> Story's Equity Jurisprudence, 12th ed., sec. 895a; and see High on Injunctions, sec. 97.

<sup>25</sup> Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30 Cal. 309; Ayres v. Bensley, 32 Cal. 620; M'Creary v. Casey, 45 Cal. 128; Hills v. Sherwood, 48 Cal. 386; and see Freeman on Judgments, sec. 501.

resort to either, at his election.<sup>26</sup> But such is not the rule in California; at least, an analysis of the decisions leaves the matter in doubt, except as to the ordinary motion to set aside a judgment or order as void on its face, or as improvidently made, or, for like reason, where the motion may be made at any time, and does not depend upon statutory authority. Inasmuch as such a motion may be made at any time, and the power of the original tribunal is sufficiently comprehensive to afford complete relief, there would seem to be no reason for the interference of equity; at least, where the facts appear on the face of the judgment-roll. On the other hand,<sup>26a</sup> there is a long line of decisions to the effect that where the party may obtain complete relief upon motion in the cause in which the judgment or decree was rendered, he cannot maintain a suit in equity for such relief. Thus in *Imlay v. Carpentier*,<sup>27</sup> where Imlay based his claim to relief upon a discharge in insolvency, obtained subsequent to the judgment, it was held that he should have applied by motion to the court which rendered the judgment, the supreme court, per Cope, J., saying: "We think the plaintiff has an adequate remedy at law, and is not entitled to the assistance of a court of equity." So in *Chipman v. Bowman*,<sup>28</sup> which was a suit brought to set aside a judgment by default, entered in the superior court of San Francisco, upon the ground, among others, that the clerk had no authority to enter the judgment, the supreme court, per Field, C. J., said: "If this last ground be tenable there can be no necessity for the interference of a court of equity to restrain the enforcement of the execution. The district court to which the cases in the superior court were transferred by statute can arrest at any time, on motion, all process issued by its clerk on judgments which for any reason are void. (*Imlay v. Carpentier*.)" So in *Mastick v. Thorpe*,<sup>29</sup> which was a suit to set aside a judgment on the ground that the complainant was not represented at the trial, Sanderson, J., delivering the opinion, said: "That the complaint contains no cause of action hardly admits of debate. That it does not is manifest from the single fact, independent of the matters set out, that the complaint assigns no reason why the plaintiffs did not avail themselves of the remedy by a motion for a new trial. If they were

<sup>26</sup> See Freeman on Judgments, sec. 497.

<sup>27</sup> 14 Cal. 173. This case seems to be inconsistent with that of *Kohlman v. Wright*, 6 Cal. 230; but *Imlay v.*

*Carpentier* undoubtedly states the correct rule; see *Green v. Thomas*, 17 Cal. 86, and cases cited in the text.

<sup>28</sup> 14 Cal. 157.

<sup>29</sup> 29 Cal. 444.

informed of the trial and judgment in time to move for a new trial, that remedy would have been all-sufficient, and that they were not informed in time is not alleged. We are compelled to assume that they did learn it in time. Such being the case, they were bound to exhaust their legal remedies by moving for a new trial in the court of law before coming to a court of equity to obtain it. By this action the plaintiffs can obtain no relief which they could not have obtained by a motion for a new trial in the original action; for if their neglect to defend that action admits of legal excuse, full relief was obtainable in that action by motion, and no resort to this action was necessary. For this reason alone they cannot be allowed to maintain this action without showing that they had no opportunity to make the motion, by reason of some mistake, accident, or surprise unaccompanied by any fault or negligence on their part.

So, in the recent case of *Ede v. Hazen*,<sup>30</sup> Sharpstein, J., delivering the opinion of the court in bank, said: "If the plaintiffs are entitled to any relief they might have obtained it by making a timely application to the court in which the judgment they seek to have set aside was rendered. That judgment was entered on the tenth day of December, 1880, and on the eighteenth day of January, 1881, the plaintiffs were informed that the mortgage foreclosed had been fully satisfied prior to the entry of the judgment of foreclosure. If they might have successfully pleaded that satisfaction, as a defense to the action, and were prevented from doing so by reason of the concealment of the fact from them until after the entry of the judgment, it would constitute a case of excusable neglect, for which the court might have relieved them from the judgment within six months after its entry. (Code Civ. Proc., sec. 473.) 'Equity will not maintain jurisdiction of a suit of this nature, merely on the ground that the demand may be unconscientious, and that injustice may have been done, provided it was competent for the party to have placed the matter before the court in the original action, either upon issues joined, or upon motion to set aside the verdict or judgment.' (*Borland v. Thornton*, 12 Cal. 440.) 'The assistance of equity cannot be invoked as long as the remedy by motion exists; but when the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or

<sup>30</sup> 10 Pac. C. L. J. 107.

propriety preventing the interference of equity.' (Bibend v. Kreutz, 20 Cal. 109.) As appears upon the face of their complaint, the plaintiffs discovered within forty days after the entry of the judgment, and within six months after the entry of their default, all the facts upon which they now base their right to have it set aside, and if it be conceded that upon those facts they are entitled to the relief they now claim, it is clear that they had a 'speedy, complete, adequate, summary remedy in the same proceeding, and that the complaint shows no circumstances which entitle them to maintain a separate and distinct equitable action.' (Ketchum v. Crippen, 37 Cal. 223.) It further appears by the record that this action was commenced within less than five months after the defaults of the plaintiffs had been entered in the action in which the judgment was rendered against them which they now seek in this action to have set aside. It is unnecessary to express any opinion upon any other question in the case."

And so in other cases.<sup>81</sup> But fraud, as a ground for setting aside a judgment or decree, cannot be utilized by motion, unless it is of a character to render the judgment or decree void *ab initio*. And although it has been said that the remedy by equity and by motion under the provisions of section 473 is cumulative and concurrent,<sup>81a</sup> the grounds for the motion, if mistake is excepted, do not, taken separately and alone, constitute grounds for the interference of equity. The fact of constructive service by publication of summons is not such a ground; although, if the defendant actually is ignorant of the action against him, and he is neither culpable nor negligent, and has an adequate defense to the action, equity will interfere on that ground.<sup>81b</sup>

It would seem, therefore, that no position other than that taken in the cases cited is possible,<sup>81c</sup> and that where the remedy by

<sup>81</sup> Gates v. Lane, 49 Cal. 266; Mayo v. Bryte, 47 Cal. 626; Murdock v. De Vries, 37 Cal. 527; Ketchum v. Crippen, 37 Cal. 223; Sanchez v. Carriaga, 31 Cal. 170; Comstock v. Clemens, 19 Cal. 77; Green v. Thomas, 17 Cal. 86; Logan v. Hillegass, 16 Cal. 200; Aldrich v. Stephens, 49 Cal. 676; compare Scherr v. Himmelman, 53 Cal. 312; and see, also, Luco v. Brown, 73 Cal. 3, 2 Am. St. Rep. 772, 14 Pac. 366; Eldred v. White, 102 Cal. 600, 36 Pac. 944; Heller v. Dyer-ville Co., 116 Cal. 127, 47 Pac. 1016.

(Note: The principle was upheld in the last three cases, although, it is believed, without sufficient reason in at least two of them.)

See Brackett v. Banegas, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90.

<sup>81a</sup> See Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317, and cases there cited.

<sup>81b</sup> See Dunlap v. Steere, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361, and cases cited.

<sup>81c</sup> See Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232; California Best

motion is complete, there is really no ground for the interference of equity, until the time to make the motion has lapsed. It is well settled that the rule has no application then. "The rule under which a court of equity declines to interfere until after the application for relief has been made in the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant relief gives to the court of equity the same authority to interfere, as if the other court was powerless to render aid."<sup>31d</sup> And it is the same where the time has passed and no motion has been made, provided, of course, the party has been guilty of no laches or want of diligence.<sup>31e</sup> But a party should resort to his remedy by motion, when he first comes to a knowledge of the fact which furnishes a ground therefor; otherwise, he will have been guilty of laches and want of diligence, and this, of itself, will be sufficient to defeat his motion. And not only must he resort to his remedy by motion, where a motion may be made, but he must prosecute it with diligence and care; otherwise he cannot have relief in equity. Thus in *Peabody v. Phelps*,<sup>32</sup> where the party lost his right to have a statement on motion for a new trial through reliance on the verbal stipulation of opposing counsel, it was held that he could not resort to a suit in equity, the court, per Terry, J., saying: "The plaintiff having failed to procure the certificate of the referee, and having chosen to rely on the verbal assurance of the attorney on the other side

*Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *Estudillo v. Security Loan Co.*, 149 Cal. 556, 87 Pac. 19; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317, where the principle seems to have been recognized that equity would interfere even though the time to move had not expired; but in none of the cases cited was there ground for relief by motion. In the first case, there was nothing else but fraud, and the court distinctly excluded all possibility of relief by motion. In *Cal. Beet Sug. Co. v. Porter*, the defendant was induced by offers and promises of compromise to take no further steps in the defense of the action against him, and judgment was taken against him by default. This may have been "inadvertence, surprise, or excusable neglect," but it is not the character of inadvertence, surprise or excusable neglect usually recognized.

(See chapter 52.) It possesses all the earmarks of fraud, and the court so treated it. The relief of equity was accorded on the ground of fraud, and not because there was ground for the motion, but that the time to move had expired without laches or want of diligence. In *Estudillo v. Security etc. Co.*, the facts were practically identical with those of the last-cited case, and the court followed the same course. In *Bacon v. Bacon* the language used was *dicta*.

<sup>31d</sup> *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786; and see *Eppinger v. Scott*, 130 Cal. 275, 62 Pac. 460.

<sup>31e</sup> See *Ede v. Hazen*, 61 Cal. 360; *Brackett v. Banegas*, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90; and see, also, cases cited in note 31c, *supra*.

<sup>32</sup> 7 Cal. 53.

that he would agree to a statement, cannot be said to be free from default and negligence, and is not in a position to invoke the aid of a court of equity." A similar ruling was made in *Quinn v. Wetherbee*.<sup>33</sup> In that case the point of law upon which a case turned was the omission of a dollar-mark from an assessment-roll. The attorney for the losing party relied on the reporter's notes and inserted them in his statement on motion for new trial without examination. The consequence was that the statement did not show the omission of the dollar-mark, and the judgment was affirmed. The party then resorted to a suit in equity. But the supreme court held that even if the action could be maintained at all (there having been a fair trial of the cause itself), it was negligence in the attorney to have relied on the reporter's notes without examination, and ordered the case dismissed.

The corollary of this rule would be, as a matter of course, that having prosecuted his remedy by motion diligently, and as efficiently as the means at hand permitted, he is then at liberty, having failed, to appear in a court of equity and ask for relief there, and such proceeding by motion would not be a bar. It has been suggested, indeed, that an appropriate practice would be to resort first to the motion and afterward, if that should prove ineffective, to the suit in equity.<sup>33a</sup>

Where the time to move has expired without fault or negligence on the part of the losing party, he may resort to the suit in equity.<sup>34</sup> And in *Wood v. Currey*,<sup>35</sup> it was held that the objection that a remedy by motion existed is to be taken at the trial in the court below, and cannot be raised in the supreme court for the first time.

Where the judgment is void on its face for want of service of summons, such want appearing affirmatively on the record, it may be set aside at any time on motion in the court which rendered it.<sup>36</sup>

Where the court rendering a judgment was without jurisdiction, owing to the absence of service of summons on the defendant, and

<sup>33</sup> 41 Cal. 247.

<sup>33a</sup> See *Estudillo v. Security etc. Co.*, 149 Cal. 556, 87 Pac. 19.

<sup>34</sup> *Bibend v. Kreutz*, 20 Cal. 109; *Lapham v. Campbell*, 61 Cal. 296; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *Brackett v. Banegas*, 116 Cal. 273, 58 Am. St. Rep. 164, 48 Pac. 90; *Gerig v. Loveland*, 130 Cal. 512, 62 Pac. 830; *Par-*

*sons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

<sup>35</sup> 49 Cal. 359; and see, also, to same effect, *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Broadway Ins. Co. v. Wolters*, 128 Cal. 162, 60 Pac. 766.

<sup>36</sup> *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *People v. Temple*, 103 Cal. 447, 37 Pac. 414.



the judgment is void for that reason, but the facts showing such want of jurisdiction do not appear affirmatively on the record, the judgment may be vacated on motion in the court based on a proper showing of the facts. Such a motion is not made under section 473, Code of Civil Procedure, as the judgment has not been taken against the defendant through his mistake, inadvertence, surprise or neglect; it is based on the absolute right of a party to be relieved from the apparent effect of a judgment rendered against him by a court acting without jurisdiction over him; and the court, in granting his application for a vacation of the judgment, must do so without the imposition of any terms or conditions whatever, and without calling upon him to show that he has a defense to the action.<sup>37</sup> It seems to be settled, however, that the motion just referred to must be made within a reasonable time, which, by analogy to the period fixed by section 473, Code of Civil Procedure, has been held to be six months after the entry of the judgment.<sup>38</sup> And if the period of time within which the motion may be made has expired, there is no doubt that equity will afford relief in an action brought to vacate the judgment or enjoin its execution, there being, in such case, no remedy at law.

Whether a party affected by a judgment, void for want of service of summons, where the invalidity is not disclosed by the record, and where the time within which a motion to set aside has not expired, and where there is no element of fraud connected with the failure to make a proper service, may appeal to equity for relief without first resorting to his motion, has not been directly decided in this state.

But where a court's assertion of jurisdiction to render a judgment has depended upon some false showing of service, as is almost always the case when there has been a failure to make a proper service, equity will entertain a suit for relief on the ground of fraud, without requiring the injured party to exhaust his remedy by motion, and this largely upon the theory that a more adequate

<sup>37</sup> Norton v. Atchison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; Mott I. Works v. West Coast Plumbing S. Co., 113 Cal. 341, 45 Pac. 683; Waller v. Weston, 125 Cal. 201, 57 Pac. 892.

<sup>38</sup> Norton v. Atchison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep.

198, 30 Pac. 585, 32 Pac. 452; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; People v. Thomas, 101 Cal. 571, 36 Pac. 9; People v. Temple, 103 Cal. 447, 37 Pac. 414; Estate of Eikerankotter, 126 Cal. 54, 58 Pac. 370; Canadian etc. Co. v. Clarita etc. Co., 140 Cal. 672, 74 Pac. 301,

relief can be afforded by action than by motion. In *Estudillo v. Security Loan etc. Co.*, the court said:<sup>39</sup>

"The burden of proof rests upon no one more heavily than upon a plaintiff seeking relief upon the ground of fraud, and he ought not to be unduly hampered as to the means of making proof. In support of a motion he is limited to *ex parte* affidavits of voluntary witnesses unless the court in its discretion permits a wider latitude. In a separate suit he may bring unwilling witnesses into court by subpoena, and he may take their depositions. The remedy is ampler and more efficacious, and the case is one which demands the amplest and most efficacious remedy."

4. *No Relief will be Granted Unless in Aid of a Meritorious Claim or Defense.*—It is a universal rule that equity will not lend its aid to enforce an unjust claim or defense, but that the party must "come into court with clean hands."<sup>40</sup> Upon this principle it has been held in California that a suit to set aside or enjoin a judgment cannot be maintained, unless it be shown that there is some defense on the merits;<sup>41</sup> and such defense must be fully set out by sufficient averments.<sup>42</sup> And the complaint must offer to do equity.<sup>43</sup>

§ 305. *Courts Which may Grant the Relief.*—It is well settled in this state that one court cannot interfere with the judgments of another court of co-ordinate jurisdiction. In this regard Duer, J., delivering the opinion of the superior court of New York in *Grant v. Quick*,<sup>1</sup> said: "The only ground upon which the court of chan-

<sup>39</sup> 149 Cal. 556, 87 Pac. 19; and see *Lapham v. Campbell*, 61 Cal. 296; *Baker v. O'Riordan*, 65 Cal. 368; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361; *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

<sup>40</sup> *Creath v. Sims*, 5 How. (U. S.) 204, 12 L. ed. 111; *Sample v. Barnes*, 14 How. 74, 14 L. ed. 330; *High on Injunctions*, secs. 86 and 89.

<sup>41</sup> *Pico v. Sunol*, 6 Cal. 294; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Logan v. Hillegass*, 16 Cal. 200; and see *Preston v. Hill*, 38 Cal. 686, and *Saunders v. Web-*

*ber*, 39 Cal. 287; and see to same effect, *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888; *Weyant v. Murphy*, 78 Cal. 278, 20 Pac. 568; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Burbridge v. Rauer*, 146 Cal. 21, 79 Pac. 526; *Reed v. Bank of Ukiah*, 148 Cal. 96, 82 Pac. 845.

<sup>42</sup> *Gibbons v. Scott*, 15 Cal. 284; and see, also, *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085.

<sup>43</sup> *Jackson v. Norton*, 6 Cal. 187; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639.

<sup>1</sup> *Grant v. Quick*, 5 Sand. (N. Y.) 612.

very formerly acted in granting injunctions, in cases like the present, was the inability of a court of law, in which the suit was pending, to grant the necessary relief; but as, since the code, the jurisdiction of all our courts is equitable as well as legal, or more properly, as the distinction between legal and equitable, except in reference to the nature of the relief demanded, is now abolished, the reasons by which the exercise of a power, always invidious and frequently abused, could alone be justified, have ceased to exist, and have left a case to which the maxim emphatically applies, that *cessante ratione, cessat etiam lex.*" The foregoing extract was quoted with approval by the supreme court of California in *Rickett v. Johnson*,<sup>2</sup> in which it was held that the old superior court of San Francisco could not enjoin the execution of a judgment of a district court. And in numerous other cases it was held that one district court could not enjoin or set aside the judgment of another district court.<sup>3</sup> The reason of the rule was stated by Sprague, J., delivering the opinion in *Crowley v. Davis*,<sup>4</sup> as follows: "The fact that the parties to the injunction proceeding are not the same as the parties to the judgment or decree sought to be enjoined does not relieve the case from the operation of the rule, nor can the consent of parties change the rule, or relax its binding force in any particular. It is not established and enforced so much to protect the rights of parties as to protect the rights of courts of co-ordinate jurisdiction, to avoid conflict of jurisdiction, confusion, and delay in the administration of justice." As stated in the foregoing extract, it makes no difference that the parties are not the same;<sup>5</sup> nor does it make any difference that the judge of the court whose process is enjoined was disqualified from acting in the case.<sup>6</sup> The reason of the rule applies between the superior courts established by the Constitution of 1879. There would, however, be plausibility in the argument that the rule does not apply where, as is the case in San Francisco, and in several counties, the superior court has several judges, each of whom is authorized to hold a separate court. The point does not appear to have been decided.

<sup>2</sup> 8 Cal. 34.

<sup>3</sup> *Chipman v. Hibbard*, 8 Cal. 268; *Anthony v. Dunlap*, 8 Cal. 26; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Gorham v. Toomey*, 9 Cal. 77; *Uhfelder v. Levy*, 9 Cal. 607; *Hockstacker v. Levy*, 11 Cal. 76;

*Crowley v. Davis*, 37 Cal. 268; *Flaherty v. Kelly*, 51 Cal. 145; *Judson v. Porter*, 51 Cal. 562.

<sup>4</sup> 37 Cal. 268.

<sup>5</sup> *Uhfelder v. Levy*, 9 Cal. 607.

<sup>6</sup> *Flaherty v. Kelly*, 51 Cal. 145.

A state court cannot enjoin the process of a federal court.<sup>2a</sup> Nor will a federal court enjoin the process of a state court.<sup>2b</sup>

§ 306. **Miscellaneous Matters.**—As to the time in which the action must be brought, it would seem that actions for relief on the ground of fraud can be brought within three years after the discovery of the facts constituting the fraud.<sup>1</sup> A bill of review, strictly so called, must be brought within the time allowed for an appeal;<sup>2</sup> but whether there is such a thing under our practice as a bill of review, strictly so called, *quaere*.<sup>3</sup> There must in any case be no laches.<sup>4</sup> As to the parties to the suit, see cases cited below.<sup>5</sup> A party cannot prosecute an appeal and a bill of review at the same time.<sup>6</sup> A second bill of review will not be permitted.<sup>7</sup> As to the rights of third parties, see cases cited below.<sup>8</sup> As to the rule that the party must obey the decree, see cases cited below.<sup>9</sup> A court of equity will not set aside an ineffectual decree;<sup>10</sup> nor will it do a vain thing by setting aside a decree and permitting a new trial which would have the same conclusion.<sup>11</sup> A suit for equitable relief, or a bill of review, is a direct and not a collateral

<sup>2a</sup> Phelan v. Smith, 8 Cal. 520.

<sup>2b</sup> Nougue v. Clapp, 11 Otto (U. S.), 551, 25 L. ed. 1026; Story's Equity Jurisprudence, 12th ed., sec. 900.

<sup>1</sup> Section 338, subdivision 4, California Code of Civil Procedure.

<sup>2</sup> Allen v. Currey, 41 Cal. 318; Thomas v. Harvie, 10 Wheat. (U. S.) 147, 6 L. ed. 287; Kennedy v. Georgia State Bank, 8 How. (U. S.) 586, 12 L. ed. 1209; Whitney v. Kelley, 94 Cal. 146, 28 Am. St. Rep. 106, 29 Pac. 624, 15 L. R. A. 813; Steen v. March, 132 Cal. 616, 64 Pac. 994.

<sup>3</sup> See note 11 to section 304, *ante*.

<sup>4</sup> See Neal v. Byers, 45 Cal. 234; Brown v. County of Buena Vista, 5 Otto (U. S.), 159, 24 L. ed. 422; Harwood v. R. R. Co., 17 Wall. (U. S.) 81, 21 L. ed. 558; compare Hayden v. Hayden, 46 Cal. 332. See, also, Hildreth v. James, 109 Cal. 301, 41 Pac. 1039.

<sup>5</sup> Gates v. Lane, 44 Cal. 392; Marriener v. Smith, 27 Cal. 649; Macovich v. Wemple, 16 Cal. 104; Whiting v.

Bank of United States, 13 Pet. (U. S.) 14, 10 L. ed. 33; Atkins v. Dick, 14 Pet. (U. S.) 114, 10 L. ed. 378; Marshall v. Beverley, 5 Wheat. (U. S.) 313, 5 L. ed. 97.

<sup>6</sup> Kirk v. Reynolds, 12 Cal. 99; but compare Parker v. Judges of Circuit Court, 12 Wheat. (U. S.) 562, 6 L. ed. 729.

<sup>7</sup> Freeman on Judgments, sec. 323.

<sup>8</sup> Reeve v. Kennedy, 43 Cal. 643; Stokes v. Geddes, 46 Cal. 17; Martin v. Parsons, 49 Cal. 94; Freeman on Judgments, sec. 500; Marriner v. Smith, 27 Cal. 649; Wright v. Levy, 12 Cal. 257.

<sup>9</sup> Davis v. Speiden, 14 Otto (U. S.), 83, 26 L. ed. 660; Ricker v. Powell, 10 Otto (U. S.), 103, 25 L. ed. 569; Story's Equity Pleadings, 9th ed., sec. 406.

<sup>10</sup> Aldrich v. Stephens, 49 Cal. 676.

<sup>11</sup> Reed v. Bank of Ukiah, 148 Cal. 96, 82 Pac. 845.

attack.<sup>12</sup> Equitable relief will not be denied because relief might have been had by *certiorari*, especially where the latter would be less effective.<sup>13</sup>

<sup>12</sup> *Bergin v. Haight*, 99 Cal. 53, 33 Pac. 760; but see *Eichhoff v. Eichhoff*, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24; *Le Mesnager v. Variel*, 144 Cal. 463, 108 Am. St.

Rep. 91, 78 Pac. 988; *Campbell etc. v. Campbell*, 152 Cal. 201, 92 Pac. 184. <sup>13</sup> *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786.

## CHAPTER LII.

## RELIEF AGAINST JUDGMENTS BY DEFAULT.

- § 307. Scope of subject—Remedies available—The statute.
- § 308. Time in which the motion must be made.
- § 309. Parties who may move.
- § 310. The motion, showing, affidavit of merits, etc.
- § 311. Motions for relief on the ground of accident, surprise, excusable neglect, etc., are addressed to the sound discretion of the court.
- § 312. Instances of the granting and denial of motions on the ground of accident, surprise, excusable neglect, etc.
- § 313. Reliance on oral stipulations.
- § 314. Imposition of terms.
- § 315. Miscellaneous matters.

§ 307. **Scope of Subject—Remedies Available—The Statute.**—The subject of motions for new trial has been considered in the first part of this treatise. Such motions can be made only where there has been a trial of the issues of fact raised by the pleadings.<sup>1</sup> They are not proper where the judgment was by default.<sup>2a</sup> The procedure in the latter case is according to different rules. And as default judgments are not infrequent, it will probably be useful to consider some of the remedies to be resorted to for relief against them.

Where a party has had a judgment by default taken against him he may resort to either one of two remedies.<sup>2</sup> He may appeal directly from the judgment,<sup>3</sup> or he may move in the court below to have the default and judgment set aside.<sup>3a</sup> These remedies are, to a certain extent, concurrent; but the remedy by motion is much more extensive in its operation than that by appeal. The appeal must be from the judgment, and is heard upon the judgment-roll, and can present only such questions as arise upon the roll, as

<sup>1</sup> See Part I, section 1 et seq., on subject of "New Trial."

<sup>2a</sup> See section 1, *ante*.

<sup>2</sup> In *Howard v. Galloway*, 60 Cal. 10, it was said that the defendant may avail himself of either remedy, "and probably both." And see *Bryan v. Berry*, 8 Cal. 130; *Baggs v. Smith*, 53 Cal. 88. It would seem, however, that this *dictum* is inconsistent with later decisions to the effect that a

trial court is without jurisdiction to set aside a judgment after an appeal has been perfected therefrom.

<sup>3</sup> *Hallock v. Jaudin*, 34 Cal. 167; *Howard v. Galloway*, 60 Cal. 10.

<sup>3a</sup> Such motion must, as a matter of course, be made in the tribunal and in the original proceeding in which the default was taken, and not by separate action. In *re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381.

whether there was proper service<sup>4</sup> of a valid summons,<sup>5</sup> whether it appears from the roll that the defendant was in default,<sup>6</sup> whether the complaint states facts sufficient to constitute a cause of action,<sup>7</sup> and whether the proper judgment was entered. There cannot be presented on such appeal any question which does not arise upon the judgment-roll. The facts in relation to such questions must be shown by affidavits on motion to open the default. This latter remedy can be used to present nearly every<sup>8</sup> question which could be presented on appeal from the judgment, and, in addition, questions which depend upon facts which do not appear in the roll. It is, therefore, as above stated, much more extensive than the remedy by appeal. Appeals from judgments by default do not differ in kind from appeals from other judgments, and the subject has been sufficiently considered in the second part of this treatise. The present chapter will be confined to a consideration of the remedy by motion. This remedy depends upon section 473 of the Code of Civil Procedure, which as amended in 1880 is as follows:

"Sec. 473. The court may in furtherance of justice, and on such terms as may be proper . . . ."; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect;

<sup>4</sup> *Maynard v. MacCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 10; *People v. De Bernal*, 43 Cal. 385; and see *Weil v. Bent*, 60 Cal. 603; *Horton v. Gallardo*, 88 Cal. 581, 26 Pac. 375.

This is on the assumption that the facts are shown by the roll.

<sup>5</sup> *People v. Greene*, 52 Cal. 577; *People v. Weil*, 53 Cal. 253.

<sup>6</sup> *Burt v. Scranton*, 1 Cal. 416; *Maud v. Wear*, 55 Cal. 25.

<sup>7</sup> *Hallock v. Jaudin*, 34 Cal. 167. *Instances*: *Abbe v. Marr*, 14 Cal. 210; *People v. Hager*, 19 Cal. 462; *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476; *Pittsburg Co. v. Greenwood*, 39 Cal. 71, 12 Morr. Min. Rep. 123; *Rhoda v. Alameda*, 52 Cal. 350.

<sup>8</sup> A judgment by default may be set aside on motion if the summons be insufficient (*Ward v. Ward*, 59 Cal. 139), or if there be no service or appearance (*Glidden v. Packard*,

28 Cal. 649), or if there be no proof of service of a complaint (*Hog's Back M. Co. v. New Basil Co.*, 63 Cal. 121), or where plaintiff neglected to give defendant notice of the overruling of the complaint (*Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349), and in many other cases, which may be noted by reference to the digest. And it seems that the remedy by motion is proper where the complaint does not state facts sufficient to constitute a cause of action (see *People v. De Carrillo*, 35 Cal. 37), provided the sufficiency of the complaint has not been actually passed upon by the court. But where the sufficiency of the complaint has been actually passed upon by the court,—as where a demurrer was put in and the judgment by default was for failure to answer after the overruling of the demurrer,—it would seem that the remedy by motion would not be available to test the sufficiency of the complaint. See section 199, *ante*.

provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. . . . "

Earlier statutes are given in the notes.\*

\* Before the amendment of 1880 the section was as follows:

"Sec. 473. The court may, in furtherance of justice and on such terms as may be proper, *allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may upon like terms enlarge the time for answer or demurrer.* The court may likewise, *in its discretion* [upon affidavit showing good cause therefor], after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code; and also [may, upon such terms as may be just, and upon payment of costs] relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any reason [cause] satisfactory to the court, or the judge thereof [at chambers], the party aggrieved has failed [been unable] to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof [at chambers], in vacation may grant the relief upon application made within a reasonable time, not exceeding *six* [five] months after the adjournment of the term. When from any cause the summons [and a copy of the complaint] in action *has* [have] not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal repre-

sentatives, at any time within *one year* [six months] after the rendition of any judgment in such action to answer to the merits of the original action."

In the section just given the words in italics are the words which were added by the amendment of 1874. The words in brackets were in the section as first enacted, but were stricken out by the amendment of 1874.

Section 473 above corresponds to section 68 of the old Practice Act, which with its various amendments was as follows:

"Sec. 68. The court may, in furtherance of justice and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, *and may upon like terms enlarge the time for an answer or demurrer, or demurrer to an answer filed* (1858). The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms allow an answer to be made after the time limited by this act [or by an order enlarging such time]; and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; *and when for any cause satisfactory to the court, or the judge at chambers, the party ag-*



**§ 308. Time in Which the Motion must be Made.**—Between 1851 and 1866 the statute did not fix any limitation of time in which the motion for relief had to be made, except in cases where

*grieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term (1866.)* When from any cause the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action."

In the section last given the words in italics were added by the amendments of the years indicated. The words in brackets were added by the amendment of 1853, but omitted by that of 1866.

See Laws of 1851, p. 60; Laws of 1853, p. 276; Laws of 1865-66, p. 843. No amendments have been made since those of 1880.

Corresponding provisions in other codes are as follows:

*Arizona:* Section 1840, Revised Statutes (section 271, Civil Practice), is as follows:

"In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant, for good cause shown, supported by affidavit filed within one year after rendition of such judgment."

*Colorado:* Section 75, Mills' Annotated Code, so far as it relates to the vacation of judgments by default, is as follows: "

"The court . . . may, upon like terms, allow an answer to be made after the time limited by this act, and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal repre-

sentative from a judgment, order, or other proceeding, taken against him through mistake, inadvertence, surprise or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of, was taken, the court or judge at chambers in vacation, may grant relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. When, for any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representatives at any time within one year after the rendition of any judgment in such action, to answer the merits of the original action."

*Idaho:* Section 4229, Revised Codes, varies slightly both from the California and Colorado section quoted, but is substantially the same as the latter.

*Montana:* Section 6589, Revised Codes (section 774, Code of Civil Procedure), also varies slightly from the two above-quoted sections, but is substantially the same as that of California.

*Nevada:* Section 3163, Cutting's Compiled Laws (section 68, Civil Practice), is also substantially the same as the California section, above quoted.

*New Mexico:* The procedure does not contain any parallel provision other than section 2685, subsection 131, which is as follows:

"Any interlocutory judgment, or default, may, for good cause shown, be set aside at any time before the damages are assessed or final judgment rendered upon such terms as shall be just."

And subsection 137 as follows: "Judgments may be set aside for irregularity, on motion filed at any

there was no personal service upon the defendant, in which case the court could allow "such defendant or his legal representatives, at any time within six months after the rendition of any judgment in

time within one year after the rendition thereof."

*North Dakota:* Section 6884, Revised Codes, is as follows:

"The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this code, or by an order enlarge such time; and may also, in its discretion and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding; . . . ."

*Oklahoma:* Section 6094, Compiled Laws of Oklahoma, prescribes as follows:

"The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made:

"First. By granting a new trial for the cause within the time and in the manner provided in section 5829.

"Second. By a new trial granted in proceedings against defendants, constructively summoned as provided in section 5612.

"Third. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

"Fourth. For fraud practiced by the successful party in obtaining a judgment or order.

"Fifth. For erroneous proceedings, against an infant, married woman or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.

"Sixth. For the death of one of the parties before the judgment in the action.

"Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

"Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in section 5935.

"Ninth. For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned, or otherwise legally notified of the time and place of taking such judgment."

Section 6095 provides: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment, because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term."

Section 6096 provides that proceedings to vacate or modify the judgment or order shall be by petition, verified by affidavit setting forth the judgment or order, the grounds therefor, and the defense to the action if the party applying is the defendant; and that summons shall issue and be served as in the commencement of an action.

Section 6097 requires the court to decide whether there is ground to vacate or modify, before determining the validity of the defense; and section 6093 provides that the judgment shall not be vacated or modified until it is determined that there is a valid defense. This section also provides for the preservation of liens and securities obtained under the modified judgment.

Section 6099 provides for a stay bond pending the proceedings to vacate; and section 6100 provides that when judgment is rendered before the day set for trial, such stay may be granted although no defense to the action is shown.

Section 6101 provides that, for causes mentioned in subdivisions 4, 5, and 7, the petition must be filed within two years; for causes mentioned in subdivisions 3 and 6,

such action, to answer to the merits of the original action."<sup>1</sup> It became necessary, therefore, to fix some period at which the judgment should cease to be liable to attack; and the court adopted the common-law rule in relation to the subject, viz., that a court had no power to disturb its judgments after the adjournment of the term at which they were rendered, unless the jurisdiction was saved by a motion made during such term.<sup>2</sup> This rule applied only to

within three years; for cause mentioned in subdivision 9, within one year; and void judgments may be vacated at any time.

*Oregon:* Section 103, Lord's Oregon Laws, is as follows:

"The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this code, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

*South Dakota:* Section 151, Code of Civil Procedure, is as follows:

"The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made or other act to be done, after the time limited by this code, or, by an order, enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may, in like manner, and upon like terms, permit an amendment of such proceedings so as to make it enforceable thereto."

*Utah:* Section 3005, Compiled Laws, contains substantially the same provisions as those of California and other states above quoted.

*Washington:* Section 412, Rem. & Bal. Code (section 5091, Bal. Code), provides that, "The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable."

Section 464, Rem. & Bal. Code (section 5153, Bal. Code) is substantially the same as the Oklahoma code (section 6094), above quoted, omitting subdivision 9, and referring in subdivision 2 to section 235. The practice is also substantially the same.

*Wyoming:* Section 4650, Compiled Statutes, is the same as the Oklahoma section (6094), above quoted, with the following additional subdivision:

"10. When such judgment or order was obtained, in whole or in material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted."

Also, in place of the section references in subdivisions 1, 2, and 8, the following are inserted, viz., 4605, 4366, and 4626, respectively.

The practice is substantially the same as that of Oklahoma and Washington, but with slight differences.

<sup>1</sup> See note 9 to preceding section.

<sup>2</sup> See *Baldwin v. Kramer*, 2 Cal. 582; *Suydam v. Pitcher*, 4 Cal. 280; *Carpentier v. Hart*, 5 Cal. 406; *Robb v. Robb*, 6 Cal. 21; *Shaw v. McGregor*, 8 Cal. 521; *Branger v. Chevallier*, 9 Cal. 172; *Bell v. Thompson*, 19 Cal. 706; *Lattimer v. Ryan*, 20 Cal. 628; *Casement v. Ringgold*, 28 Cal. 335. The rule applied not only to setting aside judgments, but also to amending them (*Morrison v.*

final judgments.<sup>3</sup> But so strictly was it adhered to that it was held that after the adjournment of the term the court could not set aside a judgment which was void on its face, although its execution could be enjoined.<sup>4</sup> In 1866, however, the statute was amended so as to provide that "when for any cause satisfactory to the court or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court or the judge at chambers in vacation may grant the relief upon application made within a reasonable time, *not exceeding five months* after the adjournment of the term. When from any cause the summons, etc." A provision substantially similar, except as to the length of time after the adjournment in which the application could be made, remained in the statute until 1880.<sup>5</sup> The effect of the pro-

Dapman, 3 Cal. 255; Hegeler v. Henckell, 27 Cal. 491), except where the record contained matter to amend by (Swain v. Naglee, 19 Cal. 127), as in the description of real estate in a partition suit (Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381), or where the judgment was never in fact rendered, but was confessedly the result of a mistake. Rousset v. Boyle, 45 Cal. 64; Sheldon v. Gunn, 57 Cal. 40. The rule was at one time applied to proceedings on motion for new trial. De Castro v. Richardson, 25 Cal. 49; Willson v. McEvoy, 25 Cal. 169. But this doctrine was afterward overruled. Spanagel v. Dellinger, 34 Cal. 476.

The general rule prevails in the supreme court of the United States. Cameron v. M'Roberts, 3 Wheat. (U. S.) 591, 4 L. ed. 467; Bank of United States v. Moss, 6 How. (U. S.) 38, 12 L. ed. 331; McMicken v. Perin, 18 How. (U. S.) 507, 15 L. ed. 504; Bronson v. Schulten, 14 Otto (U. S.), 415, 26 L. ed. 797; Coughlin v. District of Columbia, 16 Otto (U. S.), 10, 27 L. ed. 74.

<sup>3</sup> Willson v. Cleaveland, 30 Cal. 192. As to what was final judgment within the meaning of the rule, see Casement v. Ringgold, 28 Cal. 35.

<sup>4</sup> This was held in Bell v. Thompson, 19 Cal. 706, in which case Norton, J., delivering the opinion, said: "It has been decided in the cases of Chipman v. Bowman, 14 Cal. 157,

and Logan v. Hillegas, 16 Cal. 200, that the district court 'can at any time arrest all process issued by its clerk on judgments which are void.' But this is by virtue of its control over its own process and its own officers, by which it can refrain from attempting to give efficacy to a void judgment, or what might be called the form of a judgment, and does not necessarily imply that it could entertain a motion to vacate the judgment, treating it as a thing of some efficacy and which there could be some object in having set aside. It is an ordinary exercise of the power of courts to set aside executions and grant a perpetual stay of execution on judgments which there is no ground for absolutely vacating. Under the effect of the decisions heretofore made by this court, we think it must be considered as settled in this state that no motion can be entertained by a district court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term in which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act."

<sup>5</sup> See note 9 to the preceding section.

vision was to ingraft an exception on the general rule. But it was held that in order to bring himself within the exception the party must make a showing as to the reason why he did not make his application during the term;<sup>6</sup> and an application made after the expiration of five months could not be considered.<sup>7</sup>

The rule itself was abolished in 1880. The Constitution of 1879 provided that the superior courts "shall be always open (legal holidays and nonjudicial days excepted)"<sup>8</sup> and by the amendments to the Code of Civil Procedure made in 1880 the constitutional provision quoted was incorporated in the statute,<sup>9</sup> and all the provisions for terms of court were omitted; and the section in relation to relief against default judgments was amended so as to provide that "application therefor be made *within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken.*"<sup>10</sup>

Under this provision the question whether the application is made "within a reasonable time" is one for the judge to pass upon under all the circumstances of the case.<sup>11</sup> But there can be no doubt but that all power to grant relief ceases at the expiration of six months from the time the judgment was taken. This has been decided in a multitude of cases.<sup>12</sup>

<sup>6</sup> Mahoney v. Mahoney, 51 Cal. 118.

<sup>7</sup> Hartman v. Olvera, 49 Cal. 101.

<sup>8</sup> Constitution, art. 6, sec. 5.

<sup>9</sup> Section 473, California Code of Civil Procedure.

<sup>10</sup> See section 472, California Code of Civil Procedure.

<sup>11</sup> For an instance of the effect of delay, see Reese v. Mahoney, 21 Cal. 305; and for other instances, see the digest. See, also, Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344, for a discussion of "reasonable time," and the policy which determined the law-making power to leave the determination of the question to the courts. See, also, Wolff v. Canadian Pacific Co., 89 Cal. 332, 26 Pac. 825.

<sup>12</sup> See Hartman v. Olvera, 49 Cal. 101; Hill v. Beatty, 61 Cal. 292; Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 473; California Beet Sugar Co. v. Porter, 68 Cal. 369, 9 Pac. 313; Wharton v. Harlan, 68 Cal. 422, 9 Pac. 727; Wiggin v. Superior Court, 68

Cal. 398, 9 Pac. 646; People v. Goodhue, 80 Cal. 199, 22 Pac. 66; People v. Harrison, 84 Cal. 607, 24 Pac. 311; People v. Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55; White v. Patton, 87 Cal. 151, 25 Pac. 270; Wolff v. Canadian Pacific Ry., 89 Cal. 332, 26 Pac. 825; Blondeau v. Snyder, 95 Cal. 521, 31 Pac. 591; Norton v. Achison etc. Co., 97 Cal. 383, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344; People v. Thomas, 101 Cal. 571, 36 Pac. 9; Eldred v. White, 102 Cal. 600, 36 Pac. 944; Dyerville etc. Co. v. Heller, 102 Cal. 615, 36 Pac. 928; People v. Temple, 103 Cal. 447, 37 Pac. 414; Howard v. McChesney, 103 Cal. 536, 37 Pac. 523; People v. Dodge, 104 Cal. 487, 38 Pac. 203; Whitney v. Daggett, 108 Cal. 232, 41 Pac. 471; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295;

But it is to be remembered that the provisions of section 473 do not apply to judgments which are void upon their face, and which require no more than a mere inspection of the judgment-roll to demonstrate their want of vitality. It has been said that such judgments are dead limbs upon the judicial tree, which should be

Bued v. Cooper, 109 Cal. 682, 34 Pac. 98; De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345, 32 L. R. A. 82; People v. Harrison, 107 Cal. 541, 40 Pac. 956; Storke v. Storke, 116 Cal. 47, 47 Pac. 869, 48 Pac. 121; Heller v. Dyerlyville etc. Co., 116 Cal. 127, 47 Pac. 1016; Brackett v. Banegas, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90; Scammon v. Bonslett, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272; Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682; Young v. Fink, 119 Cal. 107, 50 Pac. 1060; Wolff v. Canadian Pacific Co., 123 Cal. 535, 56 Pac. 453; Butler v. Soule, 124 Cal. 69, 56 Pac. 601; Waller v. Weston, 125 Cal. 201, 57 Pac. 892; Estate of Eikerenkotter, 126 Cal. 54, 58 Pac. 370; Leonis v. Lefingwell, 126 Cal. 369, 58 Pac. 940; Estate of Turner, 128 Cal. 388, 60 Pac. 967; Estate of Hickey, 129 Cal. 14, 61 Pac. 475; Gerig v. Loveland, 130 Cal. 512, 62 Pac. 830; May v. Hatcher, 130 Cal. 627, 63 Pac. 33; Baker v. Borello, 131 Cal. 615, 63 Pac. 914; Matter of Tracey, 136 Cal. 385, 69 Pac. 20; Levy v. Superior Court, 139 Cal. 590, 73 Pac. 417; Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Canadian etc. Co. v. Clarita etc. Co., 140 Cal. 672, 74 Pac. 301; Grannis v. Superior Court, 143 Cal. 630, 77 Pac. 647; People v. Davis, 143 Cal. 673, 77 Pac. 651; People v. Norris, 144 Cal. 422, 77 Pac. 998; People v. Mason, 144 Cal. 770, 78 Pac. 1113; People v. Wrin, 143 Cal. 11, 76 Pac. 646; Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Dunsmuir v. Coffey, 148 Cal. 137, 82 Pac. 682; Tinn v. U. S. District Atty., 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152; Estate of Dunsmuir, 149 Cal. 67, 84 Pac. 657; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Crossman v. Viviendi Water Co., 150 Cal. 575, 89 Pac. 335; Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 Pac. 934; Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; City and County v. Brown, 153 Cal. 644, 96 Pac. 281; Estate of Thomas, 155 Cal. 488, 101 Pac. 798. Also, Kerns v. McAulay, 8 Idaho, 558, 69 Pac. 539; Vane v. Jones, 13 Idaho, 21, 88 Pac. 1058; State v. Court, 32 Mont. 20, 79 Pac. 410; Greene v. Montana etc. Co., 32 Mont. 102, 79 Pac. 693; Daniels v. Daniels, 12 Nev. 118; State v. Bank, 4 Nev. 358; State v. District Court, 16 Nev. 371; Lang Syne etc. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358; Killip v. Empire etc. Co., 2 Nev. 34; Horton v. New Pass etc. Co., 21 Nev. 184, 27 Pac. 376, 1018; Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826; Yerkes v. McHenry, 6 Dak. 5, 50 N. W. 485; Alexander v. Ling, 31 Or. 222, 50 Pac. 915; Henrichsen v. Smith, 29 Or. 475, 42 Pac. 486, 44 Pac. 496; Ladd v. Mason, 10 Or. 308; Stites v. McGee, 37 Or. 576, 61 Pac. 1129; Brand v. Baker, 42 Or. 426, 71 Pac. 320; Nicklin v. Robertson, 28 Or. 278, 52 Am. St. Rep. 790, 42 Pac. 993; Darke v. Ireland, 4 Utah, 192, 7 Pac. 714; Elliott v. Bastian, 11 Utah, 452, 40 Pac. 713; Jones v. Insurance Co., 14 Utah, 215, 47 Pac. 74; Wolferman v. Bell, 8 Wash. 140, 35 Pac. 603; Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042; Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Hancock v. Stewart, 1 Wash. Ter. 323; Hill v. Lowman, 15 Wash. 503, 46 Pac. 1042; Denton v. Merchants' National Bank, 18 Wash. 387, 51 Pac. 473; Boston National Bank of Seattle v. Hammond, 21 Wash. 158, 57 Pac. 365; Scott v. Hanford, 37 Wash. 5, 79 Pac. 481; Twigg v. James, 37 Wash. 434, 79 Pac. 959; Hawks v. Votaw, 1 Wash. 70, 23 Pac. 442.

lopped off, if the power so to do can be exercised. They bear no fruit for the plaintiff, and are a constant menace to the defendant.<sup>13</sup> If the default judgment is void on its face, therefore, and its defects apparent on the judgment-roll, there is no time limit within which they are required to be presented as a ground for the relief contemplated by this section.<sup>14</sup> It may be relieved against at any

<sup>13</sup> *People v. Green*, 74 Cal. 400, 5 Am. St. Rep. 448.

<sup>14</sup> The principles here involved were well expressed by Justice Angellotti in the case of *People v. Davis*, 143 Cal. 673, 77 Pac. 651, in the following language:

"It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face, unless the motion is made within a reasonable time, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which in no cases exceeds one year. It is also settled law that a judgment is not void upon its face unless its invalidity is apparent from an inspection of the judgment-roll. It is hardly necessary to cite authorities to sustain these propositions. (See *People v. Temple*, 103 Cal. 447, 37 Pac. 414, and *Canadian etc. M. & T. Co. v. Clarita L. & I. Co.*, 140 Cal. 672, 74 Pac. 301, and cases there cited.)

"The effect of these well-settled rules is, that unless the invalidity of the judgment is apparent from an inspection of the judgment-roll, the court rendering it has no power, in the absence of application made within the time specified in section 473 of the Code of Civil Procedure, to make any order vacating or setting aside such judgment, and the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action, on the equity side of the court. (See *Eichhoff v. Eichhoff*, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24.)

"Under such circumstances, the judgment, which is not invalid on its face, is entirely beyond the reach of the court that rendered it, except in a separate action, and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore void.

(*People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22.) Such an order occupies no better position than a judgment that is void upon its face, and, like such a judgment, is assailable wherever and whenever it may be produced, and whether the attack upon it is direct or collateral. In *People v. Temple*, the attack upon such an order was collateral, and the order was held to be a mere nullity.

"The power of a court to vacate a judgment or order void on its face is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court. While a motion for such action on the part of the court is entirely appropriate, neither motion nor notice to adverse party is essential. The court has full power to take such action on its own motion and without any application on the part of anyone. (*Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740.)

"As was held in *People v. Greene*, 74 Cal. 400, 5 Am. Rep. 448, 16 Pac. 197, 'A judgment which is void upon its face, and which requires only an inspection of the judgment-roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant.'

"This is, of course, equally true of an order invalid on its face. While it is immaterial in a certain sense whether such a judgment or order be set aside, for it neither binds nor bars anyone, still it is well settled that the court whose records are thus encumbered with what is a mere form without substance may at any time formally remove the same by declaring it a nullity."

The following decisions also support the rule: *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232; *Savings &*

time, however remote, by mere motion. The attention of the courts need merely to be called to that which its own record demonstrates, and the judgment, order, or proceeding will be nullified without question. But if it is not void on the face of the record, and it is sought to vacate it by mere motion, such motion must be made within a reasonable time, in any event within six months;<sup>15</sup> unless, indeed,

*Loan Society v. Thorne*, 67 Cal. 53, 7 Pac. 36; *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727; *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *People v. Pearson*, 76 Cal. 400, 18 Pac. 424; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Norton v. Atchison etc. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; *Ex-Mission etc. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51; *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523; *Whitney v. Daggett*, 108 Cal. 232, 41 Pac. 471; *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345, 32 L. R. A. 82; *Mott L. Works v. West Coast S. S. Co.*, 113 Cal. 341, 45 Pac. 683; *Brckett v. Banegas*, 116 Cal. 278, 58 Am. St. Rep. 180, 48 Pac. 90; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601; *Crescent etc. Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892; *Estate of Eikerenkotter*, 126 Cal. 54, 58 Pac. 370; *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89; *Matter of Tracey*, 136 Cal. 385, 69 Pac. 20; *Canadian etc. Co. v. Clarita etc. Co.*, 140 Cal. 672, 74 Pac. 301; *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *People v. Norris*, 144 Cal. 422, 77 Pac. 998; *Grannis v. Superior Court*, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; *Dunsmuir v. Coffey*, 148 Cal. 137, 82 Pac. 682; *Estate of Dunsmuir*, 149 Cal. 67, 84 Pac. 657; *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; *City and County (San Francisco) v.*

*Brown*, 153 Cal. 644, 96 Pac. 281. Also, *Park v. Higbee*, 6 Utah, 414, 24 Pac. 524; *Benson v. Anderson*, 14 Utah, 334, 47 Pac. 142.

It would seem, upon principle, that if a judgment is void, whether it so appears on the face of the record or not, it ought to be set aside by the tribunal which rendered it at any time, when an adequate showing shall be made; but the courts do not appear to share this opinion. It is said that such cases are analogous to those that come under the rule of section 473, and that the motion to vacate must, therefore, be made within a reasonable time, not later than six months. See *Norton v. Atchison etc. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Estate of Eikerenkotter*, 126 Cal. 54, 58 Pac. 370; and see, also, *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899.

The right to have a void judgment set aside, whether the defect is or is not apparent on the face of the record, is a legal right not dependent upon statutory authority. *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51.

<sup>15</sup> As a matter of course, if there are equitable grounds, a separate suit may be availed of. See the preceding chapter. And see *Dean v. Superior Court*, 63 Cal. 473; *Baker v. O'Riorden*, 63 Cal. 368, 4 Pac. 232; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129; *Thompson v. Laughlin*, 91 Cal. 343, 27 Pac. 752; *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361; *Heller v. Dyerville etc. Co.*, 116 Cal. 127, 47 Pac. 1016; *Brckett v. Banegas*, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90; *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008; *Butler v.*



the motion is made on the ground of want of personal service of summons, in which event the motion may be made at any time one year after the rendition of the judgment.<sup>10</sup>

It will be observed that the time begins to run when the "judgment, order, or proceeding was taken." In so far as an order, taken *ex parte*, or a judgment, taken by default, is concerned, no difficulty is apparent, but it is not always clear just what is meant

Soule, 124 Cal. 69, 56 Pac. 601; Gerig v. Loveland, 130 Cal. 512, 62 Pac. 830; Estudillo v. Security etc. Co., 149 Cal. 556, 87 Pac. 19.

Also, as to equity suit, see Freebrich v. Lane, 45 Or. 13, 106 Am. St. Rep. 634, 76 Pac. 351. But it has been held that a denial of a motion to vacate on the ground of inadvertence, etc., is a bar to a suit in equity on the same ground. See Thompson v. Connell, 31 Or. 231, 65 Am. St. Rep. 818, 48 Pac. 467.

<sup>10</sup> In Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191, the supreme court, with reference to this clause of the section under consideration, said:

"It is provided by section 473 of the Code of Civil Procedure that when for any cause the summons in an action has not been *personally* served on a defendant, the court may, at any time within one year after the rendition of judgment, upon such terms as are just, set it aside and allow him to answer upon the merits of the original action. The obvious and sole purpose of this particular provision of section 473 is to afford one, who has only constructive notice of a suit brought against him, an opportunity within the time designated, to invoke the benefit of the section and defend upon the merits. Where, however, at any time prior to the judgment, the defendant personally appears in the action, this, of course, establishes his personal knowledge of its pendency, and so removes him from the class to which the section affords relief. Now, the motion made by defendant was based solely upon the ground that personal service of the summons had not been made upon him; that he had only constructive notice of the action brought against him. The discretion of the court was not invoked on any other ground; no show-

ing or suggestion that the judgment was taken against defendant through mistake, surprise, inadvertence or excusable neglect. He based his application upon want of personal service, and the validity of the order is to be determined by considering whether the evidence sustained that claim. We are satisfied that it did not, because it appears from the record that the defendant, . . . personally appeared in the action prior to the rendition of the judgment, and hence was not entitled to have the judgment set aside under the provisions of the section upon which his application was based."

It would appear from the doctrine here stated that the mere fact of want of personal service will not be deemed to confer an incontestible right to have the judgment set aside, if there is appearance without service.

See, also, the following cases: Dunlap v. Steere, 92 Cal. 344, 27 Pac. 143, 28 Pac. 563, 16 L. R. A. 361; Schart v. Schart, 116 Cal. 91, 47 Pac. 927; Scamman v. Bonslett, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272, and cases there cited; Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; Estate of Wood, 137 Cal. 129, 69 Pac. 900; Fox v. Townsend, 149 Cal. 659, 87 Pac. 82; and see Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691, 12 Ann. Cas. 990, as to difference in scope between the two clauses of section 473, considered in this chapter.

The question as to whether a McEnery decree can be set aside under the provisions of this clause was not considered in the Kerrigan case (Title etc. Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 356, 8 L. R. A., N. S., 682); but in Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939, it was, and was decided in the affirmative.

by the term "proceeding," nor when the same may be said to be *taken against* the party who seeks relief under this section. The term has been said to apply to any distinct step taken by either party in the progress of an action; and also, it has been held to refer to any act of the court or of a party. Possibly, upon occasion, it may refer to both, taken together, as an application for an order and the order itself. Again, it has been held to be anything done from the commencement to the termination of any particular litigation, or cause.<sup>17</sup> The settlement of a bill of exceptions is a proceeding.<sup>18</sup> So an application for the settlement or allowance of a statement or bill of exceptions, or a presentation for settlement, is a proceeding.<sup>19</sup> When a statement is presented too late, therefore, it is clearly a proceeding. If such failure to present in time is the result of mistake, inadvertence, surprise, or excusable neglect, it may be relieved against by the party whose duty it was to present it within the time prescribed by law; provided, application is made within a reasonable time. But such a party is not the one *against* whom this *proceeding* was taken. This *proceeding* was taken against his adversary. It is obvious, therefore, that this is not the proceeding referred to. The proceeding taken against the party who made the mistake, or who inadvertently failed or neglected to present the statement in time, is the objection which his adversary made at some subsequent time, whereby he sought the advantage accorded to him by the law, in the elimination of the statement. The time, in such a case, would therefore begin to run from the date the objection was made, and not from the date when the presentation was, or should have been, made, had it been in time.<sup>20</sup>

<sup>17</sup> See *Irwin v. Bank of Bellefontaine*, 6 Ohio St. 81; *Wilson v. Allen*, 3 How. Pr. 369.

<sup>18</sup> *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883; *Sprigg v. Barber*, 118 Cal. 591, 50 Pac. 682. The certificate of such settlement or allowance, when signed and filed, is an order of court, and cannot be amended or modified, except to make it speak the truth, after the expiration of a reasonable time, or six months, as a maximum. See *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 73 Pac. 590, and cases there cited; and also *Merced Bank v. Price*, 152 Cal. 697, 93 Pac. 866.

<sup>19</sup> See *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Baily v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *King v. Dugan*, 150 Cal. 258, 88 Pac. 925; *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543.

<sup>20</sup> See *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911. The word "proceeding" necessarily depends for its signification largely upon the context. See *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597.

But this in no manner affects the rule that application must be made within a *reasonable* time, without regard to the six months' period, which is merely the maximum.<sup>21</sup>

It has been held that not only is it requisite that notice be given and application for relief filed, within the statutory time, but the application must be presented and determined within such time.<sup>22</sup>

§ 309. **The Parties Who may Move.**—The provision of the statute always has been that the court may relieve "*a party or his legal representative* from a judgment, order, or other proceeding taken *against him*,"<sup>1</sup> etc. This is in accordance with the general rule that only a party to a cause can be allowed to make a motion therein.<sup>2</sup> And in pursuance of this rule it was held in *Dimick v. Derringer*,<sup>3</sup> that where judgment by default, in an action of ejectment, was taken against a tenant, the landlord could not move in his own name to have the judgment set aside. And in *Corwin v. Bensley*,<sup>4</sup> it was held that even if a person who had bought out the interest of a party to an action to quiet title could move in his own name to have the judgment opened (which was doubted), yet that he was in no better position than his grantor, and that his application must be governed by the same rules that would apply to a motion by the grantor. But the code provides that "in case of any other<sup>5</sup> transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."<sup>6</sup> And if the successor in interest chooses

<sup>21</sup> See *Smith v. Pelton etc. Co.*, 151 Cal. 399, 90 Pac. 932, 1135.

<sup>22</sup> *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826; *Nicklin v. Robertson*, 28 Or. 278, 52 Am. St. Rep. 790, 42 Pac. 993.

<sup>1</sup> See note 9 to section 307, *ante*.

<sup>2</sup> As to the general rule, see *Estate of Aveline*, 53 Cal. 259; *Blanc v. Rodgers*, 47 Cal. 606. If the motion raises the question of the jurisdiction of the court it matters not who makes it. See *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457. In *Smith v. Roberts*, 1 Cal. App. 148, 81 Pac. 1026, it was held that one not a party to the action cannot move under the provisions of section 473, Code of Civil Procedure, to set aside a judgment taken in an action between two others upon conflicting claims for right to purchase public

lands, even though as a settler thereon for more than a year, and an applicant for the right to purchase, he might have intervened in such action prior to judgment, and obtained the determination of such rights. Only parties to the original action, or their legal representatives, may move to set aside a judgment under the authority of that section.

<sup>3</sup> 32 Cal. 488.

<sup>4</sup> 43 Cal. 253.

<sup>5</sup> That is, any transfer other than by death or disability.

<sup>6</sup> See Code of Civil Procedure of California, section 385. And see section 4108, Revised Codes of Idaho; section 6494, Revised Codes of Montana (section 587, Code of Civil Procedure); section 3111, Cutting's Compiled Laws of Nevada; section 6820, Revised Codes of North Da-

to have the action continued "in the name of the original party," he may move *in the name of such party* for relief against any proceeding that may be taken against him. Thus in *Walker v. Felt*,<sup>7</sup> where the plaintiff sold out his interest in the property which was the subject of the action to a third person, but there was no substitution of parties and no change of the attorneys of record, but for several years the case was managed by the attorneys of the grantee, and at the end of that time the attorney of record for the original plaintiff dismissed the suit without the knowledge or consent of the grantee, it was held that a motion of the grantee to set aside the dismissal should have been sustained.

This ruling was followed in the later case of *Crescent Canal Co. v. Montgomery*,<sup>7a</sup> where, in an action involving the title to real property, defendants had transferred all their interest to the property involved in the controversy, and afterward entered into a fraudulent stipulation with the plaintiff for entry of judgment in the latter's favor, it was held that the grantee and successor in interest of the defendants, as the real party in interest, might move the court, upon a proper showing, to set aside and vacate the judgment so entered upon the stipulation of the nominal defendants. Again, in *Tuffree v. Stearns Ranchos Co.*,<sup>7b</sup> where the question arose, but not under this section, the correctness of the above principle was sustained.<sup>7c</sup>

In a proceeding for the sale of certain swamp lands to satisfy an assessment for reclamation purposes, concerning which the statute provided that the defendants named "or any person claiming any interest in the land" could answer and defend the suit, it was held that persons claiming an interest in the land could move to have a

kota; section 38, Lord's Oregon Laws; section 193, Rem. & Bal. Code of Washington (section 4837, Bal. Code); section 4330, Compiled Statutes of Wyoming.

<sup>7</sup> 54 Cal. 386. In *State v. Napton*, 24 Mont. 450, 62 Pac. 686, the application was made, not by the party beneficially interested, but by another on his behalf; an amendment was allowed substituting the real party in interest, it appearing that the adverse party was not misled.

<sup>7a</sup> 124 Cal. 134, 56 Pac. 797.

<sup>7b</sup> 124 Cal. 306, 57 Pac. 69.

<sup>7c</sup> As to what is to be understood by the phrase "personal representa-

tive," and instances of the application of the provision with reference thereto, see the following cases: *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703; *People v. Mullan*, 65 Cal. 396, 4 Pac. 348; *Dorland v. Smith*, 93 Cal. 120, 28 Pac. 812; *Malone v. Big Flat etc. Co.*, 93 Cal. 384, 28 Pac. 1063; *Heilbron v. '76 etc. Co.*, 96 Cal. 7, 30 Pac. 802; *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Crossman v. Viviendi Water Co.*, 136 Cal. 571, 69 Pac. 220; *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 Pac. 69; *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179.

judgment by default set aside, although they were not named as defendants.\*

Where the occupant of land is wrongfully dispossessed under a writ of assistance, he may move to have the writ set aside.<sup>9</sup>

Notwithstanding the language of this section would seem to limit its operation in behalf of parties in respect to a "judgment, order or other proceeding taken *against* him," etc., the supreme court of California, following New York construction of a similar provision, has adopted the principle that "the statute is intended to be remedial, and should receive a liberal interpretation," and have held that its provisions might be invoked by a party in whose favor such judgment, order, or proceeding was taken, as well as by one against whom it was taken.<sup>10</sup>

The above principles have no application where the action has abated by the death of a party, as where the suit was for divorce the right conferred by section 473, to ask for relief for want of personal service of summons, would not pass to, nor could it be invoked against, the personal representatives of the deceased. It is possible an exception to this rule might be made where property rights were involved, besides the mere personal status of the parties.<sup>11</sup>

One of several defendants may make application for all.<sup>11a</sup>

This section may be invoked in probate proceedings as well as others. Section 1713 of the Code of Civil Procedure provides for the application of Part II of that code to proceedings in probate, and this has been held to carry with it an application of section 473 to the same.<sup>12</sup> But it has been held that the heirs have no right

\* *Reclamation District v. Coghill*, 56 Cal. 607.

<sup>9</sup> See *People v. Grant*, 45 Cal. 97; and look at *City of San Jose v. Fulton*, 45 Cal. 316; *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Southern California Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Credits Commutation Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009; *Elhott v. Superior Court*, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109.

<sup>10</sup> See *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344; *Bernheim v. Cerf*, 123 Cal. 170, 55 Pac. 759; *Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686;

*Palace Hardware Co. v. Smith*, 134 Cal. 381, 66 Pac. 474; *Thompson v. Alford*, 135 Cal. 52, 66 Pac. 983.

<sup>11</sup> See *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064; *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141.

<sup>11a</sup> *Stevenson v. Mann*, 13 Nev. 268.

<sup>12</sup> See *Estate of Hudson*, 63 Cal. 454; *De Pedrorena v. Superior Court*, 80 Cal. 144, 22 Pac. 71; *Estate of Hickey*, 129 Cal. 14, 61 Pac. 475; *Levy v. Superior Court*, 139 Cal. 590, 73 Pac. 417; *Estate of Ross*, 140 Cal. 282, 73 Pac. 976; *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467.

to ask relief thereunder from a judgment rendered against the administrator of the estate.<sup>13</sup>

§ 310. **The Motion, Showing, Affidavit of Merits, etc.**—The motion must be upon notice.<sup>1</sup> The rules of court usually require that the notice of motion shall specify the grounds upon which the motion will be made; and such requirement must be complied with; but leave to amend the notice so as to insert the grounds should be given at the hearing if asked for.<sup>2</sup> There must also be a showing.<sup>3a</sup> Although, as a general rule, an application for relief against a judgment by default is addressed to the discretion of the court, yet if there be no showing there is no room for the exercise of such discretion, and an order opening the default will be reversed.<sup>3</sup> The showing must be of the facts upon which the party bases his claim for relief,<sup>3a</sup> which facts must be shown by affidavits. The reasons, the causes, the excuses, the facts whereby the party asking relief was in default, are the matters which concern the court, and these must be made to appear in the affidavits here referred to. It will not be sufficient merely to aver that the applicant for relief was mistaken, or was surprised, or inadvertently absented himself, or that by reason of inadvertence, etc., he defaulted, or was induced to default. The facts themselves upon which such mistake, inadvertence, surprise, or excusable neglect, are predicated, must be set forth. "Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted

<sup>13</sup> *Cass v. Hutton*, 155 Cal. 103, 99 Pac. 493.

<sup>1</sup> *Vallejo v. Greene*, 16 Cal. 160; *Reilly v. Buddock*, 41 Cal. 312. See note 9, section 307, where the various statutes are collected. Provision is not always specifically made for notice to be given.

<sup>2</sup> See *Sweeney v. Stanford*, 60 Cal. 362.

<sup>3a</sup> This requirement varies in different jurisdictions. In *Griswold v. Lee*, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955, it was held that no more than a *prima facie* showing was necessary. See, also, *Pettigrew v. Sioux Falls*, 5 S. D. 646, 60 N. W. 27; *Western Loan etc. Co. v. Smith*, 12 Idaho, 94, 85 Pac. 1084; *Nicklin v. Robertson*, 28 Or. 278, 62 Am. St. Rep. 790, 42 Pac. 993;

*Kirschner v. Kirschner*, 7 N. D. 291, 75 Pac. 252; *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199; *Minnesota etc. Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581; *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528; *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29; *Gauthier v. Busicka*, 3 N. D. 1, 53 N. W. 80.

<sup>3</sup> *People v. O'Connell*, 23 Cal. 281; *Santa Barbara Livestock Co. v. Thompson*, 46 Cal. 63; and look at *Watson v. San Francisco & H. B. R. R. Co.*, 41 Cal. 17; *Harlan v. Smith*, 6 Cal. 173; *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598; as to necessity for affidavit of merits, see note 4 below.

<sup>3a</sup> See sections 312 and 313, *post*, and section 307, note 8, *ante*.

with the reasons for the inadvertence."<sup>3b</sup> And this remark may well include each of the other grounds for relief provided in the section.

There must also be, in addition to the affidavit above described, an affidavit of merits.<sup>4</sup> As a rule, the affidavit of merits must be by the party, and not by his counsel.<sup>5</sup> It need not set forth the

<sup>3b</sup> *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863.

<sup>4</sup> *Nevada Bank v. Dresback*, 63 Cal. 324; *Nickerson v. California Raisin Co.*, 61 Cal. 268; *Parrott v. Den*, 34 Cal. 79; *Bailey v. Taaffe*, 29 Cal. 422; *Reese v. Mahoney*, 21 Cal. 305; *People v. Rains* (No. 1), 23 Cal. 127; *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55; *Olender v. Crystalline Mining Co.*, 149 Cal. 482, 86 Pac. 1082. It is error to grant the motion to vacate upon an insufficient affidavit. *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350. There are exceptions to this rule, however, some real and some apparent. Thus, it has been said that no affidavit is required in a case where the ground of the motion is a want of jurisdiction to make the order. See *Norton v. Atchison etc. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452. But the authority to set such a judgment aside does not rest upon the provisions of the section under consideration here. In other words, the motion in such a case would not be statutory at all. And the same may be said of cases where there was a failure to serve the summons—want of jurisdiction, again. Another class of cases which are said to constitute exceptions to the rule are those where the judgment is based upon a false return of service (see the *Norton case*, *supra*); or a fraudulent stipulation. *Toy v. Haskell*, 128 Cal. 558, 78 Am. St. Rep. 70, 61 Pac. 89. See, also, *Crescent etc. Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797. Nor is an affidavit of merits ever necessary on a motion to set aside a void judgment. Notice is not required in such a case. No affidavit of merits is necessary in divorce cases, and this is a real exception, based upon public policy, where the public interest demands that the consideration of such causes should be wholly free from collusion

and fraud. See *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61; *Cottrell v. Cottrell*, 83 Cal. 457, 23 Pac. 531; *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648; *Cohn v. Cohn*, 85 Cal. 108, 24 Pac. 659; *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621; *Smith v. Smith*, 145 Cal. 615, 79 Pac. 275.

In *Pease v. Kootenai Co.*, 7 Idaho, 731, 65 Pac. 432, it was held that an affidavit of merits is not always indispensable, and that where it is apparent that the complaint does not state a cause of action such an affidavit is not required. An affidavit of merits was held not to be essential where the application is to set aside a judgment void or prematurely entered. *Walla Walla etc. Co. v. Budd*, 2 Wash. Ter. 336, 5 Pac. 602; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053; *Bennett v. Supreme Tent etc.*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A., N. S., 389. Where substantial rights have been denied the defendant, he is not required to make a showing of merits. *Id.* And see *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351. But, in general, it is essential. *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497; *Holland Bank v. Lienallen*, 6 Idaho, 127, 53 Pac. 398; *Howe v. Coldren*, 4 Nev. 171; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80; *Nicklin v. Robertson*, 28 Or. 278, 52 Am. St. Rep. 790, 42 Pac. 993; *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487.

<sup>5</sup> *Bailey v. Taaffe*, 29 Cal. 422. But there are exceptions to this rule also, and it is not always objectionable that an affidavit of merits should be made by counsel instead of the party. See *Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830.

facts constituting the defense;\* but it has been held that it is better practice either to set forth such facts,<sup>7</sup> or to present with the general affidavit of merits the answer (verified) which it is desired to put in.<sup>8</sup> It has been held that a sworn answer was a sufficient showing of merits;<sup>9a</sup> but in one case it was said that the court may, in its discretion, require a general affidavit of merits to be more specific.<sup>9</sup> No particular form of affidavit is required,<sup>9a</sup> but the substance of a general affidavit of merits is to the effect that the party has fully and fairly stated the case to his counsel (giving his name and residence); and that after such statement he was advised by his said counsel, and verily believes that he has a good and substantial defense on the merits.<sup>10</sup> It is essential that the

In *Byrne v. Alas*, 68 Cal. 479, 9 Pac. 850, where petitioners were ignorant Mission Indians, without a knowledge of court procedure, and with but a slight knowledge of the English language, it was held that an affidavit of merits by their counsel was sufficient, where it contained a showing of familiarity with the facts.

In *Horton v. New Pass etc. Co.*, 21 Nev. 184, 27 Pac. 376, 1018, an affidavit of merits made by the attorney was held sufficient, since it showed a familiarity on his part with the facts. And see *State v. Consolidated Virginia Min. Co.*, 13 Nev. 194; *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29.

The person who makes the affidavit must show a personal knowledge of the facts. *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252.

<sup>6</sup> *Francis v. Cox*, 33 Cal. 323; *Woodward v. Backus*, 20 Cal. 137; *Rauer's Law etc. Co. v. Gilleran*, 138 Cal. 352, 71 Pac. 445; and see, also, *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849.

In *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497, it was held that the facts should be set forth so as to enable the court to determine for itself whether there was a meritorious defense or not. See, also, *Holland Bank v. Lieualten*, 6 Idaho, 127, 53 Pac. 298.

<sup>7</sup> *Woodward v. Backus*, 20 Cal. 137.

<sup>8</sup> *Bailey v. Taaffe*, 29 Cal. 422.

In *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80, it was intimated that a verified answer was sufficient. See,

also, *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

<sup>9a</sup> *Fulweiler v. Hog's Back etc. Min. Co.*, 83 Cal. 126, 23 Pac. 65; and see, also, *Merchants' Ad-Sign Co. v. Los Angeles etc. Co.*, 128 Cal. 619, 61 Pac. 277; and in *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932, it was held that a formal affidavit of merits might be dispensed with in a case where the court was otherwise satisfied that the application was made in good faith, and if a verified answer, denying all the material allegations of the complaint is on file. By "sworn answer" is meant, as a matter of course, a verified answer, in which all the material allegations of the complaint are denied under oath. In *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621, it was held that, although an affidavit of merits is immaterial in actions for divorce, it might serve a useful purpose as a verified answer to the complaint. These cases illustrate clearly the real function of the affidavit of merits.

<sup>9</sup> *Woodward v. Backus*, 20 Cal. 137.

<sup>10</sup> The following are decisions in reference to the sufficiency of affidavits of merits:

In *Woodward v. Backus*, 20 Cal. 137, the affidavit was as follows: "That he has fully and fairly stated the case to his counsel, Winans & Hyer, and that he is advised by such counsel, after such statement made as aforesaid, and verily believes that he, the said defendant Harris, has a good, full, and perfect defense



defense should be on the merits. An affidavit showing a defense of a technical character is not sufficient.<sup>11</sup> And the party cannot limit his appearance to the mere purpose of moving to dismiss the action.<sup>12</sup> Most of the trial courts have rules as to the contents of affidavits of merits; and where such rules exist they must be complied with.

An affidavit of merits cannot be contradicted.<sup>13</sup> This rule rests upon the impropriety of trying the merits of a case in a proceeding

to said action upon the merits." This was held to be sufficient. And see *Francis v. Cox*, 33 Cal. 324.

In *Buell v. Dodge*, 63 Cal. 553, the affidavit was to the effect that the party had stated "the case" to his counsel, who advised him that he had a meritorious defense to the same. This was held to be sufficient, the court saying that "a statement of the 'case' is the equivalent of the statement of the facts of the case."

In *Reiquy v. Scott*, 53 Cal. 69, the defendant presented on his application to open the default the answer which he wished to file. And this answer stated facts "*which if proved would constitute a meritorious defense.*" In addition to this he filed an affidavit that he had "fully and fairly stated to his attorneys, Messrs. Bodley & Campbell, all the facts of his said case, and they have informed him that he has a good and perfect defense to said action." The supreme court ordered the default to be opened, saying that although the averments of the affidavit of merits were inartificial, yet that they were "to be referred to the answer actually filed."

In *Nickerson v. Cal. Raisin Co.*, 10 Pac. C. L. J. 46, the affidavit was that the party had "fully and fairly stated the said defendants' defense in this action to his counsel," and was advised, etc. This was held to be insufficient, the court saying: "It might be that the defense relied on was a purely technical one that did not touch the merits of the controversy. The expression used in the affidavit is not the equivalent of a statement that the defendant had fully and fairly stated to his counsel all the facts in the case."

In *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350, an affidavit merely

that defendant "has stated the facts of his defense to his counsel" was held insufficient. It was said that it must be made to appear that defendant had "fully and fairly" stated the facts in the case to his counsel.

In *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557, the supreme court said: "It is enough that he fairly and fully stated the facts of his case to his attorney at law, and that upon that statement his attorney advised, *as matter of law*, that these facts constituted a meritorious defense to the action."

<sup>11</sup> *People v. Rains* (No. 1), 23 Cal. 127; and see *Nickerson v. California Raisin Co.*, 61 Cal. 268 (10 Pac. C. L. J. 46); and see *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849, where it was held that while it is not essential that the affidavit of merits should disclose the facts of the party's defense, yet, if such facts are stated and it appears that such defense rests upon technical grounds, the affidavit is insufficient.

Also, *Jones v. San Francisco etc. Co.*, 14 Nev. 172; *Ewing v. Jennings*, 15 Nev. 379.

<sup>12</sup> *Douglass v. P. M. S. S. Co.*, 4 Cal. 304. It is otherwise on motion to set aside service of summons before default. *Lyman v. Milton*, 44 Cal. 630.

<sup>13</sup> *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Reclamation District v. Coghill*, 56 Cal. 607; *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623; *Rauer's Law etc. Co. v. Gilleran*, 138 Cal. 352, 71 Pac. 445. In this last case it was held that it was error to require the attorney for the moving party to bring his client into open court upon a bare suspicion of the truth of the affidavit of merits.

of this character. If the case might thus be tried by affidavit and counter-affidavit, presented on a motion having for its ultimate purpose a final hearing on the merits, there would be no need for the resulting order, which might very well be dispensed with.<sup>14</sup> It is otherwise, however, as to the affidavit of facts, or the showing above referred to. That affidavit may be met with counter-affidavits,<sup>14a</sup> and the rule of conflict will no doubt be applied to a determination thereon.<sup>15</sup>

An affidavit of merits may be amended, but such amendments are in the discretion of the trial court, and the exercise of such discretion will not be disturbed except for manifest abuse.<sup>16</sup>

**§ 311. Motions for Relief on the Ground of Accident, Surprise, Excusable Neglect, etc., are Addressed to the Sound Discretion of the Court.**—That motions for relief on the grounds above specified are addressed to the discretion of the court, whose action in the matter will be disturbed only for an abuse of discretion, has been decided in many cases.<sup>1</sup> But the discretion spoken of in such

<sup>14</sup> See *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623.

<sup>14a</sup> See *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623.

<sup>15</sup> See *Sheehan v. Osborn*, 138 Cal. 512, 71 Pac. 622. See, also, *Morton v. Morton*, 117 Cal. 443, 49 Pac. 557; *Merchants' Ad-Sign Co. v. Los Angeles etc. Co.*, 128 Cal. 619, 61 Pac. 277, where it was held that "it was the peculiar province of the judge of the court below to determine the truth from the conflicting statements in the affidavits."

<sup>16</sup> *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226.

<sup>1</sup> *Roland v. Kreyenhagen*, 18 Cal. 455; *Barrett v. Graham*, 19 Cal. 632; *Howe v. Independence Co.*, 29 Cal. 72; *Woodward v. Backus*, 20 Cal. 137; *Coleman v. Rankin*, 37 Cal. 247; *Watson v. San Francisco & H. B. R. Co.*, 41 Cal. 17; *Sweet v. Burdett*, 40 Cal. 97; *Santa Barbara Livestock Co. v. Thompson*, 46 Cal. 63; *Davis v. Rock Creek Co.*, 55 Cal. 359, 36 Am. Rep. 40; *Moore v. Kellogg*, 58 Cal. 385; *S. P. R. R. Co. v. White*, No. 8532, filed December, 1882 (unreported); *Seymour v. Wood*, 63 Cal.

81; *Dougherty v. National Bank*, 68 Cal. 275, 9 Pac. 112; *Chamberlin v. Del Norte*, 77 Cal. 150, 19 Pac. 271; *Cottrell v. Cottrell*, 83 Cal. 457, 23 Pac. 531; *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Garner v. Erlanger*, 86 Cal. 60, 24 Pac. 805; *Stonesifer v. Armstrong*, 86 Cal. 594, 25 Pac. 50; *Underwood v. Underwood*, 87 Cal. 523, 25 Pac. 1065; *Wolff v. Canadian etc. Co.*, 89 Cal. 332, 26 Pac. 825; *Malone v. Big Flat etc. Co.*, 93 Cal. 384, 28 Pac. 1063; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Williamson v. Cummings etc. Co.*, 95 Cal. 652, 30 Pac. 762; *Pearson v. Drobax Co.*, 99 Cal. 425, 34 Pac. 76; *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114; *Burns v. Seooiffy*, 98 Cal. 271, 33 Pac. 86; *Bell v. Peck*, 104 Cal. 35, 37 Pac. 766; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Harbaugh v. Honey Lake etc. Water Co.*, 109 Cal. 70, 41 Pac. 742; *Rauer v. Wolf*, 115 Cal. 100, 46 Pac. 902; *Miller v. Carr*, 116 Cal. 378, 58 Am. St. Rep. 180, 48 Pac. 324; *McGowan v. Kreling*, 117 Cal. 31, 48 Pac. 980; *Morton v. Morton*, 117 Cal. 443, 49 Pac. 557; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Merchants' Ad-Sign Co. v. Los Angeles etc. Co.*, 128 Cal. 619, 61

cases is not an arbitrary but a legal one. In this regard Sander-son, J., delivering the opinion in *Bailey v. Taaffe*,<sup>2</sup> said: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its

Pac. 277; *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63; *Winchester v. Black*, 134 Cal. 125, 66 Pac. 197; *Palace Hardware Co. v. Smith*, 134 Cal. 381, 66 Pac. 474; *Langford v. Langford*, 136 Cal. 507; *Matter of Tracey*, 136 Cal. 385, 69 Pac. 20; *Moore v. Thompson*, 138 Cal. 23, 70 Pac. 930; *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176; *Estate of Ross*, 140 Cal. 282, 73 Pac. 976; *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; *Canadian etc. Co. v. Clarita etc. Co.*, 140 Cal. 672, 74 Pac. 301; *Guardianship of Van Loan*, 142 Cal. 423, 76 Pac. 37; *Grannis v. Superior Court*, 143 Cal. 630, 77 Pac. 647; *Alferitz v. Cahen*, 145 Cal. 397, 78 Pac. 878; *Fox v. Townsend*, 149 Cal. 659, 87 Pac. 82; *Mitchell v. California etc. Co.*, 156 Cal. 576, 105 Pac. 590.

Also *Donlan v. Thompson Falls Co.*, 42 Mont. 257, 112 Pac. 445 (where the Montana cases are collected); *Voelker v. Golden Curry etc. Co.*, 40 Mont. 466, 107 Pac. 414; *Mantle v. Largey*, 17 Mont. 479, 43 Pac. 633; *Pengelly v. Peeler*, 39 Mont. 26, 101 Pac. 147.

Also *Holland Bank v. Lieuellen*, 6 Idaho, 127, 53 Pac. 398; *Pease v. Kootenai Co.*, 7 Idaho, 731, 65 Pac. 432; *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497; *Western etc. Co. v. Smith*, 12 Idaho, 94, 85 Pac. 1084; *Culver v. Mountain Home etc. Co.*, 17 Idaho, 669, 107 Pac. 65; *Pettigrew v. Sioux Falls*, 5 S. D. 646, 60 N. W. 27; *Evans v. Fall River etc. Co.*, 4 S. D. 119, 55 N. W. 862; *Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201; *Baker v. Knott*, 3 Idaho, 700, 35 Pac. 172; *Kipp v. Burton*, 29 Mont. 96, 101 Am. St. Rep. 544, 74 Pac. 85; *Greene v. Rowan*, 29 Mont. 263, 74 Pac. 456; *Griawold v. Lee*, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; *Congdon Hardware Co. v. Consolidated Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022;

*Minnehaha etc. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87; *Yerkes v. McHenry*, 6 Dak. 5, 50 N. W. 485; *Thompson v. Connell*, 31 Or. 231, 65 Am. St. Rep. 818, 48 Pac. 467; *Coos Bay Nav. Co. v. Endicott*, 34 Or. 573, 57 Pac. 61; *Askren v. Squire*, 29 Or. 228, 230, 45 Pac. 779; *Lovejoy v. Willamette etc. Co.*, 24 Or. 569, 34 Pac. 660; *Schneider v. Hutchinson*, 35 Or. 253, 76 Am. St. Rep. 474 (note), 57 Pac. 324; *Whit v. Northwest etc. Co.*, 5 Or. 99; *McFarlane v. McFarlane*, 45 Or. 360, 77 Pac. 837; *Nye v. Bill Nye Mill Co.*, 46 Or. 302, 80 Pac. 94; *Horn v. United Security Co.*, 47 Or. 35, 81 Pac. 1009; *Hanthorne v. Oliver*, 32 Or. 57, 67 Am. St. Rep. 518, 51 Pac. 440; *Spokane v. Curry*, 2 Wash. 541, 27 Pac. 477; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Everett Produce Co. v. Smith Bros.*, 41 Wash. 566, 111 Am. St. Rep. 979, 82 Pac. 905, 2 L. R. A., N. S., 331, 5 Ann. Cas. 798; *McBride v. McGinley*, 31 Wash. 573, 72 Pac. 105; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042; *McDougall v. Walling*, 21 Wash. 478, 75 Am. St. Rep. 849, 58 Pac. 669; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272; *State v. Court*, 18 Wash. 227, 51 Pac. 365; *Wilson v. Seattle etc. Co.*, 26 Wash. 297, 66 Pac. 384; *Roberts v. Shelton etc. Co.*, 21 Wash. 427, 58 Pac. 576; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103; *Morrison v. Steenstra*, 45 Wash. 175, 88 Pac. 104.

<sup>2</sup> *Bailey v. Taaffe*, 29 Cal. 422; and look at *Lybecker v. Murray*, 58 Cal. 186; and see *Miller v. Carr*, 116 Cal. 378, 58 Am. St. Rep. 180, 48 Pac. 324; and this discretion should be liberally exercised in favor of a hearing upon the merits. See below.

exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."

Upon the principle stated in the foregoing extract, if there be no showing whatever,<sup>3</sup> or one utterly insufficient,<sup>4</sup> an order opening a judgment by default will be reversed. But where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice. In this regard Baldwin, J., delivering the opinion in *Roland v. Kreyenhagen*<sup>5</sup> (which was appeal from an order opening a judgment by default), said: "The power of the court should be freely and liberally exercised under this and other sections of the act to mold and direct its proceedings so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. While formal requirements of pleading and practice cannot be dispensed with by the court, it can usually make such orders, or grant such amendments in the progress of the cause as will avoid the effect of petty exceptions, and dispose of the case upon its legal merits. It can also usually prevent unjust or unfair advantages, or serious injury arising from casualties or inadvertences. The design of the act was to call into requisition its equitable powers in this respect; and we have as little right as disposition to revise its action, unless we can see that its discretion has been clearly abused."

<sup>3</sup> See section 310, *ante*.

<sup>4</sup> As in *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598, or *Bailey v. Taaffe*, 29 Cal. 422.

<sup>5</sup> *Roland v. Kreyenhagen*, 18 Cal. 455.

So in *Watson v. San Francisco & H. B. R. R. Co.*,<sup>6</sup> which was an appeal from an order opening a default, Wallace, J., delivering the opinion, said: "Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment upon the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

Nor has the doctrine here stated been departed from in later cases. In *Hitchcock v. McElrath*<sup>7</sup> the court said:

"A large discretion is vested in courts of original jurisdiction in removing such obstacles and impediments as tend to prevent a full and fair hearing of pending causes, and a default inadvertently permitted in a cause, by a party having a substantial defense, presents a case in which great latitude should be extended to the discretion of the court by which such default is set aside."

In *Ward v. Clay*,<sup>8</sup> the supreme court said:

"The principal purpose of vesting the court with this discretionary power is to enable it 'to mold and direct its proceedings so as to dispose of cases upon their substantial merits, when it can be done without injustice to either party, whether the obstruction to such a disposition of cases be a mistake of fact or a mistake of law; although it may be that the court should require a stronger showing to justify relief from the effect of a mistake of law than in the case of a mistake as to a matter of fact. The exercise of the power conferred by section 473 of the code, however, should appear to have been 'in furtherance of justice,' and the relief, if any, should be granted upon just terms."

<sup>6</sup> 41 Cal. 17.

<sup>7</sup> 69 Cal. 634, 11 Pac. 487.

<sup>8</sup> 82 Cal. 502, 23 Pac. 50, 227.

So in *Wolff v. Canadian etc. Co.*,<sup>9</sup> it was said:

"In the matter of opening defaults much is confided to the discretion of the trial court. (*Dougherty v. Nevada Bank*, 68 Cal. 275, 9 Pac. 112; *Chamberlin v. Del Norte*, 77 Cal. 150, 19 Pac. 271.) And where the circumstances are such as to lead the court to hesitate, it is better to resolve the doubt in favor of the application, so as to secure a trial and judgment upon the merits. (*Watson v. San Francisco & H. B. R. R. Co.*, 41 Cal. 17; *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. 45; *Lodtman v. Schluter*, 71 Cal. 94, 16 Pac. 540.)"

So in *Malone v. Big Flat Co.*,<sup>10</sup> the court said:

"It is true that applications for relief under this section are addressed to the sound legal discretion of the trial court, and orders granting or refusing the relief asked will only be disturbed on appeal when it appears that that discretion has been abused. But while this is so, still, the provisions of the section, like all others of the code, are to be 'liberally construed, with a view to effect its objects and to promote justice.'"

So in *Douglass v. Todd*<sup>11</sup> the court said:

"Of course, it does not follow that all mistakes of law are to be relieved against. A sound discretion controlled by an enlightened judgment, keeping in view public interests, and the due and orderly administration of the law, is to be exercised in granting that relief which justice between the parties to the cause seems to require."

So in *Melde v. Reynolds*<sup>12</sup> it was said:

"This is a remedial provision, and under the terms of section 4 of the same code, which require it to be liberally construed with a view to effect its objects and promote justice, is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in conformity with the spirit of law, and in such a manner as will subserve rather than impede or defeat the ends of justice, regarding mere technicalities as obstacles to be avoided rather than as principles to which effect is to be given in derogation of substantial right."

<sup>9</sup> 89 Cal. 332, 26 Pac. 825.

<sup>10</sup> 93 Cal. 384, 28 Pac. 1063.

<sup>11</sup> 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623.

<sup>12</sup> 129 Cal. 308, 61 Pac. 932.

So in *Pelegri-nelli v. McCloud etc. Co.*,<sup>13</sup> quoting from the earlier case of *Nicoll v. Weldon*,<sup>14</sup> Justice Harrison, for the court of appeals of the third appellate district of California, said:

"The granting or denying of a motion to set aside the default of the defendant is so largely a matter of discretion with the trial court that unless it is clearly made to appear that there has been an abuse of discretion this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default and it does not appear that the plaintiff has sustained any prejudice thereby. The discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties."

So in other cases similar expressions are to be found.<sup>15</sup>

It is not to be understood, however, that the language used in the decisions above quoted with reference to the propriety of exercising the discretion referred to in such a manner as to bring about a hearing of the controversy upon the merits is not a limitation of this discretion. The rule itself, stated in the earlier cases without limiting phrases, that a motion to vacate a default under section 473 is addressed to the sound judicial discretion of the trial court, and that an exercise of this discretion will be disturbed on appeal only in case of manifest abuse, has never been relaxed.

It was suggested in *Ingrim v. Epperson*<sup>16</sup> that observations of the kind referred to are to be regarded as in the nature of advice to the superior court, and not intended for the purpose of compelling it to decide in that mode or to govern its decisions by such a rule; and that the appellate court would go no further than to ascertain whether there was manifest abuse of discretion or not.

This exercise of discretion cannot be controlled by *mandamus*.<sup>17</sup>

The discretion here referred to does not extend to the disposition of motions based upon the fact that there was no personal service of summons. Such motions are to be determined upon the fact alone, and the absolute right of the defendant to answer to the merits,

<sup>13</sup> 1 Cal. App. 593, 82 Pac. 695.

<sup>14</sup> 130 Cal. 666, 63 Pac. 63.

<sup>15</sup> See, also, *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Stonesifer v. Armstrong*, 86 Cal. 594, 25 Pac. 50; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Pearson v. Drobaz Co.*, 99 Cal. 425, 34 Pac. 76; *Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429;

*Robinson v. Exempt Fire Co.*, 103 Cal. 1, 42 Am. St. Rep. 93, 36 Pac. 955, 24 L. E. A. 715; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Merchants' Ad-Sign Co. v. Los Angeles etc. Co.*, 128 Cal. 619, 61 Pac. 277.

<sup>16</sup> 137 Cal. 370, 70 Pac. 165.

<sup>17</sup> *Stonesifer v. Armstrong*, 86 Cal. 594, 25 Pac. 50.

provided he makes his motion within a year from the rendition of judgment. The word "may" in the statute has the signification of the word "must." The court *must* not deny the right, and *must* grant the motion.<sup>10</sup> Its discretion is limited, therefore, in this connection, to the determination of the fact of want of personal service, and cannot extend to the denial of the absolute right thus conferred.

§ 312. **Instances of the Granting and Denial of Motions for Relief Against Judgments on the Ground of Accident, Surprise, Excusable Neglect, etc.**—As stated in *Watson v. S. F. & H. B. R. Co.*, quoted in the preceding section, "each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration." Nevertheless, it may be of use to give instances of the decisions, illustrating the application of the general rule as to discretion, stated in section 311.

*Instances Defaults Opened.*—Where the defendant employed an attorney to defend the case, and relying upon his doing so was absent on business most of the time, and the attorney so employed (supposing that the defendant, who was himself an attorney, had put in an answer, and had only employed him to try the case) neglected to file any answer, and judgment by default was taken, and the attorney for the plaintiff subsequently promised both the defendant and his attorney to open the default, but failed to do so, and the plaintiff's claim being without merit, the supreme court held (reversing the judgment of the court below) that the default should be opened.<sup>1</sup>

Where the excuse of the attorney for the defendant for not filing an answer in due time after the overruling of his demurrer was as follows: "That during the present term he has been very much pressed for time, having to discharge his duties as district attorney, besides attending to all his civil business, without any one to aid him—C. V. Howard, his associate in business, having been all the time absent in San Francisco; that consequently he has had many things on his mind demanding his attention, and much writing and labor; that this case being set for trial, affiant

<sup>10</sup> 151 Cal. 352, 90 Pac. 691.

<sup>1</sup> *Bidleman v. Kewen*, 2 Cal. 248. Compare *McKinley v. Tuttle*, 34 Cal. 235.



had adopted the erroneous idea that an answer had been filed; . . . that plaintiffs have not been injured by his failure to file an answer, as the case could not have been tried, and an answer can now be filed before the case can be reached on the docket," and there was a sufficient showing as to merits, it was held that the court below did not abuse its discretion in opening the default.<sup>2</sup>

Where the day after the defendant was served he retained an attorney, and the attorney directed his clerk to enter the case on his journal with a memorandum of the day the answer was due, and the clerk forgot to make the entry, and the impression of the attorney, who was constantly engaged in court during the time, was that he had more time to answer than was the case, an order opening the default was affirmed.<sup>3</sup>

Where the defendant's attorney obtained an order from the court commissioner extending the time to answer, but neglected to file it or to give notice that it had been made, and default was taken before the expiration of the time granted by such order, it was held that the court below properly opened the default on payment of costs.<sup>4</sup>

Where the defendant was served in Merced county, where the suit was pending, on April 25th, and went to his attorneys in San Jose, and (having forgotten the precise day of the service) informed them that he was served on the 26th, and the attorneys acting on this information prepared an answer, and sent it to Merced by express in time to reach that place on the morning of the 7th of May, and it was given to the clerk a short time after 9 o'clock on the morning of the 7th, but default had just been entered, and there was a sufficient showing as to merits, it was held that the application to open the default should have been granted.<sup>5</sup>

Where the defendant was a corporation, and the summons was served on its secretary, who, instead of making a memorandum of the service, relied upon a publication of the time of the commencement of the suit appearing in a printed sheet regularly issued and containing information of court proceedings, which sheet was relied upon by the business community of San Francisco for such information, and which had always theretofore

<sup>2</sup> Howe v. Independence Co., 29 Cal. 72.

<sup>3</sup> Francis v. Cox, 33 Cal. 323.

<sup>4</sup> Swift v. Canovan, 47 Cal. 86.

<sup>5</sup> Reidy v. Scott, 53 Cal. 69.

been found to be accurate, but which in this particular instance made a mistake, and the motion to open the default was made on the day it was taken, an order opening the default upon terms was affirmed.<sup>6</sup>

When the action was against two defendants and the defendant Hall showed on motion to open a default taken against him that he was not connected directly or indirectly with the subject matter of the suit, and that he had relied upon the promise of his codefendant, who was the real party in interest, to see him harmless in the litigation, but who failed to answer for either party, it was held that there was no abuse of discretion in opening the default as to Hall.<sup>7</sup>

Where the suit was against a corporation, and the summons was served upon the president, who supposed that because a copy of the complaint was not served with the summons the service was invalid, and therefore paid no attention to it, and informed the principal stockholder, who had come from another place to look after the suit, that no summons had been served, the action of the court below opening the default was affirmed.<sup>8</sup>

So where the attorneys for defendants were misled by a conversation with opposing counsel, and induced to believe that the case would not be tried on the date set, but would be postponed by consent, and so did not prepare for trial, the order denying the motion for a new trial was reversed on appeal (continuance having been refused), along with the order denying the motion to set aside the order and permit a hearing on the merits, the supreme court saying:

"The judgment in this case was procured against defendants under circumstances which entitled them to be relieved from it. The evidence shows that the neglect of defendants, on account of which the judgment lien went against them, was excusable. The court below should, therefore, have granted them a new trial, and erred in refusing it. (Code of Civil Procedure, sec. 473.)"<sup>9a</sup>

So where it appeared that on the day set for trial the case was preceded by many other cases which were ready for trial in the same department, and it appeared that the case at bar would not be reached on that day in that department, it was, at the instiga-

<sup>6</sup> *Watson v. San Francisco & H. B. R. R. Co.*, 41 Cal. 17.

<sup>7</sup> *Santa Barbara Livestock Co. v. Thompson*, 46 Cal. 63.

<sup>8</sup> *Davis v. Rock Creek Co.*, 55 Cal. 359, 36 Am. Rep. 40.

<sup>9a</sup> *Symons v. Bunnell*, 80 Cal. 330, 22 Pac. 193.

tion of plaintiff's attorney, without notice to the defendant, transferred to another department, and a judgment obtained on an *ex parte* hearing, the supreme court held that the discretion of the trial court was properly exercised in vacating the judgment and granting a new trial.<sup>53</sup>

So where it was shown that both the defendant and his attorney resided at a great distance from the county seat, and that neither of them was present when the case was set for trial, or when it was tried; that they were never notified of the setting of the case for trial, and never heard that it had been so set until just before the date fixed, when, owing to the extreme distance from the county seat, the time was too short to enable them to be present; that the only reason for their absence was lack of notice that the case was set for trial, and that the defendant had a good and substantial defense, it was held a proper exercise of discretion to set aside the default, and permit a hearing on the merits.<sup>54</sup>

So where a default was taken in a divorce case, it was set aside, as being either collusive or the wife was misled and grossly deceived, the judgment being harsh and unwarranted from the most favorable point of view.<sup>55</sup> So where a judgment was entered in the absence of the defendant's attorney, and against his express directions to the clerk, where he promptly moved to have it vacated on the ground of "surprise" as soon as he learned of its entry, it was held that it was properly vacated.<sup>56</sup> So where, owing to the inadvertence of the clerk of the attorney for the moving party, the time to serve and file a statement on motion for new trial lapsed, it was held an abuse of discretion not to relieve, under section 473, from the effect of such inadvertence.<sup>57</sup>

And so in other cases.<sup>9</sup>

<sup>53</sup> Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531.

<sup>54</sup> Buell v. Emerich, 85 Cal. 116, 24 Pac. 644. But see note 14b, below.

<sup>55</sup> Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621.

<sup>56</sup> City Street Imp. Co. v. Emmons, 138 Cal. 297, 71 Pac. 332.

<sup>57</sup> Mitchell v. California etc. Co., 156 Cal. 576, 105 Pac. 590.

<sup>9</sup> See People v. Mariposa County, 39 Cal. 683; Gracier v. Weir, 45 Cal. 53; Leet v. Grants, 36 Cal. 288; Estate of Durham, 49 Cal. 490; Freeman v. Brown, 55 Cal. 465; Reclama-

tion District v. Coghill, 56 Cal. 607; Dodge v. Ridenour, 62 Cal. 263; Cameron v. Carroll, 67 Cal. 500, 8 Pac. 45; Seymour v. Wood, 63 Cal. 81; Byrne v. Alas, 68 Cal. 479, 9 Pac. 850; Lottman v. Schluter, 71 Cal. 94, 16 Pac. 540; Underwood v. Underwood, 87 Cal. 523, 25 Pac. 1065; Wolff v. Canadian etc. Co., 89 Cal. 332, 26 Pac. 825; Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86; Pearson v. Drobaz Co., 99 Cal. 425, 34 Pac. 76; Will v. Lytle etc. Co., 100 Cal. 344, 34 Pac. 830; Craig v. San Bernardino Co., 101 Cal. 122, 35 Pac. 558; Grady v. Donohoo, 108

*Instances Refusal to Open Defaults.*—Where all that was shown was that on account of the complicated condition of the defendant's title, and from the fact that the complaint was verified, more time was required to prepare the answer than is required in ordinary cases, and that during a portion of the time required for answering the attorney was compelled to be absent from town, it was held that the showing was insufficient, and there being no proper affidavit of merits, the order opening the default was reversed.<sup>10</sup>

Where the showing was that the attorneys for the defendant had prepared a demurrer to the amended complaint, but failed to file it in time in consequence of a mistake on their part as to the day on which the time for pleading would expire, it was said that the showing was insufficient, and there being no proper affidavit of merits, the order refusing to open the default was affirmed.<sup>11</sup>

Where the showing was that the defendant was served with summons while in attendance in court as a witness, and, on receiving the papers placed them in his hat, from which place they were lost; and that having made no note of the time of service, he had no means of fixing the date thereof, and that some days afterward he went several times to his attorney's office for the purpose of having him attend to the matter, but did not succeed in finding him until the time to plead had expired, it was held that the showing was insufficient, and although there was an affidavit of merits, the order refusing to open the default was affirmed.<sup>12</sup>

Where the defendant, on being served with summons, retained attorneys to defend the action, and then left the state on a visit to New York, without having verified his answer (the complaint being verified), and his attorneys did not verify it for him, it was held that the showing was insufficient, and the order refusing to open the default was affirmed with twenty per cent damages.<sup>13</sup>

Where the defendant on being served did not consult an attorney, or take any steps until the time to plead had expired, and

Cal. 211, 41 Pac. 41; Miller v. Carr, 116 Cal. 378, 58 Am. St. Rep. 180, 48 Pac. 324; McGowan v. Kreling, 117 Cal. 31, 48 Pac. 980; Tuttle v. Scott, 119 Cal. 586, 51 Pac. 849; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; Clark v. Oyharzabal, 129 Cal. 328, 61 Pac. 1119; Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Bauer's Law etc. Co. v. Gilleran, 138 Cal. 352, 71 Pac. 445; O'Brien v.

Leach, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004; Guardianship of Van Loan, 142 Cal. 423, 76 Pac. 37; Savings Bank v. Schell, 142 Cal. 505, 76 Pac. 250; Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272.

<sup>10</sup> Bailey v. Taaffe, 29 Cal. 422.

<sup>11</sup> People v. Bains (No. 1), 23 Cal. 127.

<sup>12</sup> Coleman v. Rankin, 37 Cal. 247.

<sup>13</sup> Hancock v. Pico, 40 Cal. 153.

the only excuse offered was ignorance of the law requiring a pleading to be filed in ten days, it was held that the refusal to open the default was proper.<sup>14</sup> So where it appeared that the trial calendar was called on August 30, 1886; that the case at bar was on said calendar, and was regularly called, and was announced as "ready"; that five cases were set for trial for each day, that the case at bar was reached September 16, 1882, and that neither plaintiff nor her attorney was present; that the case was continued to September 20th, when plaintiff and attorney being again absent, the case was taken up and heard and judgment rendered for defendants. The excuse of the attorney that he did not think that the case would be reached so soon, that he was deceived by mistaking the date of a certain number of the "San Francisco Law Journal," in which the calendars of the various courts of the city were published daily, and that he did not think the case would be reached on the day judgment was rendered, was held insufficient.<sup>14a</sup> So it has been held that want of notice of the setting of a case for trial has been held not to be sufficient ground upon which to vacate a default.<sup>14b</sup>

And so in other cases.<sup>15</sup> As a general rule, negligence of the attorney is negligence of the client, and the latter cannot have relief on the ground that his attorney was negligent.<sup>16</sup> It is otherwise, however, where a party is in default by reason of erroneous

<sup>14</sup> Chase v. Swain, 9 Cal. 130.

<sup>14a</sup> O'Connor v. Ellmaker, 83 Cal. 452, 23 Pac. 531.

<sup>14b</sup> Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; but see note 8c, *supra*. In the absence of a rule of court requiring notice of the setting of a case for trial, no notice is necessary. Eltzroth v. Ryan, 91 Cal. 584, 27 Pac. 932. And a failure to give such notice by a moving party does not excuse the neglect of the attorney of the opposite party to be present at the trial, and it is not abuse of discretion to refuse to open a default upon such a showing. See, to same effect, Bell v. Peck, 104 Cal. 35, 37 Pac. 766; Yancey v. National Ben. Assn., 122 Cal. 676, 55 Pac. 604.

<sup>15</sup> See Taylor v. Randall, 5 Cal. 79; Sutter v. Cox, 6 Cal. 415; Seale v. McLaughlin, 23 Cal. 668; Sweet v. Burdett, 40 Cal. 97; Reilly v. Bud-

dock, 41 Cal. 312; Grant v. White, 57 Cal. 141; Moore v. Kellogg, 58 Cal. 385; Weisenborn v. Neumann, 60 Cal. 376; Greehn v. Marker, 67 Cal. 364, 7 Pac. 783; Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503; Garner v. Erlanger, 86 Cal. 60, 24 Pac. 805; Williamson v. Cummings etc. Co., 95 Cal. 652, 30 Pac. 762; Edwards v. Hellinger, 103 Cal. 204, 37 Pac. 218; Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; Alexander v. McDow, 108 Cal. 25, 41 Pac. 24; Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237; Rauer v. Wolf, 115 Cal. 100, 46 Pac. 902; Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809; Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474; Ingram v. Epperson, 137 Cal. 370, 70 Pac. 165; Alferits v. Cahen, 145 Cal. 397, 78 Pac. 878; Cass v. Hutton, 155 Cal. 103, 99 Pac. 493.

<sup>16</sup> Smith v. Tunstead, 56 Cal. 175; and see, generally, section 80, *ante*.

advice of his counsel.<sup>17</sup> And an attorney may be the victim of a mistake, inadvertence, etc., as well as another, and so may be within the rule.<sup>18</sup>

§ 313. **Reliance on Oral Stipulations.**—As has been shown, the general rule is that oral stipulations are not binding, and that reliance upon them is negligence and not ground for relief.<sup>1</sup> This general rule, however, has not been uniformly applied on applications for relief against judgments by default. In *Woodward v. Backus*,<sup>2</sup> the affidavits for the defendant showed that an answer was prepared in time, but was not filed because of an oral agreement with the plaintiff's attorneys to the effect that the answer might be filed at the latest period which would enable the case to be tried at a certain term; that the defendant's attorneys had relied upon such agreement; and that default had been taken in violation of it. The affidavits for the plaintiff denied the existence of any such stipulation. But the court below opened the default, and the order was affirmed on appeal. The question as to necessity for a written stipulation (although discussed by the respondent's counsel) does not seem to have been considered; the supreme court simply said that it did not appear that there had been an abuse of discretion. In *Reese v. Mahoney*,<sup>3</sup> the court below declined to open a default alleged to have been taken in violation of an oral agreement, and the order was affirmed on appeal, the supreme court, per Field, C. J., saying: "Verbal stipulations with reference to proceedings in pending actions cannot be regarded, except so far as they are admitted by the parties against whom they are sought to be enforced. This rule is necessary to avoid endless disputes." But there was another ground upon which the affirmance of the order was placed. And the recent case of *Huart v. Goyeneche*<sup>4</sup> seems to be like *Woodward v. Backus*, above cited. In *Huart v. Goyeneche* the attorney for the defendant on the day before the time for answering had expired went to the office of one of the plaintiff's attorneys and told him that the answer was drawn but not verified, and that he would have to go after his client to get him to verify it unless an extension should be given,

<sup>17</sup> *Douglass v. Todd*, 96 Cal. 655,  
31 Am. St. Rep. 247, 31 Pac. 623.

<sup>18</sup> *O'Brien v. Leach*, 139 Cal. 220,  
96 Am. St. Rep. 105, 72 Pac. 1004.

<sup>1</sup> See section 82, *ante*.

<sup>2</sup> 20 Cal. 137.

<sup>3</sup> 21 Cal. 305.

<sup>4</sup> 56 Cal. 429.

See *McGowan v. Kreling*, 117 Cal.  
31, 48 Pac. 980.

to which the plaintiff's attorney replied that he would extend the time to answer, and would not take default. The affidavit of the plaintiff's attorney admitted the foregoing, but stated that he informed his client of what had occurred, and that the client had insisted upon default being taken, and had gone to his associate attorney and caused him to have the default entered. Upon this showing the supreme court reversed the order of the court below, refusing to open the default, saying: "There was no negligence on the part of the defendants or their attorneys, and the default should be set aside." But the court did not touch upon the question as to the necessity for a written stipulation.

In *Johnson v. Sweeney*,<sup>4a</sup> where an oral stipulation extended time to interpose a special demurrer, but acceptance of service was qualified by the words, "reserving all rights in the premises regarding default in the within entitled action," a motion to set aside a default on the ground of reliance upon the oral stipulations, supported by affidavit that the stipulation had been made but not in writing, no counter-affidavit being offered, was denied by the trial court; the supreme court held, reversing such action, that:

"It is a general rule that a stipulation of counsel cannot be enforced unless put in writing, or entered in the minutes of the court; but where an oral agreement for an extension of time to answer or demur is admitted, and has been relied on by the defendant, a judgment by default, taken against him in violation of the terms of the stipulation will be set aside. If the party against whom the stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute; but where the facts relied upon by the moving party are not controverted, there is no reason for the application of the rule, and it is too late to repudiate the stipulation after it has been executed. (*People v. Stephens*, 52 N. Y. 306.)"

In *Crane v. Crane*,<sup>4b</sup> where there was an oral stipulation extending time to answer until July 4th, and answer was in fact filed July 6th, previous to default taken on same day, July 4th being a holiday, and July 5th being Sunday, a nonjudicial day, the supreme court held that such default was premature, and that, although the stipulation was not a matter of record, "it was yet sufficient to repel the imputation of negligence."

<sup>4a</sup> 95 Cal. 304, 30 Pac. 540.

<sup>4b</sup> 121 Cal. 99, 53 Pac. 433.

In *Smith v. Whittier*,<sup>40</sup> it was said that "if under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has, at his instance, given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement, upon the ground that it had not been entered in the minutes of the court." Again, in the same case, it was said that "if the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court," but if "the terms of the verbal agreement are disputed, courts refuse to settle such disputes, or to try a collateral issue for the purpose of determining whether any agreement has been made."

In *Hawes v. Clark*,<sup>41</sup> although the minutes contained no record of the oral waiver of a jury trial, the court enforced it, notwithstanding objection.

In *McLaughlin v. Clausen*,<sup>42</sup> it was said that "verbal stipulations with reference to proceedings in pending actions cannot be regarded except so far as they are admitted by the parties against whom they are sought to be enforced, or have been wholly or in part executed. (*Reese v. Mahoney*, 21 Cal. 305; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.) And if a party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute. (*Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540.)"

It would appear, therefore, that since the earlier cases were decided, the doctrine has undergone a change, and the weight of authority is in support of a limitation of the rule of law prescribed in section 285, Code of Civil Procedure, requiring stipulations to be in writing, unless they are entered in the minutes of the court, when applied to default matters, where the default is sought to be excused by reliance upon oral stipulations.<sup>43</sup>

§ 314. **Imposition of Terms.**—From 1851 to 1874 the provision of the statute was that the court could grant relief against a judgment by default "upon such terms as may be just *and upon pay-*

<sup>40</sup> 95 Cal. 279, 30 Pac. 529.

<sup>41</sup> 84 Cal. 272, 24 Pac. 116.

<sup>42</sup> 116 Cal. 487, 48 Pac. 487. And see *Reclamation District v. Hamilton*, 112 Cal. 603, 44 Pac. 1074, where the

stipulations were not filed, but appeared to have been written.

<sup>43</sup> See *Himmelman v. Sullivan*, 40 Cal. 125, an early case which seems to be in line with later decisions upon this point.



*ment of costs.*"<sup>1</sup> In this condition of the statute it was held in several cases that the court below had no discretion concerning the payment of costs, but that the payment thereof must in all cases be made a condition of granting relief.<sup>2</sup> But it was held in *Ryan v. Mooney*<sup>3</sup> that the order need not require the payment of *all* the costs. In 1874 the provision concerning the payment of costs was omitted from the statute. The provision of the amendment of 1880 is that relief may be granted "upon such terms as may be just." This leaves the imposition of terms to the discretion of the court. In this regard *Wallace, J.*, delivering the opinion in *Watson v. S. F. & H. B. R. R. Co.*,<sup>4</sup> said: "Terms and conditions ought generally to be imposed upon the party in default, which, of course, should be more or less severe as the particular circumstances would seem to require."

But it is entirely within the discretion of the court to impose terms or not, as it sees fit, and this whether an application has been made for this purpose or not.<sup>5</sup> In *Youngman v. Tonner*,<sup>6</sup> where, upon a showing "that on the seventh day of November, 1888,—one day after the expiration of the time allowed him by law in which to answer,—'he became suddenly and violently ill,' and was forbidden by his physician to attend to any business whatever, and 'that he remained under the care and instructions of his physicians until about four days after his default; . . . and at the time of the entry of said default, and one day prior thereto, defendant was confined to his bed, and so ill that he was unable to appear personally,' etc.," the court opened the default "upon payment within ten days from this date, by the defendant to the plaintiff, of all the said judgment over and above the sum of four hundred and fifty dollars," and defendant was allowed to come in and answer and defend on the merits to said sum of four hundred and fifty dollars, and the terms thus offered were sustained in the supreme court, which held that under the circumstances such terms were not an unwarrantable exercise of the discretionary power of the trial court.

<sup>1</sup> See note 9 to section 307, *ante*.

<sup>2</sup> *Roland v. Kreyenhagen*, 18 Cal. 455; *People v. O'Connell*, 23 Cal. 281; *Howe v. Independence*, 29 Cal. 72; *Leet v. Grants*, 36 Cal. 288; *Heermance v. Sawyer*, 48 Cal. 562; *Chamberlin v. Del Norte*, 77 Cal. 150.

<sup>3</sup> 49 Cal. 33.

<sup>4</sup> *Watson v. San Francisco & H. B. R. R. Co.*, 41 Cal. 17.

<sup>5</sup> *Robinson v. Merrill*, 80 Cal. 415, 22 Pac. 260.

<sup>6</sup> 82 Cal. 611, 23 Pac. 120. See, also, *Nicoll v. Weldon*, 180 Cal. 666, 63 Pac. 63.

In *Gray v. Lawlor*,<sup>42</sup> in this regard, the court said:

"The effect of that qualifying phrase in our statute ('on such terms as may be just') is not to give the court power or discretion to refuse the relief when the statutory conditions, expressed and implied, are met, but merely confers upon it the power, when it finds the defendant entitled to relief, to consider whether or not the defendant may not have been negligent, in a degree not amounting to laches or creating an estoppel, and whether or not the plaintiff or his successor may not have innocently, on the faith of the judgment, incurred costs or expenses which the defendant in justice should refund, and to impose on the defendant such terms as may be necessary to do complete justice between the parties, or to fix the time for filing the answer, and limit and define its character so that it shall be addressed to the merits."

Where a motion to open a judgment by default was granted on terms, and the terms were not complied with, it was held that "both the default and judgment remained in force in the same manner as if the order for setting them aside had not been made."<sup>43</sup> It has been held, in relation to motions for new trial, that where a motion is granted on terms, and the moving party complies with the terms and so obtains the benefit of the order, he cannot afterward question the correctness of the imposition of the terms.<sup>44</sup> So acceptance of money by the moving party from his adversary in accordance with the terms imposed has been held to be a waiver of the right of appeal from the order setting aside a default.<sup>45</sup>

But, on the other hand, it has been held that where a motion for new trial is granted on condition that the losing party pay costs, the acceptance of the costs by the successful party does not take away his right of appeal from the order granting the new trial.<sup>46</sup>

**§ 315. Miscellaneous Matters.**—The negligence of the attorney is the negligence of the party; a party cannot have relief on the

<sup>42</sup> 151 Cal. 352, 90 Pac. 691, 12 Ann. Cas. 779.

<sup>43</sup> *Hartman v. Olvera*, 49 Cal. 101; and see *Gregory v. Haynes*, 21 Cal. 443.

<sup>44</sup> *Battelle v. Conner*, 6 Cal. 140.

<sup>45</sup> *San Bernardino Co. v. Riverside Co.*, 135 Cal. 618, 67 Pac. 1047. The

acceptance of the fruits or benefits of an order or judgment is said to be, in general, inconsistent with the right of appeal therefrom. See sections 2 and 272, *ante*.

<sup>46</sup> *Tyson v. Wells*, 1 Cal. 378; and look at *Price v. Riverside Co.*, No. 8132, filed July 30, 1883.

ground that his attorney was negligent.<sup>1</sup> A judgment by default may be set aside although the judgment has been sold to a person without notice.<sup>2</sup> Acceptance of service of a demurrer after default waives the default.<sup>3</sup> Where a demurrer has been filed but not served, the clerk cannot enter default.<sup>4</sup> As to when a judgment entered by the clerk in excess of his authority is void and when voidable only, see cases cited below.<sup>5</sup> Where several defendants are jointly liable the clerk has no authority to enter judgment against one of them.<sup>6</sup> The disqualification of the judge does not prevent the clerk from entering judgment by default.<sup>7</sup> As to the right to answer an amended pleading filed after default, see cases cited below.<sup>8</sup> Right of defendant to have service of amended complaint.<sup>9</sup> Setting aside decision of the supreme court.<sup>10</sup> The provision that where there is no personal service of summons the court may allow the defendant to come in and answer at any time within one year after rendition of the judgment (Code of Civil Procedure, section 473) applies to all cases where there has been no personal service, and not to publication only.<sup>11</sup> Section 473 is applicable to probate proceedings.<sup>12</sup> A motion to vacate a judgment on the ground of fraud is not a suit in equity;<sup>13</sup> nor is such a motion one made under the authority of section 473.<sup>14</sup>

<sup>1</sup> Smith v. Tunstead, 56 Cal. 175.

<sup>2</sup> Northam v. Gordon, 23 Cal. 255; Roland v. Kreyenhagen, 18 Cal. 455; but look at Wright v. Levy, 12 Cal. 257.

<sup>3</sup> Hestres v. Clements, 21 Cal. 425.

<sup>4</sup> Oliphant v. Whitney, 34 Cal. 25; and as to where the clerk receives a demurrer, but does not file it for nonpayment of fees to which he is not entitled, see Tregambo v. Comanche Co., 57 Cal. 501.

<sup>5</sup> Bond v. Pacheco, 30 Cal. 530; and see Chase v. Christianson, 41 Cal. 253; Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595.

<sup>6</sup> Long v. Serrano, 55 Cal. 20; Curry v. Roundtree, 51 Cal. 184.

<sup>7</sup> People v. De Carrillo, 35 Cal. 37.

<sup>8</sup> See Thompson v. Johnson, 60 Cal. 292; but compare Brock v. Martinovich, 55 Cal. 516.

<sup>9</sup> See cases cited in note 8, and Elder v. Spinks, 53 Cal. 293.

<sup>10</sup> Black v. Shaw, 20 Cal. 68; Roland v. Kreyenhagen, 24 Cal. 52; Noriega v. Knight, 20 Cal. 172; Blanc v. Bowman, 22 Cal. 23; Ellis v. Jeans, 26 Cal. 272; Estate of Boyd, 25 Cal. 511; Hagar v. Mead, 25 Cal. 598; Paine v. Linhill, 10 Cal. 370; Hildreth v. Gwindon, 10 Cal. 490; Lightson v. Laurence, 2 Cal. 106; Welch v. Kenney, 47 Cal. 414; Warner v. Holman, 24 Cal. 228; Reed v. Allison, 54 Cal. 489; Estate of Montgomery, 59 Cal. 583.

<sup>11</sup> Lewis v. Rigney, 21 Cal. 268. Compare Dorente v. Sullivan, 7 Cal. 279.

<sup>12</sup> Estate of Hickey, 129 Cal. 14, 61 Pac. 475; Levy v. Superior Court, 139 Cal. 590, 73 Pac. 417; Estate of Ross, 140 Cal. 282, 73 Pac. 976.

<sup>13</sup> Tinn v. United States District Attorney, 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152.

<sup>14</sup> Estate of Hudson, 63 Cal. 454; Plummer v. Brown, 64 Cal. 429, 1 Pac. 703.



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